SHĀṬIBĪ'S PHILOSOPHY OF ISLAMIC LAW

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An Analytical Study of Shāṭibī's Concept of maṣlaḥa in Relation to His Doctrine of maqāṣid al-sharīʿa with Particular Reference to the Problem of the Adaptability of Islamic Legal Theory to Social Change

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ABSTRACT

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Title	Shāṭibī's Philosophy of Islamic Law: An analytical study of Shāṭibī's concept of maṣlaḥa in relation to his doctrine of maqāṣid al-Sharīʿa with particular reference to the problem of the adaptability of Islamic legal theory to social change.
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This thesis studies Shāṭibī's (d. 790/ 1388) frequently quoted yet little explored and often misunderstood concept of maṣlaḥa. The thesis argues that Shāṭibī's doctrine, that the protection of the maṣlaḥa of men is the main objective of Islamic law, was a product of the grave need of his time to adapt Islamic legal theory to new social conditions. Certain theological and moral considerations had limited the validity of maṣlaḥa as a principle of legal reasoning. After an analysis of such considerations, Shāṭibī proposed maṣlaḥa as the most fundamental source of Islamic law. Shāṭibī was, however, reluctant to accept the logical conclusions of his argument and let his definition of taʿabbud be ambiguous.

The study suggests that this doctrine could have led Islamic legal philosophy to a positive outlook in separating legal obligation from theological and moral ones if the analysis were carried on further to refine the ambiguities remaining in the doctrine.

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TRANSLITERATION TABLE

ء	'	ض	ḍ
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	ʿ
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	و	w
ش	sh	ه	h
ص	ṣ	ي	y

ال al- and 'l-.)
Omitted in front of proper names.

-a (-at in construct state) ـة

VOWELS

long

آ ى ū او ā ا، آ، ى

short

ـِ i ـُ u ـَ a

doubled

ـيّ iyy (final form ـيّ ī)
ـوّ uww (final form ـوّ ū)

dipthongs

اَو aw اَى ay

CHAPTER I

THE PROBLEM

In recent years, a number of Muslim countries' governments have adopted policies to initiate the process of social change and modernization of various institutions, perhaps the most basic of which is law. Such attempts have been supported by Muslim modernism -- a movement born out of the contact of the world of Islam with Western Civilization -- which aimed at adapting Islam to modern conditions by renovating various medieval institutions. Various segments of the Muslim people opposed modernization of Islam claiming that the teachings of Islamic law did not allow any change. The modernists, on the other hand, have consistently maintained that Islamic law is adaptable to social change.

The above controversy has brought to the fore the problem of the adaptability of Islamic law which has been so widely discussed, yet remains debatable. The problem has been generally formulated in the form of the following question: Is Islamic law immutable or is it adaptable to the extent that the change and modernization sought can be pursued under its aegis?

Broadly speaking, there have been two points of view in answer to this question. One view, which is shared by a large number of Islamicists such as C. S. Hurgronje and J. Schacht, and by most of the traditional Muslim jurists, maintains that in its concept, and according to the nature of its development and methodology, Islamic law is immutable and hence not adaptable to social changes. A second view, which is upheld by a few experts on Islamic law such as Linant de Bellefonds and by the majority of Muslim reformists and jurists such as Ṣubḥī Maḥmaṣānī, contends that such legal principles as the consideration of maṣlaḥa (roughly translated, human good), the flexibility of Islamic law in practice and the emphasis on ijtihād (independent legal reasoning) sufficiently demonstrate that Islamic law is adaptable to social change.

Recent studies have touched almost all the aspects of the problem of the adaptability of Islamic law. Nevertheless, the matter still remains confused, if not unattended. A clear analysis should not aim to settle the debate in favour of one or the other view. In fact, the continuation of the debate points out, at least, the fact that elements of both adaptability and immutability exist in Islamic law. An attempt to decide in favour of one side, especially if it be motivated by dogmatic, political, or apologetic considerations, may only further the confusion.

Before any general conclusions be drawn regarding the adaptability of Islamic law, the problem requires a great deal of spade work. For a clear analysis to be achieved, the primary task is to study the various aspects and levels of this problem which should be distinguished sharply from one another and yet be studied in con-

junction with one another. Furthermore, since Islamic theory has developed through the writings of various jurists having different historical backgrounds, the problem of adaptability requires to be studied in specific reference to individual jurists in their historical settings.

In a general sense, recently the problem of adaptability has been studied in reference to the following three aspects: the concept of the nature of Islamic law, its history and its methodology. Generally no distinction has been maintained among these three aspects; conclusions obtained from the analysis of the history of Islamic law, for instance, have been read into the concept of its nature and vice versa. It is not possible to deal with all three of these aspects in one dissertation. The present treatise will study only the concept of the nature of Islamic law in reference to the problem of the adaptability. This choice is valid because a discussion of the adaptability of Islamic law, even in relation to the aspects of history and methodology, leads back to the concept of the nature of Islamic law.

An analysis of the concept of the nature of Islamic law in the above context requires a detailed study of the essential ideas in Islamic legal theory, especially those pertinent to the question of adaptability. Maṣlaḥa is one such idea. This concept is of fundamental significance to the proponents of the adaptability view. They argue that Islamic law aims at the maṣāliḥ (plural of maṣlaḥa) of man, hence logically, it should welcome any social change that serves this purpose. Furthermore, with such an objective in view Islamic law cannot be rigid and inert in regard to social change.

Among the very few jurists who treated the concept of maṣlaḥa as an independent principle of legal theory, Abū Isḥāq Ibrāhīm b. Mūsā al-Shāṭibī (d. 790/1388) made one of the more significant contributions. In his al-Muwāfaqāt, al-Shāṭibī presented a doctrine of maqāṣid al-sharī'a (the purpose or ends of law) which comprises an exposition of the various aspects of the concept of maṣlaḥa as a principle of legal theory. Shāṭibī is therefore a valid choice for a study the requirements of which we have discussed above.

The choice of Shāṭibī is further prompted by the fact that in their support of the adaptability-view, it is largely Shāṭibī upon whose arguments the modern reformists have relied.

In fact, Shāṭibī is one of the jurists to whom modern writers on uṣūl al-fiqh (Islamic legal theory) owe their greatest debts. His books al-Muwāfaqāt and al-I'tiṣām are so extensively used by modern authors on Islamic law that one cannot doubt the significance of Shāṭibī's contribution to the modernists' conception of Islamic law. In particular, the concept of maṣlaḥa, which is one of the essential elements of the modernist conception[1], is derived from Shāṭibī to a great extent.

In Egypt, Muḥammad 'Abduh used to advise his students and scholars to study al-Muwäfaqāt in order to understand the real nature of "Islamic law making" (al-tashrī' al-Islāmī)[2]. In Pakistan, Abu'l A'lā Mawdūdī, in his programme to introduce Islamic law in Pakistan, recommends the translation of al-Muwāfaqāt, among other books on the philosophy of law, into national languages, "so that our

legal experts may acquire a deep insight into and gain a correct understanding of the spirit of Islamic Fiqh".[3]

Since its first publication in 1884 in Tunis, five editions of al-Muwāfaqāt have so far appeared[4], all edited and annotated by well-known scholars such as Mūsā Jār Allāh[5], Muḥammad al-Khiḍr Ḥusayn and ʿAbd Allāh Darāz.

Evidence for the merit of Shāṭibī's lengthy work may be drawn not merely from the number of editions it has undergone but, more importantly, from the rank which al-Muwāfaqāt soon attained among Muslim works on law. It came to transcend even the limits of the Sunnī schools of law. With few exceptions, modern Muslim authors on legal matters or theories invariably refer to Shāṭibī as an authority; often they draw heavily upon his doctrines. The works of the following eminent authors adequately substantiate this point: Abū Zahra, Maʿrūf al-Dawālībī, Muḥammad Iqbāl, Muḥammad al-Khuḍrī, Yūsuf Mūsā, Muṣṭafā Zarqāʾ, Abū Sinna and Abū ʿAbd Allāh ʿUmar.[6]

Furthermore, some modern authors grant to Shāṭibī a rank as high as that of a mujaddid (religious reformer believed to appear at each turn of a century). Rashīd Riḍā counts him among the mujaddids of the 8th/14th century and regards his contribution as equal to that of Ibn Khaldūn[7]. Fāḍil Ibn ʿĀshūr[8] and ʿAbd al-Mutaʿāl al-Ṣaʿīdī[9] also express the same opinion, but Ṣaʿīdī adds that Shāṭibī ranks alongside al-Shāfiʿī in significance, because his exposition of the goal and spirit of Islamic law made it possible for Islamic law to escape the impasse into which the strict adherence to the limits defined by al-Shāfiʿī in uṣūl al-fiqh had led.

The present dissertation, therefore, proposes to seek an answer to the following question: What are Shāṭibī's views on the adaptability of Islamic legal theory to social changes? To answer this question it undertakes to study Shāṭibī's doctrine of maqāṣid al-sharī'a which emerged as an exposition of his concept of maṣlaḥa.

Before an analysis of Shāṭibī's views can be launched, the question requires a proper understanding of the following terms: 'adaptability', 'Islamic legal theory', 'social changes', and 'maṣlaḥa'. A separate chapter (Chapter Two) is set apart to develop a full analysis of these terms.

The question also requires a proper appreciation of the present status of studies on the question for which the answer is sought. Shāṭibī's concept of maṣlaḥa as a principle of adaptability in Islamic law has not been yet directly investigated. Scholars have, however, sometimes casually, and sometimes specifically, expressed their views regarding Shāṭibī's thought and the concept of maṣlaḥa. Although the discussions on these two matters are not necessarily connected with each other, yet since they sometimes bear upon one another, a survey of previous studies on both matters is necessary.

It is curious to note, however, that despite the prominence and the wide acknowledgement of Shāṭibī's contribution, no exclusive study is yet known to have been made either on the life and works of Shāṭibī or on his legal thought.

Two reasons can, perhaps, be suggested for the absence of such studies. One, as ʿAbd Allāh Darāz, the commentator on al-Muwāfaqāt, remarks is the fact that Shāṭibī's thought is too difficult and too complex to be easily penetrated.[10] Margoliouth also referred to confusion and subtlety in Shāṭibī's views.[11] This complexity is not due to any abstractness of thought or to any bizarreness in his style or in his choice of words. His style is lucid, and his discussion is systematic and clear. The difficulty in understanding Shāṭibī lies, rather, in the fact that a study of his thought demands not only a sufficient knowledge of the development of uṣūl al-fiqh in prior times, but also a fair acquaintance with the development of the doctrines of fiqh, theology, philosophy and mysticism and more importantly, there is required a knowledge of the political, economic and social developments in Shāṭibī's time as well. Without this background knowledge his views appear to be contradictory, vague or abstract, and hence difficult to follow.

The second reason has to do with a generally skeptical attitude of Islamicists towards studies of Islamic doctrines on the formal level. Gibb, for example, warns against studying theological doctrines arguing that since Islamic theology is always forced into extreme positions, it exhibits a predilection for words and form. Islamic doctrine thus presents an outer formulation rather than an inner function or reality. Hence islamic doctrines, taken literally, are not of much help in understanding the inner religious attitudes of Muslims.[12]

Such warnings discouraged any study of Islamic doctrines per se, including legal

theory. In his discussion of Islamic legal theory, S. Hurgronje dismissed a discussion of the question of whether all acts are forbidden by nature and only those specified by the divine law may be allowed...saying that "these and similar questions may be of importance to the Imām al-Ḥaramayn, but they do not help us to a correct understanding of Islam".[13] Chehata maintains that uṣūl al-fiqh was born independently of fiqh and developed without influencing the science of law or being influenced by it.[14] Schacht concludes that the theory of uṣūl al-fiqh is of little direct importance for the positive doctrines of the schools of law.[15] Why, if a study of uṣūl al-fiqh has no relevance to the understanding of fiqh and is merely a consideration of words and forms if studied per se, should it be studied at all?

The first printing of al-Muwāfaqāt in 1884, though diligently edited, did not contain any commentary or analysis of the work. In 1909 the second printing appeared with an introduction in Turkish by Mūsā Jār Allāh. In 1913 some extracts from another of Shāṭibī's work - Al-Iʿtiṣām, appeared in the Cairo journal Al-Manār. These extracts stirred the interest of scholars in Shāṭibī.

In 1916, Ignaz Goldziher, in his translation and critical study of al-Ghazālī's work Faḍā'iḥ al-Bāṭiniyya made use of these extracts to compare Shāṭibī with Ghazālī. Although Goldziher's knowledge about Shāṭibī was limited (only the above-mentioned extracts and Turkish introduction were available to him), and although he confused al-Iʿtiṣām with al-Muwāfaqāt (as he insisted on identifying these extracts as part of al-Muwāfaqāt), yet he is the first scholar

who tried to place Shāṭibī's thought into a historical perspective. While comparing similarities in the treatment of the Bāṭinīs by Ghazālī and Shāṭibī, he found them identical. He, therefore, drew a general conclusion that "in many ways Shāṭibī is through and through penetrated with the ideas of Ghazālī".[16]

Rashīd Riḍā, himself a warrior against bidʿa, was largely responsible for creating the image of Shāṭibī as a crusader against bidʿa. After publishing the above-mentioned extracts from Shāṭibī on bidʿa in Al-Manār, he edited and published Shāṭibī's al-Iʿtiṣām in 1913/1914.

This theme was further stressed by Rashīd Riḍā in the biography of Muḥammad ʿAbduh which was published in 1931.[17]

Al-Iʿtiṣām was reviewed by D. S. Margoliouth in The Journal of the Royal Asiatic Society in 1916. In his very brief review Margoliouth described the work as "occupied with juristic subtleties and distinctions which become more and more confused towards the end of the book".[18] Thus implicitly he rejected the work as not worthy of further scholarly attention.

It was about the same time that, on the suggestion of Goldziher, a notice on Shāṭibī was included in Brockelmann's Supplement. This notice was based entirely on the information provided by Goldziher. Some of the factual mistakes by Goldziher were also included without correction.[19]

About the same time, Muḥammad Khuḍrī (d. 1927) a teacher at Gordon Law College in the Sudan at that time, published his Uṣūl al-fiqh, for which, in many ways, he drew heavily upon Shāṭibī's al-Muwāfaqāt. He also disclosed in the

preface that it was on the suggestion of Muḥammad ʿAbduh that he had turned to Al-Muwāfaqāt for understanding the nature of Islamic legislation (asrār al-tashrīʿ al-Islāmī).[20]

While Rashīd Riḍā's interpretation of Shāṭibī depended solely upon Al-Iʿtiṣām, that of Khuḍrī was entirely shaped by al-Muwāfaqāt. In the former he appears as a crusader against bidʿa, while in the latter as a philosopher-jurist. Khuḍrī argued that Shāṭibī's teachings present the real spirit of Islamic law which had been forgotten by medieval jurists.

Muḥammad Ḥasan al-Ḥajawī, in his lectures on the history of Islamic Jurisprudence, given in 1918, did not differ greatly from Riḍā and Khuḍrī in presenting Shāṭibī's image as a reformer.[21] But believing in this image he misread Shāṭibī's concept of obedience (Taʿabbud). Ḥajawī, in his lectures, maintained that the flexibility of Islamic law was lost in later Islamic history as the jurist extended taʿabbud even to those acts which fell under the category of muʿāmalāt. A certain correspondent, in order to refute Ḥajawī's argument, quoted Shāṭibī on the point that the consideration of Taʿabbud is inevitable in muʿāmalāt as well. To reject this argument, Ḥajawī referred toʿIzz al-Dīn ʿAbd al-Salām in his support and judged the quotation from Shāṭibī in this light as he said:

> "This (statement ofʿIzz al-Dīn) is opposite to your quotation from the author of al-Muwāfaqāt where he narrowed (the application of maṣlaḥa) by imposing taʿabbud on all categories of acts. But he (Shāṭibī) did not support his contention with any proof."[22]

We shall deal with this point in detail later in the course of our discussion. It must, however, be pointed out at the moment that such an interpretation of Shāṭibī's view of taʿabbud is quite misleading. Shāṭibī certainly differentiated between two kinds of obligations, those which are absolute and not subject to changes, consisting of ʿibādāt, and those which are relative and subject to changes, consisting of ʿādāt which include muʿāmalāt. The former are taʿabbudī and the latter maṣlaḥī. This distinction is maintained on the first level, i.e. that of shāriʿ, though both may become taʿabbudī on the second level, i.e. that of mukallaf.

In 1941 Lopez-Ortiz published his invaluable detailed study of certain fatāwā (responsa) given by Granadian jurists of the fourteenth century.[23] Among these Shāṭibī's fatāwā were also included. This study provides us with the actual historical context against which Shāṭibī's doctrine can be studied. Although Ortiz's study is not concerned with the philosophical questions of a legal theory and thus does not include al-Muwāfaqāt, yet he confirms that in his fatāwā, Shāṭibī relied on the notions of tashīl (facilitation) and Istiṣlāḥ. Shāṭibī defended custom against the rules of fiqh. It is also significant to note that Ortiz was impressed by the deep insight that Shāṭibī showed into the economics of the society.

Since Ortiz was concerned with Shāṭibī's fatāwā and not with his philosophy of law, one might be misled by his remarks to conclude that Shāṭibī's reference to tashīl and Istiṣlāḥ was a measure of expediency. Such an understanding of

Shāṭibī is misleading because the principle of maṣlaḥa in Shāṭibī's legal philosophy is a basic concept; not an expedient method of legal reasoning. Lopez-Ortiz's remarks may, however, be best understood in reference to Shāṭibī's doctrine of the Ends of the law.

In 1916, in his study on Mālik b. Anas, Abū Zahra observed that on the problem of ʿUmūm and Khuṣūṣ (the general and specific use of words/expressions in general or specific meanings), Shāṭibī forsook the Mālikī stand in favour of that of the Ḥanafīs.[24]

We need not go into the details of Abū Zahra's explanation. It is sufficient to note that Ḥanafīs and Mālikīs disagree on the definition as well as on the legal value of ʿāmm and khāṣṣ. According to Abū Zahra, for Ḥanafīs, the ʿāmm is rated as definite or absolute (qaṭʿī); while for Mālikīs it is only probable (ẓannī). Both schools, however, agree that a qaṭʿī can be particularized (takhṣīṣ) only by another qaṭʿī; consequently, Ḥanafīs reject particularization of the Qur'ānī commands by those aḥādīth which have only probable (ẓannī) authenticity. Mālikīs, on the other hand, accept such particularizations, because, for them it is only the khāṣṣ in the Qur'ān, which is qaṭʿī, and which cannot be particularized by a probable ḥadīth.

In 1951 ʿAbd al-Mutaʿāl al-Ṣaʿīdī observed that in matters of dogma, Shāṭibī was rigid like other jurists such as Ibn Taymiyya and Ibn Qayyim. Ṣaʿīdī refers to Shāṭibī's view of ribāṭ to uphold his point. He states that Shāṭibī declared that to dwell in a ribāṭ for the sake of ʿibāda only, constitutes bidʿa.[25]

Fāḍil ibn ʿĀshūr credited Shāṭibī with providing an escape from the impasse that Islamic jurisprudence faced in the fourteenth century. Furthermore, according to Ibn ʿĀshūr, Shāṭibī rejected the differentiation between theoretical and practical religion - a distinction which was maintained by a number of theologians and philosophers.[26] Shāṭibī insisted on unity in the essence of religion. That is why he also opposed the practice of classification of bidʿa into praise-worthy and condemnable.

Ibn ʿAshūr argues that Shāṭibī and Ibn Lubb had fundamental differences on the legally binding nature of certain acts. By binding nature Ibn ʿĀshūr means the process of acts being or becoming ʿibādāt or religious obligations. Ibn ʿĀshur concludes that Shāṭibī's concept of religion was more comprehensive than most other jurists because he considered the payment of taxes to government to be a religious duty, thus regarding them as ʿibādāt.

In a study of transactions in the Sharīʿa, made in 1955, Ṣubḥī Maḥmaṣānī was struck by the modern subjective approach adapted by Shāṭibī in torts.[27] Shāṭibī maintained that if an act which is legal in itself is committed with the sole intent of inflicting injury upon others, it is legally prohibited and must be prevented. Maḥmaṣānī observed that this subjective approach is quite modern as it directs itself to the intent of the person exercising the right. This approach also stands in contrast to the traditional objective approach as formulated in the Majalla.

It was, perhaps, this finding that led Maḥmaṣānī to a further study of Shāṭibī.

In his lectures in 1962 he was more enthusiastic and admiring of Shāṭibī. Maḥmaṣānī believes that the foundations of the modern renaissance in Islamic legal thought were laid in the fourteenth century by the Muslim jurists who wrote on the methodology and the ends of Islamic law. In these writings they were the precursors of western legal philosophers such as Montesquieu who taught that the evolution of law takes place conditioned by local, temporal and situational changes. Maḥmaṣānī recalls Shihāb al-Dīn al-Qarāfī, ʿIzz al Dīn ʿAbd al-Salām, Ibn Qayyim and Shāṭibī as such philosophers of law. Among them, however, he singles out Shāṭibī for the finest exposition of Islamic jurisprudence and philosophy of law.[28]

Since 1960 references to Shāṭibī have become so frequent in almost every work on Islamic law that a complete account of them is quite impossible. Further, such an account would not be relevant to our purposes because few of these works aim to study Shāṭibī's philosophy. We will, however, take note of some of the more important recent studies.

In his Islamic Methodology in History published in 1965, Fazlur Rahman discusses Shāṭibī's views in detail to a far greater extent than earlier scholars. Rahman, in his Islam, considered al-Muwāfaqāt as a work on the philosophy of law and jurisprudence.[29] Rahman has observed Shāṭibī's views on the following points: his concept of knowledge, his views about the role of human reason in acquiring knowledge, and his views on ijtihād and taqlīd. Since these points have been studied mainly in reference to Shāṭibī's epistemology, Rahman finds Shāṭibī little different from other Muslim thinkers in whose

arguments Rahman sees a "patent denial of faith in the intellectual and moral powers of man".[30]

Rahman, however, is reluctant to carry the above conclusion to Shāṭibī's legal thinking. He observes that although Shāṭibī "categorically denies that reason has any primary role in law-making or even in the formulation of the moral imperatives, yet he (Shāṭibī) himself has exercised a great deal of rational power in fixing the "goals of Sharīʿa."[31]

He also finds an implicit confusion in Shāṭibī's statement about ijtihād that it "is the necessary duty of a Muslim" along with the stipulation that the ijtihād should not contradict the objectives of Sharīʿa. Rahman finds this stipulation inconsistent because the objectives of the lawgiver cannot be formulated without the operation of ijtihād.[32]

The above observations have significant implications for our question. Goldziher's suggestion of Ghazālī's thorough influence on Shāṭibī may mean Shāṭibī's acceptance of Ghazālī's view on maṣlaḥa. Ghazālī is known to have rejected maṣlaḥa mursala. His influence on Shāṭibī would thus amount to the rejection of the adaptability of Islamic legal theory to social changes. Shāṭibī's opposition of bidʿa (innovation), as presented by Rashīd Riḍā and others, signifies that he believed in the immutability of Islamic law.

al-Ḥajawī, al-Saʿīdī and Rahman conclude that Shāṭibī was rigid, conservative and opposed to rational interpretation of legal matters. In other words, they are suggesting that Shāṭibī would oppose the accommodation of Islamic law to social changes.

On the other hand, al-Khuḍrī, Maḥmaṣānī and Lopez-Ortiz have observed that his views in legal matters were flexible and that he preferred the consideration of human need to the hardship incurred in following the legal texts to the very letter.

Ibn ʿĀshūr's interpretation of Shāṭibī's concept of dīn (religion) and al-Ḥajawī's conclusion about Shāṭibī's conception of taʿabbud (obedience) have very serious implications for Shāṭibī's view of the adaptability of Islamic law. An all-comprehensive concept of religion and an all-inclusive conception of obedience suggest that Shāṭibī views every legal and social change from the angle of "religion" and "obedience" which only imposes limits on the adaptability of Islamic legal theory to social changes.

Abū Zahra's comment has obvious methodological implications. It suggests that Qur'ān and Ḥadīth, being qaṭʿī (definitive), cannot be particularized by what is ẓannī (probable). In the light of this view, if the concept of maṣlaḥa is employed to particularize the Qur'ān and Ḥadīth, it must either be invalid, or the concept of maṣlaḥa must be proven to be as definitive as the Qur'ān and Ḥadīth.

To conclude, the scholars are disagreed as to the assessment of Shāṭibī's contribution to Islamic jurisprudence. Their disagreement stems from their differences of understanding and interpretation of Shāṭibī's basic terms such as bidʿa, taʿabbud, dīn, etc. As is shown in the following chapters, the above terms are related to Shāṭibī's conception of maṣlaḥa which is the basis of his doctrine of maqāṣid al-sharīʿa, and they cannot be properly understood in isolation from this

conception. In fact, the confusion and sometimes the misinterpretation of these terms is caused by disregarding their relationship to Shāṭibī's conception of maṣlaḥa.

Recently there have been a few significant studies of the concept of maṣlaḥa, but they have not paid due attention to Shāṭibī. The present study contends that by failing to take into account Shāṭibī's conception of maṣlaḥa, recent studies have fallen short in bringing out the real significance of the concept of maṣlaḥa as a principle of adaptability of Islamic law.

Critical remarks and studies of the concept of maṣlaḥa in western scholarship started to appear in the nineteenth century. This was the period when Muslim reformists of Islamic law had revived the interest in the concept of maṣlaḥa as a principle of change. Before going into the details of the criticism of the concept of maṣlaḥa by modern scholars, some remarks about the emergence of the concept of maṣlaḥa among modern Muslim scholars must be made.

In 1857 the ʿAhd al-Amān, a document of reforms in Tunisian law, was issued. This document later became the fundamental legal instrument in the 1860 Constitution - "the first Constitution to be issued in any Muslim country in modern times".[33] In its preamble, maṣlaḥa was referred to as the principle of interpretation of law: "God ... who has given justice as a guarantee of the preservation of order in this world, and has given the revelation of law in accordance with human interests [maṣāliḥ]."[34] The document then expounded the following three principles as the components of the concept of maṣlaḥa: "liberty, security, equality".[35]

In 1867 Khayr al-Dīn Pasha, in his Aqwam al-masālik, reaffirmed that the principle of maṣlaḥa must be the supreme guide of the government.[36] He found this principle extremely significant as it could be used to justify a change of institutions in the interest of the public as well as to condemn a change when it opposed public interest.[37]

In 1899, in his speech on the reforms in the court systems in Egypt and the Sudan, Muḥammad ʿAbduh also stressed the use of maṣlaḥa as a guiding principle in law making.[38] J. Schacht has argued that the principle of maṣlaḥa, according to ʿAbduh, was preferable to the literal application of Islamic law.[39] Henry Laoust has also observed that the principle of maṣlaḥa was one of the two ideas on the basis of which ʿAbduh considered Islam to be superior to Christianity. It is because of this principle that Islam has a sense of reality more developed than Christianity.[40]

It is to be noted that Khayr al-Dīn and ʿAbduh both referred to maṣlaḥa as a principle of interpretation of law - and as such a principle of change, dynamism and adaptability.

The same theme, in varying versions, has been repeated by a large number of modern Muslim scholars of Islamic law. Among them the following are notable illustrations: Rashīd Riḍā, Ṣubḥī Maḥmaṣānī, ʿAbd al-Razzāq al-Sanhūrī, Maʿrūf al-Dawālibī, Muṣṭafā al-Shalabī, ʿAbd al-Wahhāb al-Khallāf, Muḥammad al-Khuḍrī and Muṣṭafā Abū Zayd.[41]

In 1906, Al-Manār published Najm al-Dīn al-Ṭawfī's treatise on maṣāliḥ. Ṭawfī, a

Ḥanbalī jurist, sometimes also considered a Shīᶜī, represented radical views on maṣlaḥa. For example, he held that the principle of maṣlaḥa could even restrict (takhṣīṣ) the application of ijmāᶜ as well as that of the Qurʾān and Sunna if the latter were harmful to human interests. This publication raised a strong reaction among the conservative group of scholars in Egypt. Consequently Ṭawfī as well as the concept of maṣlaḥa was bitterly opposed. Only to illustrate this opposition, we quote Zāhid al-Kawtharī as follows:

> "One of their spurious methods in attempting to change the Sharᶜ in accordance with their desires is to state that 'the basic principle of legislation in such matters as relating to transactions among men is the principle of maṣlaḥa; if the text (naṣṣ) opposes this maṣlaḥa, the text should be abandoned and maṣlaḥa should be followed'. What an evil to utter such statements, and to make it a basis for the construction of a new Sharᶜ. This is nothing but an attempt to violate divine law (al-Sharᶜ al-Ilāhī) in order to permit in the name of maṣlaḥa, what the Sharᶜ has forbidden. Ask this libertine (al-fājir) what is this maṣlaḥa on which you want to construct your law?..., The first person to open this gate of evil...was Najm al-Ṭawfī al-Ḥanbalī... No Muslim has ever uttered such a statement...This is a naked heresy. Whoever listens to such talk, he partakes of nothing of knowledge or religion." 42

Kawtharī did not deny that the Sharᶜ took into consideration the interests and good of the people, but what is good and what is bad can only be known through revelation. Maṣlaḥa as an independent principle for the interpretation of law has, therefore, no validity whatsoever.

Kawtharī's criticism of maṣlaḥa is typical of the traditional view of the concept. To him maṣlaḥa is arbitrary and merely personal. In fact this fear of arbitrariness arising from regard for human interests, and resulting in violation of divine law is

a familiar feature in the history of the development of Islamic legal theory. Maṣlaḥa and similar legal principles which were employed in favour of the adaptability of Islamic law, were opposed on the same grounds. In this sense the concept of maṣlaḥa has always been connected with the question of adaptability.

As a problem of legal theory the question of adaptability to social change has been a controversial one in the history of uṣūl al-fiqh. The qāḍīs in the early courts of law, particularly in the Umawī period, relied mostly on ra'y (considered opinion). The use of ra'y generally amounted to a general consideration of human needs. The ra'y was, thus, a method that kept the then institution of law adaptable to social change.

There, however, existed an opposition to ra'y among the scholars who specialized in ḥadīth and in local practice. These scholars considered the use of ra'y as an arbitrary and therefore unreliable method of making a decision. The diversity of laws that resulted from the exercise of ra'y by the qāḍīs in various cities increased the number of opponents to the use of ra'y.

The general attitude of the Ḥadīth group was to adhere strictly to the Qur'ān and Sunna (of the Prophet as well as that of his companions), and thus to reject any idea of the adaptability of Islamic law. This attitude was motivated by the religious apprehension of distortion of Islamic tradition by the use of ra'y. This attitude was, however, impossible to be maintained in view of the enormous degree of

social changes that had taken place in Islamic society by the end of the eighth century.

The literal provisions of the Qur'ān and Sunna were insufficient to accommodate the growing number of social changes. Even the method of extending these provisions by accepting the ijmāᶜ (consensus) of the past generation of scholars on certain matters failed to meet the demand of accommodation. The need to accommodate the changes could not be denied, but how to extend the limited legal provisions to adapt to these changes.

The method of qiyās (analogy) developed as an answer to the need of the adaptability of Islamic law. Even among the Ḥadīth group, a large number of scholars recognized this need and accepted the validity of the method of qiyās for this purpose. The religious and theological implications of the attitude of the Ḥadīth group, however, spelled out the same fear of arbitrariness for the method of qiyās as it had done for ra'y. Consequently, the Ẓāhirīs who still adhered to the older trend of rejecting anything beyond the literal provisions, opposed the use of qiyās and departed from the mainstream of the Ḥadīth group.

Although initially a method of adaptability, yet in reaction to the Ẓāhirī and similar criticism, qiyās was soon ushered into the protection of strict formality. It was sought as a foolproof corrective of the method of ra'y. To remove the fear of arbitrariness, qiyās was connected with the "sources" -- the Qur'ān and Ḥadīth. The appeal of this method was so strong that it overshadowed its opposition

as well as any other methodological developments in Islamic legal theory.

Nevertheless, the method of ra'y was not completely swept away by qiyās. Trends similar to the use of ra'y survived in the form of principles such as istiḥsān, istiṣlāḥ, ḍarūra, munāsaba, etc. Incidentally, rules derived from these principles constitute the basis of a considerable part of Islamic law (fiqh) -- probably even more than those based on qiyās.

The qiyās which was the basis of a number of other methods in extending or adapting legal doctrines to social changes, was itself hampered by at least two limitations. One was the attitude of formalism which required that in order to be conclusive, the analogy must be derived explicitly from the original sources (the Qur'ān, Sunna or the ijmā' of the early generations). In other words, the basis of analogy must be explicitly expressed as a "cause" or "reason" for the original ruling. This attitude discouraged the use of implicit cause in the original ruling as a basis of analogy. Also this attitude required reference to specific original rulings rather than encouraging the search for, and the application of, general principles or the intent and "spirit" of the law in original rulings.

The second limitation, which further strengthened the attitude of formalism, stemmed from the theological view of the problem of causality in reference to the attributes of God. The Ash'arīs opposed the idea of there being any causality behind God's actions and speech. Thus, since the command of God, being one of His acts, cannot have any cause or motive, the entire method of qiyās came to be suspected as wrongly or arbitrarily seeking to appoint causes for the commands of God.

One of the major consequences of the above limitations - i.e. formalism and the denial of causality - was that the discussion on the problem of social change and legal theory became essentially a question of "sources of law".

To escape this dilemma, the Ẓāhirīs rejected qiyās altogether. The Shāfiʿīs, who did not entirely reject qiyās, imposed limitations on its application. They rejected any method of reasoning or any form of qiyās which was not linked with certain specific rulings in the Qurʾān or Sunna. Nevertheless, they could not deny the occurrence of social changes, nor could they refuse to accept these changes in practice. They had, therefore, to adopt methods such as istiṣḥāb (presumption of continuity of a legal evidence) to justify these changes. Ḥanafīs and Mālikīs employed certain methods which did not strictly adhere to the requirements of the theory of the sources of law, principally the methods of qiyās. Two such methods are istiḥsān (to decide in favour of something which is considered ḥasan, good, by the jurist, over against the conclusion that may have been reached by qiyās), attributed to Ḥanafīs, and istiṣlāḥ (to decide in favour of something because it is considered maṣlaḥa, more beneficial, than any alternative rule decided on another basis.) These methods were not accepted by all the schools. Yet the concepts of istiḥsān and istiṣlāḥ have in common the consideration of human good. Invariably the underlying principle in the reasoning of these schools was to favour the adaptability of Islamic law.

In order to render the concept of maṣlaḥa suited to their legal philosophy, the Shāfiʿī jurists imposed upon this concept the approach of the "sources of law".

They divided maṣlaḥa into categories according to its basis in the sources. If maṣlaḥa accorded with the sources, it was not disputable, since it was somehow justifiable as a method of qiyās, when it was literally derived from the sources. The only category which was questionable was that which was not based on the sources. This category was called maṣlaḥa mursala. Naturally for the Shāfiʿī jurists the only discussion of maṣlaḥa that mattered was discussion of maṣlaḥa mursala. This view predominated in other schools, and even Mālikīs eventually accepted it.

The significant consequence of the above categorization of maṣlaḥa was that the original idea of maṣlaḥa as a principal independent source came to be disregarded, and istiṣlāḥ came to be equated with maṣlaḥa mursala. Recent studies related to maṣlaḥa also betray this traditional outlook.

A brief survey of the significant observations on the concept of maṣlaḥa made in recent studies, to which we now turn, illustrates the above comments.

Ignaz Goldziher compared Istiṣlāḥ with istiḥsān saying that the latter is'a Ḥanafī principle according to which a decision reached by analogy can be dismissed when the legislator finds that this decision opposes a certain matter which he believes is useful', which is to say that Istiḥsān removes the rigidity of law depending upon the discretion of an individual jurist. Istiṣlāḥ, on the other hand, depends upon a rather objective method; it removes the rigidity of law in consideration of general human "interests" (maṣlaḥa). He also suggests that istiṣlāḥ partially resembles the Roman legal principle of utilitum publicum as well as Rabbinic law.[43]

Recent studies on maṣlaḥa can be generally divided into two groups. First, there are studies dealing with maṣlaḥa mursala or istiṣlāḥ and, second, those dealing with maṣlaḥa as such. The focus in the first group of studies is not on maṣlaḥa proper but on maṣlaḥa mursala, yet it is significant to note that for them Istiṣlāḥ is in no way different from maṣlaḥa mursala.

N. P. Aghnides and G. H. Bousqet also refer to Istiṣlāḥ in the same sense. Aghnides defines it as a principle that consists in prohibiting or permitting a thing because it serves a useful purpose, although there is no express evidence in the revealed sources to support such action.[44] Bousqet's definition is as follows: "Istiṣlāḥ consists of discarding by exceptional disposition the rules deduced by qiyās in cases where the application of general rules would lead to illogical, unjust and undesirable results.[45]

J. Schacht's treatment of maṣlaḥa is not much different from that of the above scholars. He described Istiṣlāḥ as a special form of analogy, or rather a type of istiḥsān used by early Mālikī scholars and which later came to be called istiṣlāḥ.[46] Schacht re-emphasized that istiṣlāḥ is identical with the Roman legal principles of utilitas publica which characterises jus honorarium.[47]

R. Paret also finds istiṣlāḥ to be connected with istiḥsān, but the latter is more limited and definite as it replaces a general principle such as "finding good", by a rather specific principle, such as "according to the demand of human welfare (maṣlaḥa)". Maṣlaḥa thus is the material principle underlying istiṣlāḥ which is a method of reasoning. In actual details where Paret traces the history of istiṣlāḥ,

he specifically refers to maṣlaḥa mursala, rather than maṣlaḥa as such. This is why he finds nothing of much importance after Ghazālī had theorized about istiṣlāḥ. His references to uṣūl works are confined to the discussions of maṣlaḥa mursala.[48]

Analysing the treatment of maṣlaḥa by modern Muslim scholars such as ʿAbduh and others, A. Hourani criticised their use of maṣlaḥa in a utilitarian sense. He argued that such an interpretation of maṣlaḥa was not justified; "for the traditional thought, maṣlaḥa had been a subordinate principle, a guide in the process of reasoning by analogy rather than a substitute for it."[49]

Von Grunebaum, in his study of the concept of reason in Muslim ethics, concluded that istiṣlāḥ (the public interest) is unmistakably one point at which human "reason" is permitted to impinge on traditional or systematic considerations that would normally be viewed as the determining factors of Sharʿī developments.[50]

Although all of the above opinions agree in regarding maṣlaḥa as a principle that removes rigidity and suggests adaptability to changes based on human needs, yet according to the same writers, its function is restricted to exceptional cases or to use a special form of analogy. The reasons for such a limited view of maṣlaḥa in these studies is either that they have studied only maṣlaḥa mursala to the exclusion of other aspects of maṣlaḥa or that they have equated maṣlaḥa mursala with maṣlaḥa.

There are, however, a few studies which evince an integral approach to the problem of maṣlaḥa or which study the concept of maṣlaḥa as such. Among such

studies, the following four are relevent to our point. G. F. Hourani has examined maṣlaḥa as an ethical concept. M. H. Kerr and Saʿīd Ramaḍān al-Būṭī have analyzed it in particular reference to legal theory. E. Tyan has studied it as a principle of methodology.

Tyan describes maṣlaḥa as 'general interest', 'social utility' and 'good' and has defined istiṣlāḥ as "to recognize a rule as useful".[51] He distinguishes two conceptions of istiṣlāḥ. In the original conception of istiṣlāḥ, the interests (maṣāliḥ) were divided into three categories according to its recognition by the law, the last category being maṣāliḥ mursala. The directing principles in this kind of research consisted essentially in considering the elements of social utility (maṣlaḥa) and of convenience (munāsaba). The speculation according to this conception of istiṣlāḥ remains within the limits of law.

The other conception of istiṣlāḥ is more extensive.[52] According to this conception of istiṣlāḥ "it may be admitted that this method can be employed not only in relation to matters which are not regulated by the precise texts of law, but also in those matters which have been subjects to such regulations, so much so that it be legitimate to make it prevail over precise rules or over conflicting or contradicting regulations, provided that, in the final analysis, they (the rules derived from this method of reasoning) remain in conformity with the objectives of law, i.e. they accord with the above-mentioned five major interests (religion, physicial integrity, descendance, patrimony and mental faculty)."[53]

Tyan, thus, concluded that istiṣlāḥ "is a method of interpreting already existing

rules by disengaging the spirit of these rules from the letter; exceptions and extensions are reached which command practical utility and correspond to the fundamental goals of the law".[54]

G. F. Hourani has studied maṣlaḥa as an ethical concept in medi eval Islam.[55]

He observes that there were two theories of value in medieval Islam: one, that of objectivism, i.e. that the value has real existence; the second theory of value was that of theistic subjectivism, that the values are determined by the will of God. The theory of objectivism was expounded by the Muʿtazila; the idea of rational good was called by them ḥasan or maṣlaḥa. The theory of theistic subjectivism was maintained by the Ashʿarīs. The opposition of these two theories manifested itself in the field of fiqh also. Jurists in the early period used certain methods which did not correspond with "theistic subjectivism". Principles such as istiḥsān and istiṣlāḥ tended rather towards "objectivism". The ethical basis of these principles, however, remained unarticulated. The Muʿtazilī theory of rational good [that there is an objective good including a real public interest (maṣlaḥa) and a real justice (ʿadl), and that they could be recognized by human reason] could have provided a basis to support the above principles. But the theory of objectivism was superseded by theistic subjectivism. Why? Hourani suggests that, apart from the religious and political factors that prevented objectivism from being adopted by the lawyers, the Muʿtazilī theory of objectivism had its own deficiencies. First it could not show how moral judgment operates. Second, it could not fill up the theoretical gap between means (moral and legal acts)

and the end (the eternal happiness, which is the happiness in the world hereafter for Muslims).

On the other hand, the theory of theistic subjectivism corresponded with Shāfiʿī and Ẓāhirī views on legal reasoning, which opposed the use of ra'y and any judgment independent of the revelation. Shāfiʿīs denied the objective value of idle fancy, ẓann and hawā. Theologically also the theory of objectivism appeared to curtail the omnipotence and omniscience of God, which the theory of theistic subjectivism promoted.

Hourani's study of maṣlaḥa, in reference to history, is confined to the early period of Islamic tradition. Because of this limitation he could not take into consideration the development in the treatment of maṣlaḥa by later uṣūliyyīn such as Shāṭibī. In fact, Hourani's criticism of objectivism is mainly ethical. The three deficiencies that he ascribed to maṣlaḥa as an objective value are not found in Shāṭibī's conception of maṣlaḥa as a legal value.

Muḥammad Saʿīd Ramaḍān Būṭī presented his doctorial dissertation, Ḍawābiṭ al-Maṣlaḥa fī al-Sharīʿa al-Islāmiyya, at al-Azhar University in 1965. In his introduction to the published edition of this dissertation Būṭī explains that the Orientalists, whom he regards as new crusaders against Islam, have adopted a new measure to destroy Islam. They are urging Muslims to open the gate of ijtihād, and to accomplish this end they refer to the concept of maṣlaḥa as the fundamental principle of Sharīʿa. He is, however, convinced that the real motive behind this proposal for ijtihād is the destruction of Islam. He admits

that the gate of ijtihād has never been closed and that the lawgiver has given full consideration to the principle of maṣlaḥa, but this principle has always been restricted with a number of qualifications.[56] After a detailed analysis of etymology and the theory of the concept of maṣlaḥa, he deduces the qualifications which the traditional jurists have suggested in the application of this principle. He also compares this concept with the concept of 'utility' and 'pleasure' in the philosophies of Stuart Mill and J. Bentham. He concludes that Maṣlaḥa in its unqualified sense is identical with the above concepts which he considers as purely hedonistic. The qualified concept of maṣlaḥa, however, contradistinguishes itself from utility and pleasure as it takes into consideration the following three characteristics. First, it is not limited to this world only but equally includes the hereafter. Second, the Islamic value of good is not material. Third, the consideration of religion dominates other considerations.[57] He has thus concluded that if these and other qualifications are disregarded "and the term maṣlaḥa alone is held up as a light post and a criterion, then upon my life ! an ijtihād such as that will descend upon Muslims from all sides. [To prove such terrifying results after opening the gate of ijtihād] it suffices to observe the evil that brings the laws of Sharīʿa out of the fortress of texts into the open, exposed to desires and arbitrary opinions that deceive (us) behind the name of maṣlaḥa and manfaʿa."[58]

In fact Būṭī's view of maṣlaḥa is no different from that of Zāhid al-Kawtharī. If Al-Būṭī's expositions of maṣlaḥa and its qualifications are accepted, maṣlaḥa, as a matter of fact, becomes superfluous as a legal concept. The consideration of maṣlaḥa by the Shāriʿ, then only means that maṣlaḥa is what the Shāriʿ commands.

In other words, maṣlaḥa has no objective value. This is a logical conclusion from al-Būṭī's view of Islamic law according to which he rejects a distinction between this world and the hereafter. He does not separate muʿāmalāt from ʿibādāt but rather considers the former part of the latter. He does not distinguish between ḥuqūq Allāh and ḥuqūq al-ʿIbād. In fact, his conception of Islamic law is that of taʿabbud (mere obedience). On all these points he is in disagreement even with the jurists who employ the concept of maṣlaḥa in reference to human needs. His disagreement becomes particularly evident if his conclusions are compared with Shāṭibī's conception of maṣlaḥa.

Al-Būṭī has frequently referred to Shāṭibī in his dissertation, but these references are selective and often out of the context. Al-Būṭī's study fails to bring out the real significance of the concept of maṣlaḥa mainly because he has not given full consideration to the proponents of this concept such as Shāṭibī.

The same deficiency is found in M. Kerr's study of maṣlaḥa, which also offers a detailed analysis of the concept. Examining Rashīd Riḍā's legal doctrines, Kerr observed that the logical conclusion of Riḍā's arguments for the use of maṣlaḥa would be that it is something equal to natural law and that istiṣlāḥ does not depend on the texts and qiyās. Such conclusions, however, are not spelled out by Riḍā himself.[59] Why? According to Kerr, the failure to spell out the full implications of the argument has to do with the theological nature of Islamic law which influences even maṣlaḥa, theoretically the most liberal principle of legal interpretation in Islamic jurisprudence. The theological foundations of Islamic

law insist on minimizing the part of human reason in the formulation of law.[60]

Before he goes into a detailed analysis of the concept of maṣlaḥa in traditional jurisprudence, Kerr clarifies two general aspects of Islamic law which, in turn, affect the function of maṣlaḥa. Firstly, Islamic law has its basis in revelation and thus is an expression of the will of God. Kerr refers to the theological differences between Ashʿarīs and Muʿtazilīs about the will of God. In contrast to the Muʿtazila, Ashʿarī denied freedom in man's acts. Consequently, the intellectual spirit and methods of Islamic jurisprudence "could not entirely escape the influence of the law's theological underpinnings, which proclaimed that reason is essentially irrelevant to the substance, determination and obligatory character of moral principles."[61]

The second aspect that affected maṣlaḥa was the emphasis on qiyās. According to Kerr, the method of qiyās itself is a means of protecting the authority of revelation.[62] In fact, the term ʿilla in jurisprudence is not applied in the usual sense of cause and effect. ʿIlla is not a value judgment, but only the attribute or the characteristics of the matter under consideration that gives rise to the judgment.[63] Further, the limitations of the means to identify ʿilla are also confined to the use of indication within the text. Munāsaba (suitability) is the only means that goes beyond the indication of the texts. Kerr finds even munāsaba to be a conservative, circumscribed and timid acknowledgement of the place of social utility (maṣlaḥa) in God's commands. In fact, he concludes, in final analysis even munāsaba is subordinate to the indications of the text.[64]

Kerr, thus treats maṣlaḥa as one of the aspects of munāsaba. He also divided maṣlaḥa on the basis of the conformity to sources, and thus it is only maṣlaḥa mursala which really needs to be discussed. According to him maṣlaḥa mursala is a form of qiyās, because whereas qiyās looks for ʿilla, maṣlaḥa mursala seeks ḥikma, a more general ʿilla. Kerr concludes that because it is not based on a specific ʿilla, istiṣlāḥ has been a subsidiary and occasional technique of disputed validity.[65]

In a final analysis Kerr comes to equate maṣlaḥa with maṣlaḥa mursala.

> "The maṣlaḥa is therefore a more specific term for ḥikma and since it is known in each case not by direct indication in the textual source but by the jurist's own judgment, it is a maṣlaḥa mursala." [66]

To sum up, Kerr also confines maṣlaḥa to its correspondence with the textual sources. It is noteworthy that Kerr, in his discussion, refers to such jurists as al-Ghazālī and al-Qarāfī who viewed maṣlaḥa in the above terms. He also discusses the views of Ibn Taymiyya, Ibn Qayyim and Ṭawfī whom he chose as proponents of the validity of maṣlaḥa as a principle of legal interpretation, but these jurists, too, regarded maṣlaḥa as subordinate to the textual sources and qiyās. The consideration of maṣlaḥa, according to them, would prevail over the texts and qiyās only when the latter are harmful to obey.

Kerr has not taken into account jurists, such as Shāṭibī, who favour maṣlaḥa as an independent legal principle. The significance of studying Shāṭibī's views is evident from Tyan's analysis of istiṣlāḥ which gives a more integral picture of maṣlaḥa.

The absence of Shāṭibī from Kerr's analysis of maṣlaḥa is regrettable. According to Kerr, Rashīd Riḍā, whose views led Kerr to study the concept of maṣlaḥa in detail, characterizes Shāṭibī "as exceptionally outspoken in his defence of istiṣlāḥ."[67]

It comes as a further surprise that Shāṭibī was not only disregarded but also suffered a sort of indifference when Kerr, probably following Paret,[68] confused him with Abū'l Qāsim al-Shāṭibī.[69]

To sum up, the present studies on maṣlaḥa generally present an unbalanced analysis of this concept. They have failed to see the real significance of this principle as it was conceived and employed by those jurists who viewed it as an independent principle. A study of Shāṭibī's concept of maṣlaḥa, as already indicated by Tyan, can fill this gap.

The present study, therefore, aims to investigate Shāṭibī's concept of maṣlaḥa as a principle permitting the adaptability of Islamic law. The enquiry is concerned mainly with the theoretical aspect of the question of adaptability. Nevertheless, Shāṭibī did not conceive maṣlaḥa in isolation from the social realities of his time, and his doctrine of the maqāṣid was actually an attempt to answer the questions that arose in relation to maṣlaḥa. The various developments in the society in which Shāṭibī lived and the actual legal problems with which Shāṭibī was faced must be studied, as they not only explain the cause of Shāṭibī's interest in this problem, but also clarify the nature of the answer that Shāṭibī was seeking in the concept of maṣlaḥa.

A brief outline of the dissertation may clarify its scope, method and its limitations. The first two chapters, the present and the following, introduce the problem and explain the basic terms of the enquiry. The next three chapters deal with the social milieu in which Shāṭibī expounded this doctrine. Chapter three outlines the social developments in fourteenth century Granadian society in general. Chapter four deals with the available information about Shāṭibī's life and his academic disputations with other scholars, and reviews his works. Chapter five analyses his fatāwā to point out the actual legal problems which he faced. It also investigates whether or not Shāṭibī showed willingness to adapt to social changes. The following four chapters deal with Shāṭibī's concept of maṣlaḥa itself. Chapter six outlines the major problems that arose in traditional Muslim jurisprudence regarding the concept of maṣlaḥa. Chapter seven analyses Shāṭibī's doctrine of the maqāṣid and reconstructs an understanding of his concept of maṣlaḥa. Chapter eight examines Shāṭibī's views on social and legal change, and attempts to define his basic terms in regard to the problem of adaptability.

For the purpose of limiting the work the focus of the study falls on Shāṭibī's doctrine of maqāṣid al-sharīʿa. The main sources of Shāṭibī's thought for this dissertation are thus Al-Muwāfaqāt, a part of which is devoted to the exposition of the above doctrine, and Al-Iʿtiṣām. Among Shāṭibī's works, only these two are relevant to our study. Detail of the publication of these two works are noted in Chapter four.

The sources of information on the history of the period and on Shāṭibī's life have been reviewed in the beginning of the relevant chapter or in the first footnote.

Regarding transliteration and translation, a transliteration table is attached. The Arabic affix al- with proper names is omitted. The exact translations of the terms are not attempted. An explanatory English translation is given in parenthesis when the Arabic term is used first. At later points the Arabic term itself is normally used without repeating the translation. English equivalent of Arabic terms are used only when they are usually so accepted; in case of doubt, the Arabic term is supplied in parenthesis.

References to sources in footnotes are usually short. Fuller bibliographical information can be found in the section on Bibliography.

NOTES: CHAPTER I

1. Malcolm H. Kerr, Islamic Reform, The Political and Legal Theories of Muḥammad ʿAbduh and Rashīd Riḍā (California: University of California, 1960), p.55 ("The element in their jurisprudence which the modernists have particularly seized upon as the basis for dynamism and humanism is the notion of maṣlaḥa (welfare, benefit, utility".)

2. Muḥammad al-Khuḍrī, Uṣūl al-Fiqh, (Cairo: Maṭbaʿ al-Istiqāma, 1938), p.11, relates that when he was appointed to teach Islamic law in Gordon Law College in the Sudan, he planned to write a book on uṣūl. He discussed with ʿAbduh, when the latter was visiting the Sudan, who then recommended al-Muwāfaqāt to be used as a basis for the studies on the asrār al-tashrīʿ al-Islāmī.

   Also Muḥammad ʿAbd Allāh Darāz, in his introduction to al-Muwāfaqāt, Vol. I (Maṭbaʿ Tijāriya, N.D.) relates that "often we listened to the recommendation (waṣiyya) of the late (Shaykh ʿAbduh) to the students to obtain this book, and I was ever anxious to fulfil his will." (p.12-13).

3. Abū'l Aʿlā Mawdūdī, Islamic Law and Constitution (Lahore: Islamic publications, 1960), p.113-114.

4. See below Chapter IV, p. 197ff.

5. Musā JārAllāh's edition, in spite of patient search, is not available to the writer of this dissertation.

6. Abū Zahra, Mālik (Cairo: Maṭbaʿ Aḥmad ʿAlī, First edition published in 1946); al-Dawālibī, Al-Madkhal ilā ʿilm usul al-Fiqh (Beyrouth: Dār al-ʿilm l'il mala'īn 1965), especially pp.433-41.
   Iqbāl, Reconstruction of Religious Thought in Islam (Lahore: Ashraf, 1965), pp.169-174.
   Yūsuf Mūsā, Al-Madkhal li dirāsāt Fiqh al-Islāmī (Cairo: 1961), pp.196-202.
   Muṣṭafā Zarqā, Al-Madkhal l'il-Fiqh al-Islāmī, Vol. 1 (Dimashq: Maṭbaʿ Jāmiʿa al-Dimashq, 1961), pp. 62 ff., particularly p.68, no. 1.
   Abū Sinna and others, Madkhal al-Fiqh al-Islāmī (Cairo: Jāmiʿa al-Azhar, 1965), pp.97-100, 119-131 and 163-165.
   ʿAbd Allāh ʿUmar, Sullam al-Wuṣūl li ʿilm al-Uṣūl (Cairo: Dār al-Maʿārif, 1956), pp.73-76, 233-239.

7. Riḍā, Taʾrīkh al-Ustādh al-Imām al-Shaykh Muḥammad ʿAbduh, Vol. I, (Cairo: Dār al-Manār, 1350/1931), p. Jīm and his introduction to al-Iʿtiṣām, (Cairo: Tijāriya, circ. 1332/1913) p. Jīm.

8. Fāḍil ibn ʿĀshūr, Aʿlām al-Fikr al-Islāmī fī Tārīkh al-Maghrib al-ʿArabī (Tūnis: Maktabat al-Najāḥ, n.d.), pp.71-72.

9. Abd al-Muta al al-Saʿīdī, Al-Mujaddidūn fī'l Islam, (Cairo: Maktabat al-Ādāb, n.d.), pp.294-296, 309.

10. ʿAbd Allah Darāz, op. cit. p.11-12.

11. D. S. Margoliouth, "Recent Arabic Literature", in Journal of Royal Asiatic Society (London: 1916), pp.397-98.

12. H. A. R. Gibb, Studies on the Civilization of Islam (Boston: Beacon, 1968), pp. 205-206.

13. Hurgronje, Selected Works of C. Snouck Hurgronje, (Ed.) G. H. Bousquet and J. Schacht, (Leiden: Brill, 1957), p.287.

14. Chafique Chehata, "Logique Juridique et droit musulman" in Studia Islamica Vol. XXIII (1965), p.16.

15. J. Schacht, "Fiḳh" in EI^2, Vol. II, p.890.

16. Ignaz Goldziher, Streitschrift des Ġazali gegen die Baṭinijja-Sekte (Leiden: 1916), pp.32-34.

17. See above note 7, and below n.19.

18. See note: 11.

19. Goldziher op.cit. p.33. He says, "Meine Kenntnis von den Beziehungen dieses Śāṭibī auf das Mustaẓhirī grunden si ch auf Auszüge, die aus dem Kapitel (الاعتصام) der Muwāfaḳāt in der arabischen Zeitschrift al-Manār unlängst".

Goldziher wrote thusly despite the fact that the title of the book in this issue was specifically mentioned as "Kitāb al-Iʿtiṣām" cf. Al-Manār, Vol. XVII (1913-14), pp.54-63, 273-293.

Elsewhere as well, on the basis of this conclusion, Goldziher commenting on "Ālī al-Qārī's mention of a book on "al-Ḥawādith al-Bidaʿ" by Shāṭibī, again suggested, "Es ist jedoch möglich, dass damit ein Kapitel der Muwāfaḳāt gemeint sei." (op.cit. note: 1).

This confusion was further carried on by Brockelmann, Geschichte der Arabischen Litteratur, S II, p.375, where he, probably basing his information on Goldziher's remarks, wrongly describes these excerpts in Al-Manār as "Auszüge" of al-Muwāfaqāt.

20. See above note: 2. Khuḍrī's Uṣūl...is available to us in its third edition, 1938 and second edition, 1933. The date of the first edition could not be known.

21. Muḥammad B. Ḥasan al-Ḥajawi, Al-Fikr al-Sāmī fi Tārīkh al-Fiqh al-Islāmī (Ribāṭ, 1345 A.H.), Vol. IV, p.82.

22. Ibid., p.17. For the complete discussion see pp.304-17.

23. Lopez-Ortiz, J. "Fatwas granadinas de los siglos XIV y XV", Al-Andalus, Vol. VI (1941), pp. 73-127.

24. Abū Zahra, op. cit. p.267

25. al-Ṣaʿīdī, op. cit. p.311. Ṣaʿīdī's views on Shāṭibī's rigidity are mostly unfounded. For instance his claim that Shāṭibī believed in only one saved sect, Salaf Ahl al-Sunna, and none else, is just opposite to what Shāṭibī maintained. cf. Al-Iʿtiṣām, Vol. II, pp.217ff.

26. Ibn ʿĀshūr, op. cit. pp.73-74.

27. Ṣubḥī Maḥmaṣānī, "Transactions in the Sharīʿa", in Law and the Middle East, Vol. I, ed. M. Khadduri and H. J. Liebesny, (Washington, 1955), p.187.

28. Ṣubḥī Maḥmaṣānī, Muqaddima fī Iḥyāʾ ʿUlūm al-Sharīʿa (Bayrūt: Dār al-ʿilm li'l Malaʾīn, 1962), pp. 22, 63, 65-67.

29. Raḥmān, Islam (London: Weidenfeld, 1966), p.108.

30. Rahman, Islamic Methodology in History, (Karachi: Central Institute of Islamic Research, 1965), p.154.

31. Ibid., pp.133-4.

32. Ibid., p.160.

33. Albert Hourani, Arabic Thought in the Liberal Age, 1798-1939 (London: Oxford, 1962), p.65.

34. Muḥammad Bayrām, Ṣafwat al-Iʿtibār, Vol. II, p.11, vide Hourani, op.cit. p.64.

35. Ibid.

36. Ibid, p.92.

37. Ibid, p.93.

38. Muftī Muḥammad ʿAbduh, "Taqrīr Muftī al-Diyār al-Miṣriyya fī Iṣlāḥ al-Maḥākim al-Sharʿiyya", Al-Manār, Vol. II, 1899, p.761.

39. Schacht, "Muḥammad ʿAbduh", Shorter Encyclopaedia of Islam, (Leiden: Brill, 1961), p.406.

40. Henry Laoust, Le Califat dans la doctrine de Raŝîd Riḍâ, (Beyrouth, 1938), p.273, n.61.

41. The following works by the authors enumerated below stress the dynamism of maṣlaḥa as a principle of interpretation of Islamic law:
Rashīd Riḍā, Yusr al-Islām (Cairo: Nahḍa, 1956), pp.72-75.

Ṣubḥī Maḥmaṣānī, Falsafat al-tashrīʿ fī al-Islām, transl. by F. J. Ziyadah (Leiden: Brill, 1961). (Arabic Ed. Bayrūt, 1952), pp.130-133, 205.

ʿAbd al-Razzāq al-Sanhūrī, "Wujūb Tanqīḥ al-Qānūn al-Madanī al-Miṣrī", in Majalla al-Qānūn wa l-Iqtiṣād, Vol. 6 (1963) 3-144. vide Kerr, op. cit.

Maʿrūf al-Dawālībī, Al-Madkhal ilā ʿilm uṣūl al-fiqh (Bayrūt: Dār al-ʿilm l'il-Mala'īn, 1965), pp.442.450.

Muṣṭafā al-Shalabī, Taʿlīl al-Aḥkām, ʿArḍ wa Taḥlīl li Ṭarīqat al-taʿlīl wa taṭawwurātihā fī ʿuṣūr al-ijtihād wa al-taqlīd (Cairo: Azhar, 1949), pp.278-384.

ʿAbd al-Wahhāb al-Khallāf, Maṣādir al-Tashrīʿ al-Islāmī fī mā lā naṣṣa fīhī, (Cairo: Dār al-Kutub al-ʿArabī, 1955), pp.70-122.

Muṣṭafā Zayd, Al-Maṣlaḥa fī al-Tashrīʿ al-Islāmī wa Najm al-Dīn Ṭawfī (Cairo: Dār al-Fikr al-ʿArabī, 1954).

Muḥammad Khuḍrī, Uṣūl al-fiqh, (Cairo: Muṣṭafā Muḥammad, 1933).

42. Zāhid al-Kawtharī, "Maqālāt al-Kawtharī, posthumous publication in 1372 A.H., as quoted by Muṣṭafā Zayd, op. cit. pp.164-66.

43. Goldziher, "Das Prinzip des Istiṣḥāb in der Muhammedanischen Gesetzwissenschaft", Wiener Zeitschrift fur die Kunde des Morgenlandes. Vol. I (1887), pp.128-236; vide Summary in French by G. H. Bousquet, in Arabica, VII (1960), pp.12-15.
The points of resemblance with Roman and Rabbinic law are not elaborated but most probably Goldziher refers to certain areas of flexibility in contrast to the strict application of law.

44. N.P. Aghnides, Mohammedan Theories of Finance (London: Longman, 1916), p.102.

45. G. H. Bousquet, Précis de droit musulman (Alger: Maison du Livre, 1947), p.37.

46. J. Schacht, The Origins of Muhammadan Jurisprudence, (Oxford: Clarendon, 1959), p. 11, n.1.

47. Ibid, "Classicisme, traditionalisme et ankylose dans la loi religieuse de l'islam", in Classicisme et déclin culturel dans l'histoire de l'Islam, (ed.) Brunschvig et als (Paris: 1957), p.158, note no. 4.

48. Rudi Paret, "Istiḥsān and Istiṣlāḥ", in Shorter Encyclopaedia of Islam, p.185.

49. Albert Hourani, op. cit. p.234.

50. G. E. Von Grunebaum, "Concept and Function of Reason in Islamic Ethics", Oriens, Vol. 15 (1962), p.15.

51. E. Tyan, "Méthodologie et sources du droit en Islam", Studia Islamica, Vol. X (1959), p.97.

52. Ibid.

53. Ibid.

54. Ibid., p.98.

55. G. F. Hourani, "Two Theories of Value in Medieval Islam", Muslim World, Vol. L (1960), pp.269-278.

56. Saʿīd Ramaḍān al-Būṭī, Ḍawābiṭ al-Maṣlaḥa fī al-Sharīʿa al-Islāmiyya, (Damascus: Umawiyya, 1966-67), pp.12-14.

57. Ibid, pp.23-60.

58. Ibid., p.414.

59. M. Kerr, "Rashīd Riḍā and Legal Reform", Muslim World, 1960, p.108.

60. Ibid., Islamic Reform, p.56.

61. Ibid., p.60.

62. Ibid., p.77.

63. Ibid., p.67.

64. Ibid., p.73.

65. Ibid., p.76.

66. Ibid., p.81.

67. Ibid. Muslim World, op. cit. p.107.

68. R. Paret, op. cit. mentions 1194 as the year of Shāṭibī's (d.1390) death, which is in fact the year in which Abū'l Qāsim Muḥammad b. Fīra al-Shāṭibī died. See Brockelmann, G.A.L.(Brill, 1943), p.520, and F. Krenkow, "Shāṭibī", in E.I.[1], Vol. IV, p.337-388. Unfortunately, the same error is repeated in the heavily edited and revised version of Paret's article in the Urdu Encyclopaedia of Islam. Urdū dā'ira ma'ārif Islāmiyya (Lahore: Danishgāh Panjāb), Vol. II, (pp.586-591), p.589.

69. Kerr, op.cit. p.194, referring to Riḍā's mention of Shāṭibī rightly quotes his year of death, but in his index on p.247 identifies him as Abū'l Qāsim b. Firra ash-Shātibī.

CHAPTER II

ISLAMIC LEGAL THEORY AND SOCIAL CHANGE

The relationship between legal theory and social change is one of the basic problems of the philosophy of law.[1] Law, which by its nature, tends to be unchanging, always faces the challenge of social changes which demand adaptability from law. Most often the impact of social change is so profound that it affects legal concepts as well as institutions and thus creates a need for a fresh philosophy of law. The problem of social change and legal theory is of particular significance in case of Islamic law. Islamic law is generally defined as religious, sacred and hence immutable. How does such a law face the challenge of change?

Shāṭibī sought an answer to such a challenge in the principle of maṣlaḥa. A discussion of Shāṭibī's answer is, however, unwarranted unless we first explain what the 'immutability' of Islamic law means. The present chapter attempts to examine the arguments of recent studies on the immutability of Islamic law. From this examination will be drawn definitions of the key terms in the problem of the present study.

Presuming that the interaction between social change and legal theory must have been at work in Islamic law before Shāṭibī as well, it may be rightfully suggested that to evaluate Shāṭibī's contribution to the philosophy of Islamic law his views

must be studied in comparison with those of his predecessors. Unfortunately, fulfilment of this task is not possible in view of the present state of scholarship on the philosophy of Islamic law; not only because a general history of Islamic legal philosophy does not exist, but also because very few studies have been made on individual uṣūl works.

On the other hand, an attempt to establish the views of Shāṭibī's predecessors by surveying the original sources is also beyond the scope of this study. The literature available on uṣūl al-fiqh, belonging to the pre-Shāṭibī period is enormous and there is no way to estimate how much more material was lost or not yet discovered. There is, in addition, the problem of the differences in the legal doctrines among various schools of law due to the various theological and philosophical predilections of the uṣūl writers. Such extra-legal considerations are reflected in the treatment of legal theory. A survey of the philosophy of law, therefore, would demand an investigation of all these aspects which is impossible within the limited scope of this dissertation.

It is with these limitations in view that in attempting to formulate an understanding of the key terms of the problem of adaptability of Islamic legal theory to social change, this chapter proposes to make an analysis of the findings of recent scholarship on this problem. This choice is made mainly in consideration of the fact that in the modern period (since the beginning of the nineteenth century) the question of the adaptability of legal theory to social change has been asked more pointedly than ever before. Hence, the formulation of the problem can be

expected to be clearer than in earlier periods of the history of Islamic law.

It must be stressed, however, at the very outset, that the following is not a report on the present state of scholarship on this problem, and, as such, it does not aim to be exhaustive. What we intend to do in the remaining pages is to establish the prominent land marks of the problem in reference to which Shāṭibī's views may be analysed.

In the nineteenth century when most of the Muslim peoples, directly or indirectly, came to be ruled by Western powers, a number of attempts were made to reform the laws of the Muslim peoples. Whether they were attempts to codify or to modify the Muslim laws, the strong religious reaction among the Muslim peoples against such legislative attempts made the reformists aware of the complexities of the problem of change in the Islamic law.

The early colonial policy of non-interference in personal and religious matters, particularly in India, in fact, tended to support the conservatives' view of the immutability of Islamic law.[2] One of the solutions to avoid interference in personal laws was sought in establishing separate courts for personal and religious matters. This solution required either that these courts should be entrusted entirely to the traditional jurists or that the judges should be assisted by specialists trained in the traditional Muslim laws. The situation led to a series of translations of the traditional texts and their codification along Western patterns. This was the beginning of legislative modernism in Islamic law.

The early legislative modernism, however, added a new dimension to the problem. Most of the translators and jurists were lawyers such as Van Den Berg and M. Morand and their attempts at translations and codifications were meant for judges in modern courts. More significantly, most of them were foreigners and non-Muslims. Perhaps naturally they tended to treat the whole body of Islamic law as though it were Western law. At the extreme of their reform efforts, they excluded from the body of Islamic law what they considered as not belonging to Law. The underlying conception in these attempts was that Islamic law, like other laws, could be changed, reformed and codified by government legislation according to social needs. Confronted with orthodox conservative opposition, these men spelled out their views more explicitly by questionning the idea of the immutability of Islamic law.[3]

This view of Islamic law was strongly criticised by Islamicists, especially by Snouck Hurgronje[4] and G. Bergsträsser.[5] Hurgronje pointed out that it was a mistake to treat Islamic law like Western law and that Islamic law was a 'doctrine of duties'. By its nature it was religious law, and as such it was immutable.[6]

Consequently, from that time, as J. Schacht also reported in his lecture on the status of scholarship on Islamic law,[7] there appeared two approaches to the study of Islamic law: one, that of the lawyers, the other, that of the Islamicists. An implicit controversy between these two approaches continues even today on the problem of legal theory and social change.

In a very broad sense this problem has been formulated by recent scholarship thus:

Is Islamic law immutable, or is it adaptable to social change? Whereas the lawyers have been inclined to regard Islamic law as adaptable to social change, the Islamicists have stressed the immutable character of Islamic law.

The arguments of the advocates of the immutability of Islamic law can be summed up in the following three general statements:

1. Islamic law is immutable because the authoritative, divine and absolute concept of law in Islam does not allow change in legal concepts and institutions. As a corollary to this concept, its sanction is divine and hence cannot change.

2. Islamic law is immutable because the nature of its origin and its development in its formulative period isolated it from the institutions of legal and social change - the courts and the state.

3. Islamic law is immutable as it did not develop an adequate methodology of legal change.

The advocates of the adaptability-view disagree with the above conclusions, yet their arguments also turn around these three aspects of Islamic law: concept, history and methodolgy.

It is, therefore, possible to accept these three aspects as general landmarks in surveying the problem of social change and legal theory. The following discussion is, therefore, arranged according to these three aspects.

1) THE CONCEPT OF LAW

The argument that the Islamic concept of law is absolute and authoritative and hence immutable, has been advanced from two points of view. First, with regard to the source of Islamic law, it is contended that the source of Islamic law is the will of God, which is absolute and unchangeable. The second point of view springs from the definition of Islamic law; there it is demonstrated that Islamic law cannot be identified as law in the proper sense, rather it is an ethical or moral system of rules. The first view, thus, treats the problem of the concept of law in terms of the distinction between reason and revelation. The second view deals with it in terms of the distinction between law and morality.

The arguments in regard to the first view take into account two subject matters: i) law and theology and ii) law and epistemology.

J. Schacht has very forcefully argued in his article, "Theology and Law in Islam", that there has always been a close connection between Islamic law and theology; and that certain isolated instances of separatist trends are only accidental. He has demonstrated this connection by the fact that the schools of law and their eponyms showed their interest both in law and in theology.[8] Further, a certain symbiosis of the schools of law and the schools of theology existed throughout the history of Islamic law.[9]

Malcolm H. Kerr also observes that the concept of Islamic law is very firmly grounded in theology.[10]

The connection between law and theology, however, must not be understood in the sense that law was theological so as to be a counterpart of "Divine Law" or "Canon law" as in Christian teachings. "Islam", as Schacht put it, "is a religion of action rather than of belief".[11] Hence a "Theology" in the Christian sense could not be conceived of in Islam. The argument asserting the theological foundations of the concept of Islamic law is advanced simply to stress that the law's source is Divine will, and not human reason.

C. H. Toy has put this idea more neatly by comparing the Greek and the Semitic concepts of law. He found that Semites conceived law as absolute, revealed by God; whereas the Greeks worked out the idea of natural law. The absolute law of the Semites is external, imposed on man from without, by God, while the Greek conception is of an inward law which is part of man's nature.[12]

It appears that arguments holding Islamic law to be theologically grounded are advanced in the sense in which Toy speaks about the Semitic concept of absolute law. The evidences that the advocates of the immutability view present to prove their point confirm our observation.

The first evidence they advance concerns the divinity of the sources of Islamic law. It is argued that Islamic law seeks its basis in Divine Revelation through the Prophet; it is embedded in the Qur'ān and Ḥadīth. Being divine, or divinely inspired these sources are believed to be sacred, final, eternal and hence immutable. It is in this sense that some scholars have understood Islamic law as divine law. Among them N. J. Coulson,[13] H. A. R. Gibb,[14] H. J. Liebesny,[15] M. Khadduri,[16] H. Lammens,[17] G. Makdisi,[18] and particularly J. N. D. Anderson[19] have expressed this view.

Leon Ostrorog,[20] S. G. V. Fitzgerald[21] and some others have disagreed with the view of the scholars mentioned above. They argue that the strictly legal materials in these 'revealed' sources are limited and, indeed, negligible. Furthermore, this material is more concerned with the religious and moral teachings than with matters strictly pertinent to law. The whole body of Islamic law, cannot, therefore, be called revealed and sacred when the amount of legal material existing in the revealed sources is very little.

The second evidence advanced by the advocates of the immutability view takes the question of the sources of law in a more abstract sense. It contends that Islamic law has its source in the Will of God. Since Gibb has expressed this view more succinctly, we quote him as follows:

> "The conception of law in Islam is thus authoritarian to the last degree. 'The law, which is the constitution of the Community, cannot be other than the Will of God, revealed through the Prophet'. This is a Semitic form of the principle that 'The will of the soverign is law', since God is the sole Head of the Community and therefore sole Legislator".[22]

The concept of the Will of God has theological implications, which render it entirely absolute and immutable. The reason for this situation Gibb finds in the nature of the development of Muslim theology. Because of its stress on monotheism, Islamic theology refused to admit any limitations whatsoever upon the Power and the Will of God. But the frame of reference of these theological discussions was Aristotelian logic rather than metaphysics. Consequently, the theology was forced into extreme positions; one such position is that there could be no agent of any kind in the universe except God, since the existence of an agent implies the possibility of an action independent of God, and, therefore, a theoretical

limitation upon the absolute power of God.[23] This conclusion was extended even to 'human acts'; man was not considered the free agent of his acts. This, apparently, would also imply a denial of moral and legal responsibility on the part of man. It would also imply that nothing can be qualified as good or bad except in relation to His will, because the Creation would have no intrinsic value. The knowledge of this value can only be had through revelation and not through human reason; leading to the other subject matter of the concept of law, its epistemology.

The arguments in respect to epistemology of Islamic law have referred to two aspects of the problem, a) the possibility and method of knowing the law, and b) the role of human reason.

Gibb has brought these points clearly to the fore. He argues that Islamic law is thought of, not as a product of human intelligence and adaptation to social needs and ideals, but of divine inspiration and hence immutable. The Qur'ān and Ḥadīth are not the basis of Islamic legal speculation but only its sources. The real foundation of the law is to be sought in the attitude of mind which determined the methods of utilizing these sources. The ultimate reason of such a mental attitude is metaphysical; an a priori conviction of the imperfection of human reason and its inability to apprehend by its sole powers the real nature of the good, or indeed, of any reality whatsoever.[24]

As a corollary of the above concept of the epistemology of law, no primary role is allowed to independent human reason in law making.

Schacht has pointed out that as a consequence of such an epistemological attitude a number of irrational elements have survived in the Islamic law.[25] R. Brunschvig also speaks of the irrationality of Islamic law in this special sense.[26] G. F. Hourani's distinction of two theories of values in Islam is also concerned with the point we are discussing.[27]

The concept in Islamic legal theory that implies the employment of reason in knowing and interpreting law is maṣlaḥa. In fact, both Grunebaum[28] and Hourani[29] have classified it as a rational principle. This classification has been, however, disputed by scholars like Schacht.[30]

The second view, in regard to the concept of Islamic law - dealing with it in terms of the opposition between law and morality - is concerned with its definition. Since law and morality or ethics have a great deal in common, they are often liable to be confused. Hence, any attempt to define law necessarily starts by distinguishing one from the other, law from morality. In defining Islamic law, Islamicists conclude that it is a system of ethical or moral rules. This conclusion must be understood in reference to the separation of law from morality. By defining Islamic law as 'ethics' it is certainly never implied that it is a branch of philosophy; nor is it 'morality' in the sense of having its source in social customs only.

The main aim of the argument in describing Islamic law as ethical law was to refute the modern lawyers' approach to Islamic law as being law in the modern sense. The second aim was to maintain the position that, being a system of ethics,

Islamic law is not capable of change through legislation. Snouck Hurgronje was the first scholar to advance this argument. He defined, in very clear terms, Islamic law as a 'Doctrine of Duties'.[31] Th. W. Juynboll[32] and others agreed with Hurgronje. G. H. Bousquet carried this argument to the extent of affirming that Islamic law is idealistic and casuistic, based on imaginative, non-discursive and often rationally absurd hypotheses.[33]

Gibb's elaboration on this point is very succinct. To maintain that Islamic law was a system of ethics would naturally imply that it was a system based on human reason; Gibb explained that it was an ethical system in contradistinction to a legal system; yet it was not a rational or philosophical system as it sought its basis in revelation. The main points in his argument that distinguish Islamic law as an ethical system in contrast to a legal system were the following:

a) The classification and categories of actions in Islamic law are moral, not juridical. The five categories of obligatory, recommended, indifferent, reprehensible and forbidden which are to cover all human actions, are moral and ethical.[34]

Schacht, however, made it clear that the ethical nature of the categories of action does not mean that there did not exist any legal subject-matter in Islamic law. As a matter of fact, Schacht maintained, the legal subject-matter can be distinguished from other subjects but what is meant by the all-inclusiveness of these five moral categories is that even legal subject-matter is classified as an ethical and religious duty.[35]

b) Islamic law speaks of "duties", not of "rights". In other words there is much more emphasis on what one ought to do rather than upon what one is entitled to claim as a right. The term ḥuqūq even though it means "rights" in a sense, nonetheless, does not contradict the point. In Islamic law, ḥuqūq are divided into those belonging to God and those belonging to men. Subsequently, the latter are subordinated to the former, and this, in fact, renders them into religious and ethical duties rather than rights in the strictest meaning.

c) Penalties and sanctions in Islamic law are religious and moral, not civil and legal. The term used for a penalty, even in matters belonging to penal law, is ḥudūd Allāh (the limits of God) which stresses the fact that a certain offence has been committed against God and that it is His right to impose penalty.[36]

Schacht explains further that the other category of penalty called taʿzīr, according to which a qāḍī (judge) may punish at his discretion any act which, in his opinion, calls for punishment, in fact, did not belong to the Islamic legislation which appears in the Qur'ān and in the tradition of the Prophet.[37] What is implied in this explanation is that the concept of civil penalty which the term taʿzīr might convey, originally did not belong to the concept of Islamic law.

2) THE HISTORICAL NATURE OF ISLAMIC LAW

In the above section on the concept of law we dealt with explanations of how the idea of law is conceived in Islamic legal thought. The present section treats the explanation of the characteristics of Islamic law as it developed historically. This section, however, does not include questions regarding its application in practice; the matter of practice is treated separately in the section following.

In general, those who took a historical approach for understanding the nature of Islamic law have pointed out the following as its characteristics: 1) its idealistic nature, 2) its religious nature, 3) its rigidity, and 4) its casuistic nature. All four characteristics are related to one another and are presented as the reasons for the law's immutability.

The arguments about the nature as revealed in its history of Islamic law, concern the analysis of the following areas: i) the origins of Islamic law; ii) Islamic law and state legislation; iii) the role of the institution of the qāḍī; and iv) the establishment of the schools of Islamic law.

The Origins of Islamic Law:

The traditional Muslim point of view, later accepted by a number of modern scholars, maintained that Islamic law began with the Divine Revelation in the Qur'ān and with Muḥammad's decisions. These decisions as preserved in the large corpus of Ḥadīth literature were believed to be the foundation of Islamic law.

1. Goldziher's study of the Ḥadīth literature from the point of view of its historicity

exposed the authenticity of the larger part of this literature to serious criticism.[38] J. Schacht[39] and R. Brunschvig[40] brought this criticism to bear upon that part of the Ḥadīth literature that concerned Islamic law. Schacht argued that a large number of legal aḥādīth were, in fact, legal doctrines of the early scholars of Islamic law which were projected back to the Prophet in the form of ḥadīth, ḥadīth being the most acceptable method of establishing a point.

Some scholars also found that there existed in Islamic law a considerable foreign element coming especially from Roman law.[41] As the ancient schools of law developed in areas where Roman law had been applied before the advent of Islam, these scholars concluded that the origins of Islamic law must be sought in Roman law. This view has been a point of controversy among a number of scholars. Schacht connected the existence of the foreign elements to the Sunna. He argued that the ancient scholars, in fact, had assimilated local administrative practices and foreign legal elements into a series of doctrines which they had Islamicized by incorporating them into the Sunna.[42]

The need for projection backward to the Prophet was not felt until Shāfiᶜī very forcefully presented the thesis of the traditionists and established the sole authority of the Prophet in opposition to the authority of "living tradition".

The bearing of these studies on the origins of the law and upon the problem of the law's immutability lies in their conclusion that Islamic law originated from a pious and religious motivation. This motivation became stronger as the religious element in the law was threatened by the attempts of government in the early

ʿAbbāsī period to control Islamic law. To save Islamic law from government control, Muslim jurists stressed its religious and divine nature so as to raise it above any human tampering.

Goldziher's and Schacht's criticism on the authenticity of the Ḥadīth literature have been questioned in a number of recent studies, but since most of these studies are not directly relevant to the question of the law's origins, they do not concern us here. Two studies are, however, relevant to our discussion.

Fazlur Rahman[43] disagreed with Schacht's conclusion that the Sunna of the Prophet was a late concept that emerged in consequence of the development of the Ḥadīth movement. Using literary, philological and historical evidence, F. Rahman showed that, contrary to Schacht's argument, the Sunna of the Prophet could not have been a late concept. If Rahman's conclusion is accepted, it would mean that the origin of Islamic law is to be sought in the early period of Islam.

S. D. Goitein,[44] although he has insisted that his conclusions do not differ from those of Schacht, suggested that the origins of Islamic law may be dated to the year 5/627. Goitein draws his conclusions from a Qurʾānic verse which, he says, establishes Muḥammad's role as law-giver. From the verse he concluded that the idea of Islamic law was not the result of post-Qurʾānic developments but was formulated by Muḥammad himself.

Besides these differences in determining the historic beginnings of Islamic law, all of the above arguments agree upon the religious nature of its origins.

ii) Islamic Law and State Legislation:

Gibb observed that in Islam the law preceded the state, both logically and in terms of time, and that the state existed for the sole purpose of maintaining and enforcing the law.[45] Gibb argued that in the Umawī period the formulation of the Revealed Law was left in the hands of theologians. The advent of the ʿAbbāsī Caliphs brought this scholastic law, for the first time, to the test of practice.[46] Schacht's investigation of the early development of Islamic law explains the above observation historically.[47] As was mentioned above, Schacht concluded that Islamic law began with the activities of the jurists due to religious motives; it was not created by state legislation. This phenomenon resulted in the jurists' conviction of the independence of Islamic law from state control. Certain historical events in the eighth century solidified this attitude further.

In the early ʿAbbāsī period the administration of justice was in chaotic condition because of the lack of unity in juridical doctrines. Ibn al-Muqaffaʿ, a secretary in the ʿAbbāsī government, strongly recommended that the caliph control this diversity of opinions by state legislation.[48] The jurists reacted to this suggestion by insisting that the law was superior to the state, and hence not subject to state legislation.[49]

Whether Islamic law maintained this independence in actual practice is a matter dealt with in the next section. What concerns us here is the conclusion that many scholars have drawn from observations on the nature of the law in relation to the state.

H. Lammens and others have argued that, being severed from state legislation, Islamic law became divorced from social realities.[50] G. H. Bousquet concluded that the idea of successive adaptations to changing circumstances was strange to its system.[51]

Claude Cahen, however, has disagreed with such conclusions. He argues that the problem for the early jurists was not to derive the ideal of Muslim government but rather to institute a very loose filtering which would reserve to them the bestowal upon the régime as a whole of its certificate of 'good Muslim'. He concluded that "it would be supremely unjust...to regard the work of the ʿAbbāsī jurists as abstract and turning the back on reality".[52]

iii) Role of the Institution of the qāḍī:

The institution of the qāḍī evolved out of the pre-Islamic institution of the Ḥakam (arbitrator). Like the ḥakam, the early qāḍī was bound by the precedents of local tradition and decided cases, not through some formal methods of reasoning, but according to his own discretion.[53] As Schacht has shown, the decisions of the Umawī qāḍīs incorporated local elements. In the later development of Islamic law these decisions were assimilated into the body of Islamic law.[54] Yet the role of qāḍī was not recognized to be that of making or interpreting the law, but, essentially, only of applying it.

In the ʿAbbāsī period the office of qāḍī was connected with Islamic law, thus separating it from the general state administration and making it subject to Islamic

law only.[55] Later when the schools of law were established, the role of the qāḍī was reduced to the application of the teachings of one of these schools. This limitation caused the complete stagnation of the law.

N. J. Coulson, in analysing the causes of the widespread dislike of the office of qāḍī among the jurists, concluded that the rejection of the office could not be fully explained by such factors as the fear of sudden political disfavour or as pious motives, such as I. Goldziher, Amerdoz and E. Tyan had suggested. According to Coulson the real cause of dislike of the office was its impracticable and idealistic nature.[56]

Coulson observed a significant distinction in the attitude of the jurists toward the institution; the distinction between the attitude of the practical lawyers and the attitude of the idealist traditionists. He stresses that this distinction was real and vital in the history of Islamic law.[57] For lawyers, Islamic law consisted of enforceable legal rules; for traditionists it was a code of moral and religious duties. The former regarded the office of qāḍī as essential and honourable; the latter wished to avoid it at all costs. The attitude of the lawyers was a continuation of the outlook of the early Umawī qāḍīs who, as legal secretaries, were responsible to the governor. The other attitude was the result of the growing influence of the religious concept of law in the eighth century, extending to the office of the qāḍī. The morally-inclined qāḍīs began to feel that their allegiance lay to religion rather than to the interests of the governor.

As a result of this dichotomy there developed two trends of law; the 'religious law'

as expounded by the jurists and the 'positive law' as administered by the courts. An example of the latter is the development of ʿamal (juridical practice), as court law in the Mālikī school.[58]

H. Toledano has observed that ʿamal became "an instrument for modifying and adapting the sharīʿa to meet the practical needs of the society, and the judges in Morocco were filling the same role as their predecessors in the first two centuries of Islam".[59]

iv) The Establishment of the Schools of Law:

As a result of the rapid legal activity from the late Umawi period until the end of the second century, there emerged certain schools of law which were consolidated to the extent that adherence to one of these schools was common and also necessary. This adherence was required not only of the layman but also of the qāḍī and the jurist. This requirement was called taqlīd.

The effects of taqlīd on the growth of Islamic law were fateful. It reduced legal activities to the confines of particular schools. On the one hand, the procedure of legal reasoning became mechanical and, on the other hand, the whole body of Islamic law was cast into a rigid mold, not allowing further independent growth.[60]

The phenomenon of taqlīd has been considered by a number of scholars as a factor responsible for the belief in the immutability of Islamic law.

3) ISLAMIC LAW IN PRACTICE

Most studies on Islamic law lay stress on the gap between theory and practice. This gap has been so striking that some scholars such as J. Kramers even suggested the distinction between two systems of law in Islam: 'droit de l'Islam', the laws in practice, and 'droit islamique', the law in theory.[61]

The cleavage between theory and practice has been observed under three aspects: i) between Islamic law and the customs of the Muslim people; ii) between Islamic law as elaborated in Texts and as practiced in the courts; iii) between different kinds of subject matters in reference to their application.

Although custom was not recognized, theoretically, as a source of Islamic law,[62] yet scholars have observed that custom not only played an important role in the growth of Islamic law but also that it always co-existed with the law.[63]

As for the cleavage between the jurists' law and the court law, scholars have observed that the administration of justice was not completely subject to Islamic law. An evident example of this was the introduction of the courts of naẓar fī al-maẓālim where decisions were reached through individual discretion and Siyāsa. The jurisdiction of the qāḍī was limited, and even there interference by the governor and other government officials in the qāḍī's decision, and restricting his competence in legal matters, was so frequent that, in fact, the applicability of sharīʿa law in courts was more and more restricted. Consequently, the 'positive law' applied in the courts grew separately from the religious law.

As mentioned above the ʿamal tradition is an example of the positive law. As a

matter of fact, it was assimilated into Mālikī law as a doctrine that had a regulative force. The judges were required to follow it even when it ran contrary to the dominant opinion of the school.[64]

Customary law and the law of the courts that responded to social needs and that were adaptable to social changes ought to have influenced Islamic law. This influence, as observed by the scholars, did operate, but it varied according to the various subject matters of Islamic law.

A. L. Udovitch believes that Bergsträsser was the first scholar who pointed out this influence.[65] He distinguished three broad categories of the subject matters of Islamic law:

1. Ritual, family and inheritance laws, which though they accepted certain changes based on custom, yet remained as a whole closest to Islamic law.

2. Constitutional, criminal and fiscal laws - an area where Cahen believed the jurists to be very flexible[66] - which was constantly being adapted to social changes. In fact, Bergsträsser observed that this category of Islamic law diverged farthest and in some cases completely from the classifcal formulation of Islamic law.[67]

3. Commercial laws, or to use Schacht's terminology, the laws of contract and obligation, fell somewhere between the two extremes. Schacht,[68] in one of his early statements agreed with Hurgronje[69] who maintained that Islamic commercial law remained for the most part a dead letter.

4) THE QUESTION OF METHOD

The significance of the question of method in reference to the immutability of Islamic law has been generally recognized by all scholars. Every system of law tends to be perfect and permanent; hence a sense of immutability has gathered around the concept of law. But changing social needs challenge such an attitude. Various systems of law have devised certain methods to meet such challenges. For instance, Roman law resolved this problem by distinguishing between jus civile which was strict and jus honorarium which was elastic.[71] In Common law the flexibility was achieved through Equity.[72]

The question of method in Islamic law has generally been discussed in reference to the classical theory of the 'four sources of Islamic law'.[73]

Modern scholarship also discusses the question of the method in reference to the sources of Islamic law. E. Tyan[74] and Ch. Chehata[75] observed that Islamic law did evolve methods to adapt legal theory to changes. Chehata spoke about the principle of Istiḥsān as being the counterpart of Equity in Common law.[76] Tyan pointed out three such methods: Istiḥsān, Istiṣlāḥ, and Siyāsa Shar'iyya (administration of justice according to Islamic law). All of these methods were devices to incorporate social changes into Islamic law where the strict requirements of Islamic law would not allow this.

Schacht contended that Islamic law did not and could not evolve such methods,[77] mainly because by its very nature Islamic law was not in need of them.

Islamic law was not an official law like other laws. Official law came to be by the authority of secular legislators, but Islamic law did not recognize it. Hence Islamic law was a 'sacred law' par excellence; perfect, immutable, and not in need of change. Schacht maintained that principles such as ʿurf, istiḥsān, istiṣlāḥ and ʿamal were not used as principles of change but rather to interpret and justify the already existing rules of Islamic law. Moreover, if ever they were used to adopt certain changes they were meant to build a protective zone around that particular change lest it affect the whole of the theory.[78]

Malcolm H. Kerr, in his study of Islamic reforms in the nineteenth century, has confirmed Schacht's conclusions. Kerr chose to study the principle of maṣlaḥa ("welfare, benefit, utility")[79] because it was considered by the upholders of the dynamism in Islamic law as a principle of adaptability.[80] He concluded that although theoretically a liberal principle, the maṣlaḥa in actual application succumbed to the theological and idealistic limitations imposed upon it by the Islamic legal theory.

Conclusion

As suggested at the beginning of this chapter, for the subsequent discussion of the problem, this chapter provides us with a conceptual framework in two respects. First, it helps us develop definitions of the key terms of the problem. Second, it gives us the basic assumptions and premises of the argument. The conclusion of this chapter, therefore, consists of two parts. First, it deals

with definitions of the concepts and terms in reference to the above discussion. In the second part it defines the assumptions and the manner of argument to be followed in the rest of the thesis.

Before proceeding to definitions, a general conclusion of the above debate upon the problem must be given.

The above discussion shows that the scholars are divided on the question of the adaptability of legal theory to social changes.

The immutability view maintains that the main reason for affirming the unchangeability of the law is that, by its very concept, Islamic law is not adaptable to social changes. In the actual history of the law, because of its self-concept, Islamic legal theory has been divorced from social realities. It has been separated from those institutions which are adaptable to social needs and for that reason could not develop a method of adaptation of its own.

The adaptability view does not differ from the immutability view on the concept of law but they do not give so much significance to this matter; they rather argue from the nature of the law's development. In practice Islamic law accommodated to social changes. The origin of the law came about in response to social needs, and in its subject matter and methodology it showed adaptability to social change.

Both positions, however, admit the view of the opposite group on some points. For instance, the immutability view submits to the opposite position in maintaining

that Islamic law was adaptable in its formative period. The adaptability view admits that after the "closing of the gate of ijtihād", Islamic law showed less and less adaptability.

KEY TERMS

A closer look at the above debate shows that it is the different understanding of the key terms that have caused the controversy. What follows is an attempt to redefine the basic terms of the problem.

"Adaptability" and "immutability"

It is clear that the above views have the following questions as a starting point: does Islamic law in fact change? Further, is Islamic law changeable? The two views provide different answers to these questions. The immutability-view claims that Islamic law does not change, adding that in fact it cannot change. The "immutability", to them, therefore, means that the rulings pronounced by Islamic law are static, final, eternal, absolute and unalterable. The adaptability-view, on the contrary, maintains that Islamic law changes and that, in fact, it has changed, and moreover, can be changed further. This view also stresses that it can be changed and modified to fit new social conditions. In other words, "adaptability", in the specific context of the above controversy, is not simply a contrary term to "immutability", but it consists of an additional meaning, i.e. a distinct implication of modifying to meet new conditions.

"Social Change"

The term "adaptability" is, thus, immediately concerned with social changes.

Social change, here, is obviously not a technical term which implies "transformation of society" or "social control".[81] This term is rather used as a general term to signify that the change in question has happened in society in response to social needs. A legal change that interacts with such social changes or recognizes the social needs, demonstrates the adaptability of a particular legal system.

"Islamic law"

In the above controversy neither of the views dispute that social changes occurred in Islamic history and that legal changes did take place accordingly, but whereas the adaptability-view connects these changes to the nature of Islamic law, the other view does not. The immutability-view asserts that these changes took place only in practice but were not recognized by the theory of Islamic law. The question is then obviously not about the historicity of legal changes, but about the theory of Islamic law regarding these changes. The difference of the two views is confined, therefore, to the theoretical aspect of the question. Since the two hold opposite views on this point, it is worth investigating whether they mean the same thing when they say "Islamic law", or not.

The adaptability-view refers to fiqh as Islamic law, and even shaṟīʿa is understood as fiqh. The immutability-view is not so monolithic. In reference to the concept of law, Islamic law is identified with sharīʿa, but even here the arguments about its ethical and moral nature are made in reference to fiqh. In the arguments contending that the law is divine and the will of God, obviously it is not the fiqh which is meant. In discussions of the nature of the law and practice what is implied by Islamic law is fiqh. The contrast between theory and practice is made in reference to fiqh.

The reason for this apparent inconsistency and ambiguity is that the immutability view believes that sharīʿa and fiqh are inseparably connected, sharīʿa being the law, and fiqh the science of knowing the law. This explanation, however, does not remove the ambiguity.

To explain this ambiguity we may borrow Kerr's formula of the levels of meaning. He observed the following four levels of meaning implicit in the discussion of juristic theory: (1) Divine Will, the sole metaphysical reality; (2) the spiritual relationship between man and God; (3) the normative relationship between man and man, and (4) the non-normative relationship of man and nature.[82]

In reference to these four levels we may say that sharīʿa belongs to the first level, and fiqh covers both the second and third levels. The third and fourth levels concern social changes. Now social changes would usually have immediate effects on the third level; its effects on the second level are not immediate, however. In respect of the question of adaptability therefore, the fiqh at level three is more significant than at level two.

In view of this explanation, both positions involve ambiguity in some sense. The adaptability view confuses the first and third levels by equating fiqh with sharīʿa. The immutability view also confuses the two levels. A distinction in these levels can help in demarcating sharīʿa from fiqh and also in distinguishing among various subject matters of fiqh.

The question whether sharīʿa or fiqh can be called law is another source of ambiguity. The question stems from the fact that the English term "law" has a special sense

which is not conveyed by the Islamic terms. The adaptability view believes that fiqh may be called "law". This position is taken by Linant de Bellefonds.[83] He has argued that the theocratic and religious nature of Islamic law has been stressed in an exaggerated manner, by referring to its teachings on ʿIbādāt (rituals, worship) and by comparing it with Western concepts of law. He maintained that even if the theocratic nature of its origins be admitted, it was not prevented from becoming a juridic system so long as its precepts were sanctioned by a secular authority. Implicit in his argument is the view that fiqh became law as much as and whenever it was sanctioned by governors and administrators.

The opposite view contends that sharīʿa, though not law in the proper sense, is the law of Islam. Fiqh is a science that deduces rules of law from the sharīʿa. Accordingly sharīʿa is known through the fiqh. Does there exist sharīʿa outside the fiqh ? Although the answer should be in the affirmative, yet there are different answers to the question of its location. In the abstract sense the sharīʿa is a metaphysical reality known through the Qur'ān and the sayings of the Prophet. The question whether everything contained in the Qur'ān and Ḥadīth is law takes us back to fiqh, as that is where the law is spelled out. Hence for practical purposes, even in this position, fiqh comes to stand for Islamic law.

"Islamic legal theory"

Now, coming to the question of the legal theory and social change, can we consider fiqh to be the legal theory?

Most probably not. In the preceding discussion, to consider fiqh as legal theory is possible but only in a limited sense. Fiqh cannot stand for legal theory in the sense of principles and methods, because the branch of the Islamic legal sciences that concerns such matters is Uṣūl al-fiqh.

Uṣūl al-fiqh is the formal science in which Muslim jurists have dealt with legal theories, the principles of interpretations of legal texts, methods of reasoning and of deduction of rules and other such matters. Thus, this thesis proposes to mean uṣūl al-fiqh, when it speaks of 'Islamic legal theory'.

Having defined our terms of analysis, we now come to the second part of the conclusion.

Our framework of discussion in this thesis consists of two sets of arguments. One part of the argument is that Shāṭibī's concept of maṣlaḥa in relation to his doctrine of maqāṣid al-sharī'a was the product of the need of his time to adapt Islamic law to the new social conditions. For this part the argument comprises the following steps: 1) A broad picture of the social changes in fourteenth-century Granada (Chapter 3) will be drawn to see the extent to which the political, religious and economic developments in this period brought a basic change in Granadian society. 2) We will also see how the legal system may have been affected by these social changes. These observations will then be substantiated with an analysis of the actual fatāwā in this period. (Chapter 5). Since these fatāwā are answers to the actual questions arising out of new social conditions, we will be able to assess

to what extent the need for legal change was connected with the developments as already observed. 3) This will also enable us to observe how Islamic legal theory dealt with the problem, i.e. what legal concepts and methods were used and whether, in this respect, there was a departure from the legal tradition.

This will lead us to the second part of the argument in our thesis - that Shāṭibī's concept of maṣlaḥa is an attempt to justify the adaptability of Islamic legal theory to social needs. In this regard, the assumptions and premises of our argument are drawn from the above discussion. These assumptions are as follows: First, to determine the adaptability of Islamic law, one must examine whether a certain method or concept, proposed as a theoretical justification of the adaptability, succeeds in freeing the concept of legal obligation from the theological determinism that it has received from having its origin in the absolute Will of God. To verify this hypothesis, Shāṭibī's concept of maṣlaḥa will be examined in this frame of reference. The analysis is undertaken in reference to the development of this concept in uṣūl al-fiqh (Chapter 6). The purpose of this analysis is to assess the direction in which Shāṭibī wanted this concept to lead.

This comparison also helps us in defining the meaning of theological determinism and its consequences for the concept of maṣlaḥa and then to assess whether Shāṭibī succeeded in freeing the concept from this determinism. (Chapter 7).

In examining Shāṭibī's attempt to free legal obligation from theological determinism, we will interpret such an outlook as a positive element in his legal

philosophy. Since our use of the term "positivism" may create some misunderstanding, we must explain that our use of the term is related to, but not identical with, "legal positivism".

In this thesis "positivism" refers to the well-known doctrine which explains the evolution of human thought in three stages: theological - metaphysical - positive. The third stage, positive, seeks to separate philosophical thinking from theological and metaphysical modes of thought, and stresses observable phenomena. Historians of legal philosophy, such as Huntington Cairns, attribute this development to the tendency of jurisprudence towards complete independence.[84] Jurisprudence has shown this tendency by breaking with theology in the sixteenth century and culminating in the recent trend which is called "legal positivism" or the analytical school of jurisprudence.[85]

Recent exponents of 'legal positivism', such as H. L. A. Hart, have excluded considerations of morality and justice from the concept and definition of legal obligation.[86] Hart has, however, made a significant observation at this point. He admits that the origin of the rules of law may be found in the ideas of morality and justice but that this does not prevent legal obligation from separating itself from morality in actual enforcement of law.[87]

This observation will help us in understanding the distinction that Shāṭibī suggests in defining legal obligation in reference to taᶜabbud.

The suggestion that there was an element of positivism in Shāṭibī's legal thinking

is advanced as described above. His attempt to free legal theory from theology and morality will be interpreted as a step towards positivism. Shāṭibī's distinction between ʿādāt and ʿibādāt on the basis of observability of maṣāliḥ in the former is understood as an attempt to separate positive law from religious elements.

NOTES: CHAPTER II

1. See W. Friedmann, Law in a Changing Society (London: Pelican, 1964), 19. In Chapter One, Friedmann surveys the history of this problem in Western legal philosophy.

2. In 1897, in a case (Calcutta, 25:18) before the Privy Council the appellants sought a revision of the decision of a lower court of law. The appellants contended that the decision which was based on the Hidāya was not in accordance with the Qur'ān on this point. The Privy Council confirmed the decision of the lower court and declined to go beyond Hidaya. Their Lordships explained: "It would be wrong for the Court on a point of this kind, to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority". Quoted by A. J. Robertson, The Principles of Mahomedan Law (Rangoon, 1911), 5.

3. See, for instance, M. Morand, Introduction a l'étude du droit musulman algérien (Alger, 1921), 108-112.

4. For example, M. L. W. C. Van den Berg's translation Minhâdj at-ṭâlibîn, texte arabe publié avec traduction et notations (Batavia, 1862-1884), was strongly criticized by Hurgronje in his review article in Revue de l'histoire des religions, XXXVII (1898), 1-22, 174-203; available to us in G. H. Bousquet and J. Schacht (editors), Selected Works of C. Snouck Hurgronje (Leiden, 1957), 214-255.

5. G. Bergsträsser's work, Grundzüge des islamischen Rechts, published by J. Schacht in Berlin, 1935. Cf. J. H. Kramers, "Droit de l'Islam et droit islamique" in Analecta Orientalia: Posthumous Writings and Selected Minor Works of J. H. Kramers, Vol. II (Leiden: Brill, 1956), 67.

6. Selected Works, op. cit., 256.

7. J. Schacht, "The Present State of the Studies in Islamic law", in Atti del Terzo Congresso di Studi Arabi e Islamici (Naples, 1967), 621-622.

8. J. Schacht, "Theology and Law in Islam", in G. E. von Grunebaum (ed.), Theology and Law in Islam (Wiesbaden, 1971), 4ff.

9. Ibid., 7.

10. M. H. Kerr, Islamic Reform (California, 1966), 56.

11. Schacht, "Theology and Law...", op. cit., 10.

12. C. H. Toy, "The Semitic Conception of Absolute Law", in Carl Bezold (ed.), Orientalische Studien Theodor Nöldeke, Vol. II (Gieszen, 1906), 804. Toy's attribution of natural law to Indo-European people (p.798) and of external absolute law to Semites has been confirmed in a recent article by Hajime Nakamura in "The Indian and Buddhist Concept of law", published in E. J. Jurji (ed.), Religious Pluralism and World Community (Leiden: Brill, 1969), 131-174.

13. N. J. Coulson, A History of Islamic Law (Edinburgh: Edinburgh University Press, 1964), 1,2.

14. H. A. R. Gibb, "Constitutional Organization", in M. Khadduri and H. J. Liebesny (eds.), Law in the Middle East, Vol. I (Washington, 1955), 4. Also in Gibb and H. Bowen, Islamic Society and the West, Vol. I, part 2 (Toronto: Oxford University Press, 1957), 114.

15. H. J. Liebesny, "Religious law and Westernization in the Moslem Near East", in The American Journal of Comparative Law, Vol. II (no. 4, 1953), 492.

16. M. Khadduri, "From Religion to National Law", in J. H. Thompson and R. D. Reischauer, (editors), Modernization of the Arab World (Princeton: Nostrand, 1966 38.

17. H. Lammens, Islam, Belief and Institutions (London, 1929), 82.

18. G. Makdisi, "Remarks on Traditionalism in Islamic Religious History" in Carl Leiden (ed.) The Conflict of Traditionalism and Modernism in the Muslim Middle East (Austin: University of Texas, 1966), 77.

19. J . N. D. Anderson, Islamic Law in the Modern World (New York: New York University Press, 1959), 17.

20. Léon Ostrorog, The Angora Reform (London: University of London, 1927), 19.

21. S. G. Vesey-Fitzgerald, "Nature and Sources of Shari a", in Law and the Middle East, op.cit., 87.

22. Gibb, Mohammedanism (New York: Oxford, 1962), 99.

23. Gibb, Studies in the Civilization of Islam (Boston, 1968), 204-206.

24. Mohammedanism, 90f.

25. Schacht, Introduction to Islamic Law (Oxford, 1966), 202-203.

26. R. Brunschvig, "Logic and Law in Classical Islam", in G. E. Von Grunebaum, (ed.), Logic in Classical Islamic Culture (Wiesbaden, 1970), 9f.

27. See Chapter I. p. 29f.

28. Von Grunebaum, "Concept and function of Reason in Islamic Ethics" in Oriens, Vol. XV (1962), 15.

29. G. F. Hourani, "Two theories of Value in Medieval Islam", Muslim World, L (1960) 273, and Islamic Rationalism (Oxford: Clarendon, 1971), 8-14.

30. See Chapter I. p.25, Ch. II, p. 65.

31. Hurgronje, op.cit., note 6.

32. Th. W. Juynboll, Handbuch des Islamischen Gesetzes (Leiden: Brill, 1910), 22f.

33. G. H. Bousquet, Précis de droit musulman (Alger, 1947), 44.

34. Gibb, Islamic Society and the West, 118.

35. Schacht, Introduction, 200-201.

36. Ibid., 176f.

37. Ibid., 207.

38. "Closer acquaintance with the vast stock of ḥadīths induces sceptical caution rather than optimistic trust regarding the material brought together in the carefully compiled collections. We are unlikely to have even as much confidence as Dozy regarding a large part of the ḥadīth, but will probably consider by far the greater part of it as the result of the religious, historical and social development of Islam during the first two centuries". Goldziher, Muslim Studies, translated by C. R. Barber and S. M. Stern, Vol. II (London: Goerge Allen and Unwin, 1971), p.19.

39. Schacht, Origins of Muhammadan Jurisprudence (Oxford, 1954), p.4.

40. R. Brunschvig, "Polemique medievales autour du rite de Mālik", Al-Andalus, XV (1950), 377-435.

41. This point has been a subject of controversy among scholars of Islamic law. The following studies on this subject are noted by S. D. Goitein in The Birth-Hour of Islamic Law?, Muslim World, L (1960), 23:

J. Schacht, "Foreign elements in Ancient Islamic law", Journal of Comparative Law, 1950, 3-4, 9-16;
A. D'Emilia, "Roman Law and Muslim Law, a Comparative Outline", in East and West, Vol. IV/2 (1953);
Fitzgerald, "The Alleged Debt of Islamic Law to Roman Law", Law Quarterly Review, Jan. 1951, 81-102.
C. A. Nallino, "The Impossibility of the Influence of Roman Law on Muslim Law" (trans. Hamidullah, Voice of Islam, Karachi, 1963, I/2, 63-67).

42. Schacht, Introduction, 19ff.

43. F. Rahman, Islamic Methodology in History (Karachi, 1965), 5-21.

44. S. D. Goitein, op.cit. 27ff.

45. Gibb, "Constitutional Organization" op.cit., 3.

46. Mohammedanism, op.cit., 102.

47. Schacht says that "during the greater part of the first/seventh century, Islamic law, in the technical meaning of the term, and therefore, Islamic jurisprudence, did not yet exist", article "Fiḳh" in E.I. (2nd edition) Vol. II, 887-8.

48. Schacht, Introduction, 55.

49. Ibid., 56.

50. H. Lammens, Islam..., op.cit., 92.

51. G. H. Bousquet, Précis..., op.cit., 50.

52. Claude Cahen, "Body Politic" in Grunebaum, Unity and Variety in Muslim Civilization (Chicago: University of Chicago, 1955), 139.

53. Schacht, Introduction, 24f.

54. Ibid., 25.

55. Ibid., 4.

56. N. J. Coulson, "Doctrine and Practice in Islamic Law", BSOAS, Vol. XIII/2 (1956), 211.

57. Ibid., 226.

58. Cf. J. Berque, "ʿAmal" in E.I. (2nd edition) Vol. I, and H. Toledano, "The Chapter on Marriage from Sijilmāsī's Al-ʿAmal al-Muṭlaq: A Study in Moroccan Judicial Practice (Ph.D. Thesis, unpublished, presented to Columbia University, 1969), Introduction.

59. Toledano, op.cit., p.ii.

60. Coulson, History of Islamic Law, 80f.

61. J. Kramers, "Droit de l'Islam et droit islamique", op.cit., 63-64.

62. Schacht, Introduction, 62.

63. Ibid., 76ff.

64. For details, see Toledano, op.cit., ii-vii.

65. Abraham L. Udovitch, Partnership and Profit in Medieval Islam (Princeton: Princeton University Press, 1970), 7.

66. Cahen, op.cit.

67. Udovitch, op.cit.

68. Schacht, "Islamic Law", Encyclopedia of Social Sciences (Old Edition), Vol. VIII, 348.

69. Hurgronje, Selected Works, 260.

70. Udovitch, op.cit., 10.

71. Schacht, "Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam", in R. Brunschvig and others, (editors) Classicisme et déclin culturel dans l'histoire de l'Islam (Paris, 1957), 141.

72. Y. Linant de Bellefonds, "Immutabilité du droit musulman et reformes legislatives en Egypte", Revue internationale de droit comparé, Vol.VII (1955), 10f.

73. See above Chapter I. p. 20ff.

74. E. Tyan, "Methodologie et sources du droit en Islam", in Studia Islamica, Vol. X (1959), 84f.

75. Chafik Chehata, "Logique juridique et droit musulman", in Studia Islamica, Vol. XXIII (1965), 5-26.

76. Chehata, "L'équité en tant que source du droit hanafite", Studia Islamica, Vol. XXV (1966), 123-138.

77. Schacht, "Classicisme...", op.cit., 142.

78. Ibid., Introduction..., 61ff.

79. M. H. Kerr, op.cit., 55; also see above Chapter I. p. 31f.

80. Ibid., 56.

81. In maintaining this distinction, we are relying on Amitai Etzioni and Eva Etzioni, Social Change, Sources, Patterns and Consequences (New York: Basic Books, 1964), Introduction, p.7f.

82. M. H. Kerr, op.cit., 21ff.

83. Y. Linant de Bellefonds, Traité de droit musulman comparé (Paris: Mouton, 1965), Vol. I, 46-48.

84. Huntington Cairns, Legal Philosophy from Plato to Hegel (Baltimore: John Hopkins, 1967), p.2f.

85. The exact definition of 'legal positivism' has been a subject of debate among recent philosophers. Lone L. Fuller and others contrast "legal positivism" with "natural law" philosophies. H. L. A. Hart regards such a use of the term as a cause of the confusion in modern discussions of separation of law from morals. See the following:

    H. L. A. Hart, The Concept of Law (Oxford: Clarendon, 1965), pp.253-54.
    ---------- Law, Liberty and Morality (New York: Vintage, 1963), p.2.
    Lone L. Fuller, The Morality of Law (New Haven: Yale, 1970), the chapter: "A Reply to Critic".

86. Hart, The Concept..., Ch. 8, section 2; Ch. 9, section 3.

87. Hart, Law, Liberty and Morality, Ch. 1.

CHAPTER III

SOCIAL CHANGES IN FOURTEENTH CENTURY GRANADA

For a better understanding of al-Shāṭibī's views on the adaptability of Islamic legal theory to social changes, a general study of the changes that occurred in Shāṭibī's period is necessary. Shāṭibī flourished in Granada in the reign of the Naṣrī ruler Muḥammad V al-Ghanī Billāh (755-760/1354-1359 and 763-793/1362-1391).

The present chapter, therefore, attempts to present a broad picture of the social changes in fourteenth century Granada. It must be made clear, however, that the present chapter does not aim to give a complete historical account of this period. This chapter serves only the purpose of providing a general context by indicating the significant factors of social change in the political, religious, economic and legal areas of Granadian society.

SECTION ONE

POLITICAL DEVELOPMENTS

Fourteenth Century

The fourteenth century was a period of rest for the Muslim world after the turmoils of the thirteenth century. Two major Mongol dynasties, the Ilkhānīs and the Golden Horde had been converted to Islam. The Mamlūks who had withstood the Mongol invasion had stabilized their rule in the fertile crescent and in Egypt. In North Africa as well, conditions were rather stable. The Banū Marīn had emerged as powerful successors to the Muwaḥḥidūn. In Spain, the Banū Naṣr had succeeded the Muwaḥḥidūn. They maintained their rule by keeping a delicate balance of alliance with the Christian kingdoms in Spain and with the Banū Marīn in Africa.

This political stability provided the much-needed peace for the intellectual activities essential to re-evaluating the tradition in the light of the multitudinous changes brought about by the turmoils of the thirteenth century caused by the Mongol invasion in the Muslim East and by the rapid Christian advances in the Muslim West. These changes affected the political, financial, commercial, social and religious domains. A number of social changes that had taken place needed somehow to be accommodated within the tradition.

The intellectuals of the community who had either personally experienced these

changes or been affected through the experience of others received a lasting impact on their minds. This is no doubt the reason why we find that a number of distinguished works dedicated to the re-evaluation, systematization and readjustment of the tradition appeared in this period. In North Africa, Ibn Khaldūn (784/1382) worked on a philosophy of history.[1] In Syria, Ibn Taymiyya (728/1328) reviewed the entire tradition of political and legal theory.[2] In Persia, Al-Ījī (756/1355) resystematized Sunnī theology.[3] In Spain, Shāṭibī was occupied with the philosophy of Islamic law. All of these efforts imply some breakdown in the community's sence of itself, and are acknowledgements by their very existence, of the need for new and more satisfactory formulation of certain basic values and standpoints.

Muslim Spain[4]

To help build an appreciation of political conditions in fourteenth century Muslim Spain, a brief survey of events in the reign of Muḥammad V is in order. Such a survey, however, in its turn, requires a review of the rise of the Banū Naṣr dynasty for a better understanding of the nature of the political structure that Sulṭān Muḥammad V inherited from his predecessors.

Al-Ghālib Billāh

With the decline of the Muwaḥḥidūn, the political situation in Andalus (Muslim Spain) fell into a chaotic condition.[5] Two warlords appeared in this period: Ibn Hūd in Murcia and Ibn al-Aḥmar in Arjona. Ibn Hūd revolted against the Muwaḥḥidūn in 625/1228 in Murcia.[6] He received investiture from the ʿAbbāsī caliph Al-Mustanṣir Billāh (623-640/1226-1242)

in Baghdad. Once established as Sulṭān, he assumed the title Al-Mutawakkil Billāh. Important cities such as Almeria, Malaga, Granada, Sevilla and the greater part of Eastern Andalus fell to him.

Ibn al-Aḥmar declared his independence in 629 A.H.[7] when he captured Jaen. Ibn al-Aḥmar (Muḥammad b. Yūsuf ... b. Naṣr b. Qays al-Khazrajī al-Anṣārī) was a soldier who fought on the borders of Andalus. He earned his fame mainly by his campaigns against the Christians. After Jaen, he quickly captured Sevilla and Cordova from Ibn Hūd.

At the instigation of Ibn Abī Khālid, the people of Granada proclaimed Ibn al-Aḥmar their king. In 634 A.H. Ibn al-Aḥmar moved to Granda and after inflicting a heavy defeat upon Ibn Hūd, captured Granada and declared himself the Sulṭān of Andalus, and assumed the title of al-Ghālib Billāh. Thus was founded in Granada the dynasty of the Banū Naṣr, also called Banū Aḥmar. Ibn al-Aḥmar's only rival was Ibn Hūd who died in 635 leaving Ibn al-Aḥmar the sole Sulṭān of Andalus.

Toward his neighbouring states Ibn al-Aḥmar pursued a policy of truce. He professed submission to his African neighbours and ordered that the name of the Ḥafṣī ruler, Abū Zakariyya Ibn Ḥafṣ (625-647/1228-1249), be recited in the khuṭba -- a sign of allegiance. This gesture was meant to acquire Ḥafṣī help. He even included the name of the ʿAbbāsī ruler in the khuṭba to 'elevate his prestige among his subjects;' later, however, he discontinued the practice.[8]

He concluded peace with Ferdinand III, the king of Castille, in 643 A.H. but this truce cost him the surrender of Jaen. The conditions of the truce made Ibn al-Aḥmar repent his decision.[9] In 662, however, he signed another peace treaty with the Christians, but also issued an appeal to the African tribes for Jihād.

After the decline of the Muwaḥḥidūn there emerged three dynasties among the African rulers; the Ḥafṣīs in Tunis; the Zayyānis in Tlemcen; and the Banū Marīn in Morocco. Among them the last proved themselves most powerful. It was, therefore, the Banū Marīn who crossed over to Spain in answer to the Naṣrī appeal for help. The relations between the Banū Marīn and the Banū Naṣr, however, became a source of trouble internally as well as externally; internally because they headed the African mercenaries and thus held a major source of power in their hands. They were often in conflict with the wazīrs who tried to control them. The balance of power often oscillated between these two major offices. Externally, being related to the Banū Marīn they constituted a threat to both the Banū Marīn and Banū Naṣr rulers -- to the Banū Marīn as claimants to the throne, to the Banū Naṣr as a pretext for interference by the Banū Marīn in their affairs.

This delicate balance of power continued to be critical for the successors of al-Ghālib Billāh, until this situation changed in the reign of Muḥammad V al-Ghanī Billāh, the eighth ruler in the line of his dynasty.

Al-Ghanī Billāh

At the age of sixteen,[10] Muḥammad V al-Ghanī Billāh succeeded his father in 755/1354 when the latter was assassinated. The affairs of the state were completely in the hands of his chamberlain (ḥājib), the Qā'id Abū Naʿīm al-Riḍwān.[11]

Other important offices of the kingdom were the following: the office of Shaykh al-Ghuzāt was given to Yaḥyā b. ʿUmar; Qāḍī al-Jamāʿa to Abū'l-Qāsim Sharīf al-Sabtī; Kātib al-Sirr to Ibn al-Khaṭīb. Since these offices played a significant role in the political structure as well as the political development of this period, a detailed analysis of them is attempted in the following lines:

Within a month Ibn al-Khaṭīb and Abū'l Qāsim al-Sabtī were sent on a mission to seek help from the Marīnī ruler, Abū ʿInān, against the Christians. The Castillian king, Pedro, was occupied with dynastic troubles. He confirmed his truce of 751 made with Muḥammad V's father.[12]

This peaceful situation, however, did not last long. In 760 A.H. a revolt broke out against Muḥammad V. He had two brothers whom Riḍwān had imprisoned in Alḥamrā'. Their mother sought the help of Ra'īs Muḥammad, the head of a contingent of soldiers.[13] Al-Ra'īs killed Riḍwān and proclaimed Muḥammad V's brother, Ismāʿīl, as Sulṭān and himself as his regent. Ibn al-Khaṭīb and other supporters of Riḍwān were imprisoned.

Sulṭān Muḥammad V, however, escaped to Guadix. There he received a visit from Abū'l Qāsim al-Sabtī, his former qāḍī who had joined the Marīnī

court. Abū 'l Qāsim was sent by Abū Sālim, the Marīnī, who invited Sulṭān Muḥammad V to Fez to express his gratitude for the refuge he had received at the Naṣrī court when he fled from his brother Abū ʿInān. Muḥammad V accepted the invitation. Abū'l Qāsim then proceeded to Granada to negotiate the safe conduct of the Sulṭān to Fez as well as the release of other prisoners, including Ibn al-Khaṭīb.[14] The mission succeeded, and Muḥammad V along with his supporters arrived in Fez in 761 A.H. He received a warm welcome from the Marīnī Sulṭān.

In the meantime al-Raʾīs Muḥammad, after assassinating Ismāʿīl, had assumed power. King Pedro defeated him in a battle. Shaykh al-Ghuzāt deserted to the Christian king, to escape the consequences that he feared would follow if he returned to Granada.

At the same time in Fez, during a revolt, Abū Sālim lost his life.[15] Muḥammad V left for Andalus. To regain his throne Muḥammad V depended very much on the help of the amirs of Ronda and Malaga. The castle of Ronda which belonged to Andalus had been taken by the Marīnī regent ʿUmar b. ʿAbd Allāh. Muḥammad V, however, succeeded in regaining it.[16] From there he proceeded to Malaga. Alliance of Ronda and Malaga in favour of the Sulṭān assured his capture of Granada. al-Raʾīs Muḥammad, who saw himself pressed from both sides, decided to surrender himself to Pedro. There he was treacherously killed. Thus, ground was prepared for the recapture of Granada; Muḥammad finally remounted the throne in 763 A.H.

Muḥammad V was no longer a youth, and the incident of deposition had been an instructive experience. In his second reign he seemed determined to make himself independent of internal as well as external powers.[17]

He decided to undermine the office of wazīr. He succeeded in routing his wazīr, ʿAlī b. Yūsuf b. Kumātha, whom he had been obliged to accept as his wazīr during his stay in Ronda. He sent Ibn Kumātha on a mission to the Marīnī court to get rid of him. On his way Ibn Kumātha heard the news of Sulṭān Muḥammad's successes. He tried, in vain, to instigate the rulers of Castille, Barcelona, and of Tunis against Muḥammad V, but he was finally captured in Castille and sent to prison in Fez.[18]

After a while, Ibn al-Khaṭīb joined Muḥammad V. Following lengthy secret talks and promises, Muḥammad V accepted him as wazīr.[19] Ibn al-Khaṭīb soon prevailed upon the Sulṭān who charged Ibn al-Khaṭīb with the responsibility of almost all the affairs of the government.

The office of Shaykh al-Ghuzāt was confirmed for ʿUthmān ʿAlī who had deserted al-Raʾīs Muḥammad. Muḥammad V, however, had the same apprehensions regarding this office as he had had concerning that of wazīr. In 764 he suddenly took captive all the members of Shaykh al-Ghuzāt's family and expelled them from the political domain. He appointed successively Abū 'l Ḥasan ʿAlī b. Badr al-Dīn and ʿAbd al-Raḥmān b. Abī Saʿīd, both from Banū Marīn, to the office of Shaykh al-Ghuzāt, but reduced their powers drastically. As a matter of fact, almost all of the military campaigns against the Christians, which justified the title of ghāzī, were led by the Sulṭan himself.[20]

The office of Qāḍī al-Jamāʿa was given to Qāḍī Abū 'l Ḥasan al-Nubāhī, and the office of Kātib al-Sirr to the faqīh and poet, Ibn Zumruk.

In 767 A.H. Muḥammad V decided to lead a series of campaigns against the Christians to establish himself as the defender of Islam.[21] Some fortresses close to Malaga and Ronda were taken back from the Christians. Jaen was recaptured. The campaigns in the years 770 and 771 A.H. were carried out as deep into Christian territory as the neighbourhood of Sevilla. These campaigns brought a huge amount of booty to the Muslims.

The success of these campaigns was partially due to internal troubles in the Christian kingdoms, which did not allow them to attend to the defence of their borders. In this way Muḥammad V's period remained generally safe from Christian attacks. In fact, we can say that the situation had reversed itself in the fact that the Christian kingdoms were in a defensive position against the attacks of Granada.

The same was true for his neighbours in Africa. Muḥammad V was no longer threatened by powerful neighbours. But this situation was partially accidental and partially, as we shall note below,[22] due to his skillful manoeuvres respecting the political affairs of the African rulers.

From the above survey it can be noted that the strength of the Banū Naṣr depended on two things: first, maintaining a balance between their neighbours by alternating peace treaties and court intrigues; second, by controlling the internal sources of power. We will review these two aspects of the Naṣrī political structure on the following pages.

Political Structure

Foreign Relations

The Banū Naṣr had Christian neighbours to the north and Muslim Berbers to the south. Among the Christians the more powerful kingdoms were those of Castille and Aragon. In Africa there were three kingdoms as mentioned before. In short, the Banū Naṣr had to deal with the Castille and Aragon on one side and with the Banū Marīn on the other.

From 643 A.H. onwards the Banū Naṣr were vassals of the king of Castille. According to the conditions of the treaty, the Banū Naṣr, among other things, were to pay an annual tribute whose amount fluctuated from 150,000 to 259,000 Doblas. In return, they were entitled to attend the Castilian court like Christian chiefs. Both parties agreed to supply troops to each other during war-time.[23]

This status was humiliating both politically and financially, but the Banū Naṣr were forced to accept and confirm it continuously, first to keep peace with the Christians and second as a check against the Banū Marīn designs lest they repeat the role of the Murābiṭūn and Muwaḥḥidūn.

This state of affairs had a social as well as an intellectual impact upon Granadian society. These treaties allowed an exchange of scholars and mystics on both sides.[24] The social impact of this situation is evident from the fact that the Granadian Muslims generally came to accept the Christian dress.[25]

These changes must have been a challenge to the Mālikī fuqahā' who were known for strict adherence to their tradition.

Relations With The Banū Marīn

In the early seventh century the Banū Naṣr had depended more on the Banū Ḥafṣ but later, when the Banū Marīn grew stronger, they leaned towards the Banū Marīn. In 634 A.H. the Marīnī Sultan Manṣūr crossed over to Spain in answer to the Naṣrī appeal and defeated Sancho of Castille. On his return, he left behind several Marīnī clans to defend Andalus against the Christians.[26] These clans played a very active role in Naṣrī politics because the office of Shaykh al-Ghuzāt remained in their hands.

The Banū Naṣr needed Marīnī help against the Christians, but their relations were not always friendly. Each conspired constantly to weaken the other. Both provided political refuge to defecting princes, wazīrs and scholars from the other's camp. The Banū Marīn could dictate their terms[27] as long as they were strong, but the situation was reversed during the reign of Muḥammad V.

The Banū Marīn were heavily defeated by the Christians in 741/1340[28] and from that time onward were not in a position to stand in aid of the Banū Naṣr. The regular internal quarrels among the Banū Marīn during 759-774/1358-1373 weakened them still further. The following incident worsened terribly the relations between the Banū Marīn and the Banū Naṣr. The Marīnī wazīr ʿUmar b. ʿAbdAllāh, who was responsible for a series of dethronements and bloodshed during the period of 762-767, expelled the Marīnī prince ʿAlī b. Badr al-Dīn and his wazīr

Masʿūd b. Masā'ī. They were welcomed in Granada by Sulṭān Muḥammad V; he even appointed ʿAlī as Shaykh al-Ghuzāt. In the meanwhile Sulṭān ʿAbd al-ʿAzīz had taken all powers into his hands after killing ʿUmar b. ʿAbd Allāh. He was apprehensive of prince ʿAlī. He requested the Naṣrī Sulṭān to send the prince and his wazīr back to Fez. The Sulṭān refused, but Ibn al-Khaṭīb whom Sulṭān ʿAbd al-ʿAzīz had taken into his confidence, prevailed upon Muḥammad V; yet the latter only agreed to imprison them. The Marīnī Sulṭān accepted but did not like this move. Ibn al-Khaṭīb, apprehensive of the intrigues against him in the Naṣrī court, was planning to escape. Sulṭān ʿAbd al-ʿAzīz welcomed him in the Marīnī court. Now Sulṭān Muḥammad V requested Sulṭān ʿAbd al-ʿAzīz to send Ibn al-Khaṭīb back again to Granada, but he refused. This disagreement soured their relations to the extent that from that point on both the Banū Marīn and the Banū Naṣr spent their efforts in staging intrigues against one another.

Muḥammad V released the Marīnī prince and his wazīr and sent the prince as pretender to the Marīnī throne. He even marched toward the Marīnī borders and captured Ceuta to stress his support for the pretender. He succeeded finally in staging a revolt and establishing his own choice on the Marīnī throne.[29] Thus Sulṭān Muḥammad V succeeded in solving an almost century-old problem. His successes against the Marīnīs brought further security to his rule as well as to the Granadian society in general.

Internal Political Structure

The Granadian political structure consisted of three major offices directly responsible to the sultan: Shaykh al-Ghuzāt, Wazīr and Qāḍī al-Jamāʿa.

Shaykh al-Ghuzāt The chief of the ghāzīs (warriors for the faith) actually was the office of the head of the armies, both regular armies and mercenaries. This office, according to Gaudefroy Demombynes, was "comparable to that of the amīr al-'umarā' in the late ʿAbbāsī period."[30] The peculiar tribal structure and allegiance to the chief provided the Shaykh al-Ghuzāt with absolute power.

The office of Shaykh al-Ghuzāt was introduced to replace the power of the Banū Ashqīlūla who had been responsible for the establishment of the Naṣrī dynasty but who had soon fallen into the custom of revolting against the Banū Naṣr on frequent occasions. To counterbalance their power the Banū Naṣr welcomed the Marīnī clans left behind in Andalus by the Marīnī Sulṭān Manṣūr. The first Shaykh al-Ghuzāt was appointed from among these Marīnīs.

The Shaykh al-Ghuzāt was given vast powers as is evident from a ẓahīr (investiture)[31] conferred upon Yaḥyā b. ʿUmar by Sulṭān Abū'l Ḥajjāj Yūsuf (733-755/1334-54). The titles mentioned in the investiture include: 'The Pillar of Power', 'The Sword of Jihād', 'The Supermost Head of Defence', 'The Bond of the Kingdom' etc. The part on the description of his authority reads as follows:

"...He is the chief of the ghāzīs in spite of the differences of their tribes and the diversity in their manner of living. The promotions in their grades of acceptance will be determined by his approval... Their salaries will be determined by his assessment. Further allowances will be made to them by his confirmation and recommendation. In all, may God support him, he is the qibla (turning point) of their hopes, the balance of their deeds...and it is he with whom the kindness of the administration of their food and prosperity is sought".[32]

ʿUthmān b. Abī'l ʿUlā'was the most powerful and illustrious Shaykh al Ghuzāt in Naṣrī history. ʿUthmān was the chief of the Banū ʿUlā' clan of the Marīnī tribes in West Africa. He had been gathering forces against the Marīnī ruler Abū Yūsuf Yaʿqūb (685-706 A.H.) After a few gains ʿUthmān was heavily defeated in 707 A.H. and fled to Andalus with his contingents.[33] He was warmly welcomed in Granada. Despite the threats and the pleas of the Marīnī sulṭān to send ʿUthmān back to Africa for punishment, the Banū Naṣr bestowed upon him the office of Shaykh al-Ghuzāt.

ʿUthmān soon came into conflict with the wazīr Ibn Maḥrūq. Ibn Maḥrūq succeeded in suppressing him temporarily. Soon, however, the situation reversed itself. ʿUthmān gathered his troops and besieged Granada. Alfonso, seizing the opportunity, captured a few border towns. Sulṭān Muḥammad IV (725-733 A.H.) was forced to be reconciled with ʿUthmān. To do that he had his wazīr, Ibn Maḥrūq, murdered. Muḥammad IV himself, however, met the same fate at a later point when, dissatisfied with the Sulṭān, ʿUthmān's ghāzīs assassinated Muḥammad IV in 733-34 A.H.

Muḥammad IV's son Yūsuf's attempt to replace the Banū ʿUlā'with the Banū Raḥū, another

sub-clan of the Banū Marīn, did not bring about much change. The Shaykh al-Ghuzāt still enjoyed the same powers. Shaykh ʿUthmān b. Yaḥyā of the Banū Raḥū participated in the plot against Muḥammad V, and supported the Sulṭān's rival. He was, however, defeated in a battle against the Castillians and took refuge with them. The Castillian king Pedro was an ally of the deposed Sulṭān Muḥammad V. He delivered Shaykh ʿUthmān to Muḥammad V who reinstated him in his post when the latter remounted the throne.

Muḥammad, however, had decided to break the power of the Shaykh al-Ghuzāt. Consequently within a year he struck out at Shaykh ʿUthmān and banished the entire family from the political scene.[35] He appointed other individuals from the Banū Marīn to perform the necessary functions, but he reduced their powers by taking two steps: first, he led most of the campaigns against the Christians himself, thus taking the credit of Jihād away from the Shaykh al-Ghuzāt. Second, he sent the Shaykh al-Ghuzāt on campaigns against the Banū Marīn,[36] thus discrediting them as ghāzīs since they fought against Muslims and their own kith and kin.

Wazīr The wizāra was the second most powerful office in the Naṣrī political structure. Ibn Saʿīd observed that the institution of wizāra in Umawī Andalus consisted of a group of notables who assisted the caliph by counsels and aided in the administration. One of them whom the caliph appointed his deputy was called ḥājib. This office became hereditary and continued within certain families. The designation of wazīr was lower than that of ḥājib.[37]

During the Naṣrī period the emergence of the institution of Shaykh al-Ghuzāt had

overshadowed the powers of the ḥājib. Moreover, the offices of ḥājib and wazīr were often combined. Some wazīrs even claimed to be regents of the minor sulṭāns whom they succeeded in bringing to the throne. Such wazīrs enjoyed the highest powers. Instances of such wazīrs are Ibn al-Ḥakīm al-Lakhmī during the reign of Muḥammad al-Makhlūʿ; Ibn Maḥrūq in the period of Muḥammad IV, Qāʾid al-Riḍwān in the time of Abūʾl Ḥajjāj Yūsuf and Ibn al-Khaṭīb during the reign of Muḥammad V.

Under the wazīr were kuttāb (secretaries) who held the various offices of civil administration. The wazīr also commanded the shurṭa or the city police.[38]

Early Naṣrī wazīrs such as Abū Marwān b. Ṣanādīd, who was the ruler of Jaen, and the Qāʾid Abū ʿAbd Allāh al-Ramīmī, who was the son of the ruler of Almeria, both wazīrs of al-Ghālib Billāh, had powerful family connections. The later wazīrs were, however, men of learning, having no such powerful connections. This is why the wazīrs depended for their support on diplomatic influence. Their powers were often temporary. Whenever their plots failed, it proved easy to break their power. The wazīrs were invariably imprisoned, expelled or assassinated.

Qāḍī al-Jamāʿa This was the most respected office in the plitical structure. The Qāḍī al-Jamāʿa was responsible for the administration of justice, the inspection of markets and for regulating commercial contracts. The Qāḍī al-Jamāʿa also sometimes was the chief khaṭīb of Granada.[39]

No executive powers such as the command of soldiers, police, etc., belonged to the Qāḍī. It was rather supposed to be the duty of the Sulṭān to support a qaḍī's

judgment with his executive powers.[40] The Sulṭān and often the wazīrs, as well, interfered in the administration of justice; yet symbolically, the Qāḍī enjoyed the highest prestige in the political structure.

In spite of the absence of executive powers, the chief Qāḍī had vast influence in the affairs of the state as he was responsible for the appointments of a significant number of functionaries in the administration of judicial and religious affairs.

The real basis of the Qāḍī's power, as we shall see later in detail,[41] lay in his being part of a sort of 'religious élite' which had grown in strength in the Umawī period and proven itself indispensableever since.

Qāḍī al-Nubāhī's success in prosecuting the powerful wazīr Ibn al-Khaṭīb, is one of the recurrent examples of the powers of qāḍīs in the political structure of Muslim Spain.

As stated earlier, Sulṭān Muḥammad V was enraged by Ibn al-Khaṭīb's defection to Morocco. From certain accounts it appears that there existed a rivalry between al-Nubāhī and Ibn al-Khaṭīb. Ibn al-Khaṭīb, as Ibn Khaldūn has noted, enjoyed the highest powers after the collapse of the office of Shaykh al-Ghuzāt.[42] He interfered with Qāḍī al-Nubāhī in many cases. It is evident from certain stories recounted by Ibn al-Khaṭīb in his Aʿmāl al-Aʿlām[43] and Al-Katība al-Kāmina, that Ibn al-Khaṭīb went beyond the limits of politeness in ridiculing Nubāhī in the court. Publicly insulting the Qāḍī al-Jamāʿa must have undermined the office of qaḍā'. This derision was not without the Sulṭān's approval.[44] The Sulṭān must

have encouraged the wazīr for such derision to weaken the office of Qāḍī al-Jamāʿa. It was only after Ibn al-Khaṭīb had left for Morocco that al-Nubāhī could accuse Ibn al-Khaṭīb, in public, of heresy and burn his books. In this accusation, of course, he, too, was encouraged by the Sulṭān. The Naṣrī Sulṭān sent Nubāhī to Morocco to bring Ibn al-Khaṭīb back once more to Spain. The Sulṭān failed to bring Ibn al-Khaṭīb back to Spain but he finally succeeded in having him killed in Morocco.

This is how the Sulṭān eventually succeeded in removing a wazīr who had become too powerful and, by using the qāḍī to his advantage, also achieved his designs to make himself independent of the offices of the Qāḍī and Wazīr both.

Conclusion:

At the conclusion of this section we may say that the reign of Sulṭān Muḥammad V was relatively speaking a peaceful and politically stable period. This stability was gained by the skillful management of relations with the Christian neighbours and the Marīnī rulers, but more significantly, by the consolidation of the absolute rulership of the Sulṭān. The Sulṭān succeeded in achieving this goal by weakening and reducing the powers of the Shaykh al-Ghuzāt, the Wazīr and the Qāḍī al-Jamāʿa, which were the major offices of political significance. He used the influence of each office against the others to weaken them all.

Politically, the Qāḍī al-Jamāʿa had been a very influential office, yet the Sulṭān was able to use it to consolidate his own power. This was possible because the religous authority of the fuqahā' on which the power of the Qāḍī depended had been already weakened. This phenomenon is discussed in the next section.

SECTION TWO

SOCIO-RELIGIOUS DEVELOPMENTS

We noted earlier[1] how important a role was played by the jurists in political events during the early days of the Sulṭān Muḥammad V, especially by Qāḍī al-Sabtī and Ibn Marzūq. The significance of the jurists in the political affairs in this period was, in fact, a continuation of the role they had fulfilled from approximately the ninth century.

The Political Power of the Fuqahā'

The historians of Muslim Spain do not forget to point out the role of the fuqahā' in political affairs as a trait of Muslim history in Spain.[2] The various opinions about the significance of fuqahā' are not immediately relevant to our purpose. Nevertheless, in general, we learn that scholars have suggested three reasons for the political significance of the fuqahā'.

First, some scholars such as Ibn Khaldūn[3] and Goldziher[4] argue that it was the conservatism of the Spanish Arabs that encouraged the spread of Mālikism and that eventually conferred significance on the fuqahā' since they were the bastions of this tradition.

The second reason, as suggested by Lopez Ortiz[5], Hussain Monés[6] and others[7], was the need for the legitimization of their rule as was always felt by the Muslim

rulers of Spain. Lopez Ortiz argues that because of their breakaway from the ʿAbbāsī caliphs, the Banū Umayya in Spain needed the support of religion to justify their caliphate. Mālik b. Anas, being an antagonist of the ʿAbbāsīs, was the ideal choice for them.[8] Monés furthers this argument more strongly in the case of Hishām I and Ḥakam I.

Contrary to the claim made by historians of Hishām I's piety, Monés argues that Hishām, in fact, chose religion for rather political reasons. Hishām felt himself weak in the struggle against the rightful claimant to the throne, Sulaymān, who enjoyed the support of the Syrian contingents of the army.[9] Thus from political necessity on the part of the Umawī rulers there arose a class of ʿUlamā' and Fuqahā' who played a continuously important role in political affairs.

The third factor, suggested by L. E. Provençal[10] and Roger Idris[11], was the establishment of a kind of 'religious aristocracy' -- composed of fuqahā' and ʿulamā' -- who comprised of the intellectual as well as the social élite in the capital by the time of Ḥakam I (180-206/796-822). When Ḥakam tried to reduce their influence, they staged two insurrections in Cordova[12]. In these revolts the fuqahā' had the support of a number of aristocrats in the court as well as the people in the suburbs of Cordova. These revolts did not succeed but Ḥakam was forced to recognize the power of the fuqahā' .

We cannot agree that any one of these factors alone can sufficiently explain the influence of the fuqahā' , particularly in the Naṣrī period. Nevertheless, the third factor probably clarifies the phenomenon better than the others.

It is difficult to classify the generality of the Spanish people in the manner of Ibn Khaldūn as having been primitive and conservative. There is much evidence to the contrary. Especially in the Naṣrī period the Spanish people were quite flexible in accepting their Christian neighbours' way of life, particularly with regard to dress and recreational activities[13]. Conservatism was also absent from their ever-changing practices in trade and commerce[14]. There was conservatism, of course, in the intellectual attitude and academic activities of the élite. The latter, however, were probably the result, not the cause, of the conservatism of the fuqahā'.

Similarly it is hard to maintain that the rulers' alliance with the fuqahā' was based on the former's need for religious legitimacy. In a society where the rule of a usurper can be justified in the political theory by equating de facto with de jure[15], the need of a religious institution for that purpose is not very great.

In the case of the Naṣrī claim to the legitimacy of their rule, stress fell upon their Arabness rather than on any religious doctrine. The tension between Arabs and Berbers had been a salient feature of Muslim Spanish history. The two Berber dynasties, the Murābiṭūn and the Muwaḥḥidūn, had pushed the Arabs aside. With the decline of the Muwaḥḥidūn, the Arab element rose again, as the rise of Banū Hūd and Banū Naṣr manifested. These Arab tribes were supported by the local Spanish element and by the Arab aristocrats. They did not trust the Berbers; they sought the Berbers' help only temporarily. While the Berbers were

inclined more toward religion and piety[16], as expressed by their zeal for Jihād and Taṣawwuf, the Banū Naṣr laid stress on genealogical nobility[17]. The founder of the Naṣrī dynasty was called 'Marwānī' by a contemporary historian.[18] This shows that the Banū Naṣr in all probability wanted to present themselves as a continuation of the Banū Umayya. Later, however, they linked themselves with the Khazraj tribe of Madīna. Ibn al-Khaṭīb established the proof of their genealogy from earlier sources[19] and Ibn Zumruk recited eulogies narrating the merits of the Khazrajīs in the days of the Prophet.[20] This very fact that they stressed their descent from the anṣār would have been detrimental to their cause if they had been seeking religious support for their legitimacy, in view of the commonly accepted orthodox view of the superiority of the Quraysh over the Anṣār. The nature of the argument shows how much significance the Banū Naṣr gave to the religious aspect of the legitimacy of their rulership.

The foregoing discussion was necessary to show that the need of legitimacy existed but that it was not sought necessarily from the fuqahā' . The rulers needed the support of the fuqahā' because the latter, through strong family relations and land holdings, had established themselves in Spain as a political power. We need not go into these details; what interests us here is their strength as a political group. We will briefly review the factors of their strength.

The Factors in the Political Strength of the Fuqahā'

The high status that the fuqahā' enjoyed in Andalus is evident from the fact that the appelation "faqīh" had acquired a sense of nobility. Ibn Saʿīd points

out in his narrative of the Andalusian society that:

> The appelation of 'faqīh' is most honourable for them, so much so that if they want to make an honourable mention of their grand amīr (sulṭān), they call him 'Faqīh'. At present a faqīh in the West is what a qāḍī is in the East. They even sometimes call the kātib (secretary), a grammarian and a linguist faqīh because it is the highest appellation for them.[21]

The factors that contributed to the sustenance of fuqahā' s political power were mainly three:

1) The control of a number of important lucrative offices in the political system;
2) The control of the institutions of learning;
3) The control of the movement of free thought.

It was through the operation of these factors that the fuqahā' could preserve the Mālikī tradition in its conservative mold and hence maintain their power. When they lost control of these factors in the fourteenth century they could no more maintain their religious authority and hence their political power. We will briefly review these elements in the power of the fuqahā' in the following pages.

Religious and Judicial Offices

The highest religious and judicial office was that of Qāḍī al-Jamā'a, the appellation of the chief qāḍī in Granada. The historians stress that it was the noblest office in the political structure. The evidence for the truth of the claim is to be found in the generous salaries, the ceremonial investitures, and the lengthy formal decrees of appointment given to qāḍīs. The Qāḍī al-Jamā'a also enjoyed a wide range of prerogatives.[22]

Beside the administration of justice, the fuqahā' were officially attached to courts as muftīs (jurisconsults), mushāwirs (consultants) and wuththāqs (formularies and notaries).[23] The administration of religious and trust properties was also in their hands. Whenever a ruler made a donation for a special purpose, he appointed a faqīh to supervise it. The appointments of Abū 'Abd Allāh al-Ḥaffār (811 A.H.)[24] and Ibn al-Qabbāb (779/1378)[25] in Granada were of such nature.

The inspection of trade and commerce was also the domain of the fuqahā'. They were responsible for fixing prices and for the quality and weight of commodities in the market. The particular teachings of Islamic law[26] against Ribā (usury) and Qimār (speculation) prohibited a number of transactions which thus required the supervision of experts in the law, i.e. the fuqahā'.[27]

These prohibitions also extended to transactions involving money exchange and minting. The fuqahā' were therefore required also to supervise the minting of coins. The important offices in the mint such as Nāẓir al-Sikka were held by fuqahā'.[28]

The office of the Chief Khaṭīb was next to that of the Qāḍī al-Jamāʿa in importance in the capital city of Granada as well as in other cities and towns in the kingdom. Often both offices of qaḍī and khaṭīb were held by one person.[29] Since in Islamic history the sikka (coining) and khuṭba (Friday sermon) which became the vehicle of the announcement of the ruler's name, had become the formal signs of a claim to rulership or to allegiance of one ruler to another ruler, the khaṭīb had also become a kind of political office.[30] Attached to the office of khaṭīb were a number of other religious offices such as that of the mu'adhdhin, etc.

All the above-mentioned offices were lucrative, and often tracts of land, commensurate to their rank, were attached to these offices.[31] This land ownership also contributed to the political power of these office holders.

Intellectual Control

The status of the fuqahā' established by their function in the political administration was sustained by their control of intellectual life. This was achieved mainly in three ways: 1) The control of the institutions of learning,
2) The suppression of any movements of pure rationalism,
3) Opposition to Taṣawwuf and Ṭarīqās as a threat to the political, as well as the economic, system.

We will explain these measures briefly in the following paragraphs:

1) The Institutions of Learning

Ibn Saʿīd, who visited Andalus in the early Naṣrī period, depicts the conditions of learning in the following words:

> As to the conditions of the Andalusians in respect of the art of sciences, the truth of the matter is that they are most eager people in this regard. ...The scholars enjoy the noblest rank among the élite as well as the common people... Despite the fact that the Andalusians do not have school (madāris) to help them in seeking knowledge, they rather study (learn) all the sciences in mosques on paying fees. Thus they read in order to learn, not in order to earn a stipend.[32]

Ibn Sa'īd praised the Andalusian system as leading to learning in contrast to the system of the madrasa in the Muslim East where the interest of the student was monetary rather than learning.

This conclusion of Ibn Sa'īd stands in contrast to that of Ibn Khaldūn who praised the system in the East saying that the system of the madrasa encouraged learning and made it possible to study even for those students who could not afford to pay fees to individual teachers. On the other hand, the system in the West limited the spread of learning and eventually resulted in the decline of the sciences.[33]

Neither Ibn Sa'īd nor Ibn Khaldūn mentions one significant fact - that learning itself could not have been the sole aim of all the students. The majority of them graduated, thereupon to be given various offices in the administration. The factor that must be emphasized here is that the teachers who were mostly fuqahā' had more influence in the system of the East in comparison to the West.

The institutions of learning in Andalus was completely in the hands of the fuqahā'. They were absolutely independent in choosing the materials of teaching in the manner of teaching and the assessment of achievement of the pupils. Shāṭibī, dealing with the question of learning, in fact, discouraged the method of learning from the books without a teacher.[34]

This system was advantageous to the fuqahā' in two ways. First, it established their influence and supremacy over the people. The fuqahā' could not have had this advantage in the madrasa system, because in that system they could not be as independent as they were without the madrasa. Because of the absence of an institutionalized system of higher learning the pupils had to depend on the teachers if they were to get diplomas of graduation.

Second, the Andalusian system made possible the preservation of tradition and strict adherence to it, as well as the control of any ideas or movements that might change the tradition.

The fuqahā' in the West were certainly aware of their advantages when they opposed the establishment of madāris.[35]

The institution of the official madrasa was introduced quite late in Spain. Provençal mentions that the first madrasa was established by the Qā'id al-Riḍwān (d. 760/1359) the Ḥājib of Abū Yūsuf al-Ḥajjāj (733-755/1333-1354).[36] This move was strongly opposed by a number of scholars. Two main arguments were advanced in this respect. First, that it was a bidʿa (innovation), hence prohibited; second, that it suppressed the freedom of the ʿulamā' and hence the independence of ʿilm (scholarship).[37]

After the establishment of madrasas, the ʿulamā' and fuqahā' gradually lost their independence. The change did not immediately, however, affect their aristocratic status; but their control over intellectual movements and their

resistance to Taṣawwuf certainly relaxed. It was after the establishment of madāris that Taṣawwuf and Ṣūfī Ṭarīqas gained a wider following in Granadian society.

2) Control of Intellectual Movements

Again the same Ibn Saʿīd says that:

> "They (the Andalusians) take part in every science with the exception of philosophy and astronomy. These are specially enjoyed by the élite, but they do not show this (interest) in public for the fear of the common people. Because as soon as it is stated that 'so and so studies philosophy' or 'practices astronomy', at once he is declared Zindīq (heretic), and his days are numbered (qayyaḍat ʿalayhi anfāsuhū). If someone showed skepticism (zāla fi shubhatin) the people would stone him to death or would burn him alive long before his case was brought to the Sulṭān." [28]

Ibn Saʿīd's observation is supported by stories that frequently refer to an aversion of philosophy. Ibn Khaldūn narrates that his teacher ʾĀbilī used to teach philosophy to Ibn ʿAbd al-Salām in secret.[39] The condemnation of the study of philosophy was a very common theme in the literature written by fuqahāʾ.[40] This antagonism had grown to such an extent that even al-Ghazālī's works were counted as being philosophical.[41] One of Shāṭibī's teachers, Sharīf al-Tilimasānī, on one occasion was forced by his students to use a certain book by al-Ghazālī. He dreamt the same night that he was soiling his books in filth.[42]

The outstanding case in Shāṭibī's lifetime was the condemnation of the Wazīr Ibn al-Khaṭīb. We need not recount the event which has been mentioned earlier. Qāḍī al-Nubāhī was asked to bring charges against Ibn al-Khaṭīb.[43] He declared the latter as heretic because of his indulgence in philosophy and other such matters. Qāḍī al-Nubāhī's attitude to philosophy can be learnt from the following passage in his book pertaining to the administration of justice and the biographies of Qāḍīs:

> If something relating to the philosophical schools contradicting Sharīʿa or something similar to that is found in someone's handwriting, then the practice (ḥukm) in this respect is to study the written material. If it is clear that it is the opinion of the writer and (something) to which

> he agrees, even though he may deny it verbally, the case will be decided on the basis of the written material. ...If this writing is found only to quote these philosophical schools without relating the statement to the writer...who could be worse than the man who possesses such books...such books must be burnt and the man must be punished..." [44]

Towards the middle of 773, Qāḍī al-Nubāhī announced his fatwā about the books composed by Muḥammad b. al-Khaṭīb, relating to beliefs and morals. These books were burned in the presence of the fuqahā' and mudarrisīn (teachers) and others from the same class as the fuqahā'. "This happened because the aforementioned books contained articles that necessitated this action." [45]

Sulṭān Muḥammad, assisted by Qāḍī Nubāhī and Ibn Zumruk finally succeeded after a few years struggle to have Ibn al-Khaṭīb charged in the Marīnī court as a heretic. He was treacherously killed in prison and then burnt.[46]

Ibn al-Khaṭīb's tragic death illustrates the extent to which the fuqahā' could go in their opposition to philosophy. The case of Ibn al-Khaṭīb also provides evidence to the fact that the reason for opposing philosophy and such trends was to preserve the supremacy of the Sharīʿa which was the religious authority. These facts are to be found in al-Nubāhī's letter to Ibn al-Khaṭīb which has been preserved in Nafḥ al-Ṭīb. Al-Nubāhī charged Ibn al-Khaṭīb saying:

"I had spoken to you a number of times about your pamphlets (manuscripts) in which you invoked innovation (heresy) and made fun of the Sharī'a. I urged you to tear them up and burn them.

This unfortunate office tenure (Qāḍī al-Nubāhī's period of qaḍā' during Ibn Khaṭīb 's wizāra) endured the nonsense resulting from your ridiculing the rules of Sharī'a, and your scorn at matters of religion...some of such cases are the following: one of them was the case of Ibn al-Zubayr who, after payment of his dues, was sentenced to death on account of heresy (Zandaqa) despite your disdaining such a decision.

Another case was that of Ibn Abī'l 'Aysh, detained (muthaqqaf) in prison on account of his heterodox statement, one of such heterodoxies was that he cohabited with his wife after pronouncing the formula of triple divorces, because he claimed that the prophet himself commanded him to mate with her. You sent one of your men to secure the escape of Ibn Abī'l 'Aysh from the prison with no consideration of others. Another of such cases was that one young man related to you was prosecuted on the charge of murder. I could not do anything but imprison him according to the requirements of religion and the decision of Sunna. You detested this judgment. You imprisoned the plaintiff and immediately released the above-mentioned young man." 47

For a better understanding of the contents of this letter it must be pointed out that Ibn al-Khaṭīb was very much distrustful of the fuqahā'. His reasons for this attitude were the fuqahā's general ignorance of the Arabic language, the absence of piety and too much concern for the mundane matters. He wrote a few treatises combining satire and criticism on the practices of the fuqahā'.[48] The main targets of his writings were the qāḍī Ibn al-Ḥasan al-Nubāhī and qāḍī Ibn al-Qabbāh. It is evident from Nubāhi's letter that Ibn al-Khaṭīb did not agree with the fuqahā' in condemning heretics to death. His interference in the implementation of court decisions was considered as ridicule of the Sharī'a.

Ibn al-Khaṭīb's boldly favourable attitude towards philosophy and pure thought was made possible among other factors, by the introduction of Rāzism into Western Mālikism in the thirteenth century.

Fakr al-Dīn al-Rāzī was responsible for raising the status of Kalām to bring it closer to philosophy,[49] but his influence also meant the revival of an interest in philosophy - a forbidden science among the conservative orthodox. Rāzism was introduced to Mālikism mainly through Uṣūl al-fiqh. This made the acceptance of Rāzism easier, and the resistance to pure philosophy, though it continued, but grew weaker and weaker.

In Eastern Mālikism this impact manifested itself in two works on Uṣūl al-fiqh which were in many ways based on Rāzi's work on Uṣūl al-fiqh, Al-Maḥṣūl. One of these works was by Ibn Ḥājib (d. 646 A.H., Alexandria), Muntahā al-Su'l wa'l-'Amal fī'Ilmay al-Uṣūl wa'l-Jadal. The second was the work by Ibn Ḥājib's pupil Shihāb al-Dīn al-Qarāfī (d. 684 A.H) Tanqīḥ al-fuṣūl.[50] Both soon became very popular Uṣūl texts of the Mālikī School. Ibn Ḥājib's work had gained currency even in his life time. Consequently he had to prepare an abridged version of it.[51] This abridged work on Uṣūl along with another short work on furū' were called Mukhtaṣar aṣlī and Mukhtaṣar far'ī since they were used as texts in madāris.

Ibn Ḥājib's Mukhtaṣars were introduced into the Muslim West by one of his well known disciples, Nāṣir al-Dīn al-Mishdhālī (d. 731 A.H.)[52] He was one of the three Western scholars who travelled to the East and who served as an agent

for the influence of Rāzism on Mālikī thought. The other two were Ibn Zaytūn and al-Haṣkūnī.[53] In the West more attention had been paid to the study of fiqh and Arabic grammar, but under the influence of these scholars Kalām began to be given equal attention.

Philosophy was also making inroads, but it was still tabu. Some stories, as told by the biographers of this period, indicate that philosophy and other rational sciences were eagerly sought after by certain individuals, but in secret. Such secretly perused texts included those by Ibn Sīnā and al-Fārabī.[54]

Among the above-mentioned scholars Mishdhālī seems to be critical of Rāzism, although he retained his interest in philosophy. His son, Abū Manṣūr al-Zawāwī's and al-Sharīf al-Tilimsānī who were in Mishdhālī's circle of influence both show this critical attitude towards Rāzī and exhibit favour towards the prepatatic school of Islamic philosophy.

Such trends were encouraging freedom of thought and general intellectual activities. Yet, what probably accelerated the spread of movements of free thought the most was the rise of Ṣūfī Ṭarīqas. Even the Mālikī fuqahā' seem to have failed in their resistance to Taṣawwuf which encouraged a relaxed attitude towards the strict legalistic tradition of Mālikism. The reasons for the rise of this phenomenon are dealt in the following pages.

3) Taṣawwuf

The absolute supremacy of Sharīʿa, the palladium of the power of the religious authority of the fuqahā', was threatened by philosophy as well as

Kalām insofar as these two sciences undermined the authority of Sharī'a as the only guide to life. Taṣawwuf, however, probably presented a more direct threat to Sharī'a than any other movement of thought. The emphasis on piety, religiosity and moral commitment appealed to intellectuals as well as to the common people. The rise of Taṣawwuf in their midst was, therefore, naturally considered a threat by the Mālikīs in the West.

In addition to this consideration, certain events heightened this feeling of danger. In the twelfth century when Mālikism had been re-established by the Murābiṭūn, the fuqahā' had begun the purge of Taṣawwuf from Andalus. Among the ṣūfīs denounced by the fuqahā', the following three were prominent: Abū Bakr Muḥammad from Cordova, Ibn al-'Ārif from Almeria and Ibn Barrajān from Sevilla. They were persecuted, and all three died in prison. Ibn Barrajān had criticized the Mālikī fuqahā' very severely for their neglect of Ḥadīth. He succeded in gathering enough supporters in Almeria to form an opposition that was directed primarily against the fuqahā'.[55]

Another such uprising against the ruling class and the fuqahā' was led by another ṣūfī, Abū'l Qāsim Ibn al-Qaṣiyy, a disciple of Ibn al-'Ārif (1088-1141). This insurrection took place in Algraves region (Southern Portugal) in 1141. Ibn Qaṣiyy was killed in 546/1151).[56]

Viewing Taṣawwuf in the perspective of these uprisings, the fuqahā' naturally considered Taṣawwuf a threat against Mālikism and hence against themselves as a class.

One significant victim of this opposition to Taṣawwuf was al-Ghazāli's book, Iḥyā ʿUlūm al-Dīn. One of the earliest reactions to al-Ghazālī's Iḥyā was that of Abū Bakr al-Ṭurṭūshī (d. 520 A.H.) who wrote a treatise Al-Tibr al-Masbūk refuting al-Ghazālī's Iḥyā.[57] The aforementioned ṣūfī, Ibn al-ʿĀrif, was the first to interpret al-Ghazālī's Iḥyā in the West.[58] Along with the persecution directed against him came the suppression of Iḥyā. In 537 A.H. ʿAlī b. Yūsuf b. Tāshufīn, who also persecuted Ibn Barrajān and other ṣūfīs, ordered that all copies of Iḥyā be burnt in public.[59] Qāḍī ʿIyāḍ (d. 544 A.H.) also issued a fatwā in favour of burning Iḥyā. Abū'l Ḥasan ibn Ḥirzihim prohibited the study of the Iḥyā and ordered that all copies of it be burnt.[60]

Like other movements of free thought Taṣawwuf continued to be considered dangerous both by rulers and fuqahā' until the Muwaḥḥidūn toppled this alliance. Although the religious views of the Muwaḥḥidūn, because of their stress on the Qur'ān and Sunna did not allow absolute freedom to pure thought, yet Mālikism definitely lost its supremacy. Especially in Yaʿqūb al-Manṣūr's (580-590 A.H.) reign, a sort of war was declared on Mālikism.[61]

The Muwaḥḥidun could not, however, destroy the power of the fuqahā' in Spain. It grew stronger. The best illustration is the fact that the Muwaḥḥid Sulṭān Manṣūr under the pressure of Mālikī fuqahā', was forced to expel Ibn Rushd,[62]

During this period another movement was gaining force. It grew much stronger

in the period of the decline of the Muwaḥḥidūn. We refer to the establishment of ṣūfī ribāṭs. As G. Marçais[63] has pointed out, originally the ribāṭ was a military institution, but the mystic movements which began in eleventh century and bloomed in the thirteenth century in North Africa, changed the nature of the ribāṭ. The volunteers for Jihād in the ribāṭs were also connected with Ṣūfī Ṭarīqas. The Ribāṭ, thus, was no longer a military post but also a place for ascetics and travellers. By the thirteenth century the ribāṭs were also transformed into Zāwiyas or centres for certain Ṣūfī ṭarīqas.[64] By that time every ribāṭ had a resident ṣūfī-Shaykh.

This phenomenon had an effect on the fuqahā' intellectually as well as socially.

Spain had resisted Taṣawwuf successfully until in the thirteenth and fourteenth centuries we find travellers and biographers mentioning the emergence of a number of Zāwiyas, notable ṣūfīs and a number of works on Taṣawwuf, all in Spain. Ibn Baṭṭūta mentions, among other such centres of ṣūfism in Muslim Spain, two Zāwiyas in the vicinity of Granada: Zāwiya Maḥrūq, and Rābiṭa al-ʿUqāb.[65] Two of the significant works on Taṣawwuf in the fourteenth century were written by Spanish ṣūfīs; Abū Isḥāq Ibrāhīm b Yaḥyā al-Anṣārī (d. 751 A.H.) of Murcia, Zahrat al-Akmām and Abū ʿAbd Allāh Muḥammad b. Muḥammad al-Anṣārī al-Mālaqī's (d. 754 A.H.) Bughyat al-Sālik fī Ashraf al-Masālik fī marātib al-Ṣūfiya wa Ṭarā'iq al-Murīdīn.[66]

This phenomenon affected the intellectual as well as the social status of the fuqahā'. The emphasis on piety and simple living in their personal lives by the ṣūfīs was in sharp contrast to the aristocratic way of life of the fuqahā'. This difference in

life style made the ṣūfīs more popular than the fuqahā' among the common people. The rising influence of the ṣūfīs among the people and especially among the Berber mercenary volunteers for Jihād was also recognized by the rulers who, to establish their piety and influence among the warrior tribes, began to give attention to ṣūfī Shaykhs and ribāṭs.[67] The fuqahā' also acknowledged this change, and some of them began to drift towards Taṣawwuf. This trend is evident from a number of fatwās which mention the popularity of ṣūfism among the fuqahā'.[68]

The impact of Taṣawwuf can be seen in two principal ways. First, the ṣūfīs did not abolish the Sharī'a, but they undermined the status of the fuqahā', by their emphasis on principles of moral commitment (wara'and zuhd) to one's obligations. The fuqahā's treatment of obligations was rather legalistic. Second, instead of limiting themselves to the fiqh books, the ṣūfīs appealed to the Qur'ān and the Sunna.

Both of these aspects affected the fiqh tradition. The most obvious influence can be seen in the discussions on uṣūl al-fiqh in this period. The fuqahā' had to make concessions to both principles. Qarāfī discussed zuhd and wara'as one of the bases of fiqh.[69]

Ibn 'Abd al-Salām's legal theory is more illustrative of this accommodation.[70]

The influence of Taṣawwuf had grown very strong by the thirteenth century. At the same time with the passing away of the Muwaḥḥidūn, Mālikism was also rising again. But this rise of Mālikism could no more be a continuation of the past

tradition. Mālikism now faced many challenges; social as well as theoretical. Hence in this period fiqh and Taṣawwuf both are actively present on the scene, and both are alive with a rejuvenating spirit. The Banū Marīn and Banū Ḥafṣ who had succeeded the Muwaḥḥidūn, realizing the force of both movements, made steps toward combining the two.[71] They encouraged the fuqahā' to concede to Taṣawwuf. They also began to endow the ribāṭs with large trusts.

The fuqahā', realizing the situation, soon became themselves involved in Taṣawwuf, but they still held to the supremacy of Sharīʿa. A typical example of this rapprochement was the formation of a new sil_sila (chain of a ṭarīqa) whose connection with the Shādhiliyya Ṭarīqa is discussed below, which combined the ṣūfīs and the fuqahā'. Abū ʿAbd Allāh al-Maqqarī (d. 758 A.H.), a famous jurist, is also noted for his work on Taṣawwuf, Al-ḥaqā'iq wa al-raqā'iq.[72] Ibn ʿAbbād al-Rundī (d. 792 A.H.), the famous Shādhilī ṣūfī, was one of al-Maqqarī's disciples of whom he was very proud.[73]

al-Maqqarī, along with his lectures on fiqh, also initiated his pupils into his silsila of Taṣawwuf. The initiation was done with a symbolic act in which the shaykh placed a morsel of food into the mouth of the disciple. A most significant indicator of the new conjunction between fuqahā' and ṣūfīs is to be seen in the names comprising this silsila.

Maqqarī -- Abū ʿAbd Allāh al-Musfir -- Abū Zakariya al-Maḥyāwī -- Abū Muḥammad Ṣāliḥ -- Shaykh Abū Madyan -- Abū'l-Ḥasan b. Ḥirzihim -- Ibn al-ʿArabī -- Ghazālī -- Abū'l Maʿālī -- Abū Ṭālib Makkī -- Abū Muḥammad al-Ḥarīrī (sic) -- Junayd -- al-Saqaṭī -- Maʿrūf al-Karkhī -- Dā'ūd Ṭā'ī -- Ḥabīb al-ʿAjamī -- Ḥasan al-Baṣrī -- ʿAlī b. Ṭālib -- Rasūl Allāh.[74]

This chain has been subjected to criticism by some authors mainly because of gaps in the chain between Abū'l Maʿāli and Makkī. Paul Nwiya, after comparing the presentation of this chain as given by Shāṭibī with those given by others, maintains that it belongs to the Shādhilī Order which became better known after Ibn ʿAbbād.[75] The chain comprises four parts: the first part consists of Maqqarī and Musfir both primarily faqīhs; it is connected with the second part comprising a chain from Maḥyāwī to Abū Madyan - primarily ṣūfīs. They are connected again with the third part consisting of mainly fuqahā; starting with Ibn Ḥirzihim to Abū'l Maʿālī. They are then connected with the traditional chain of early ṣūfīs, through Abū Ṭālib Makkī.[76]

Nwiya's suggestion about the connection of this chain with the Shādhiliya, together with his conclusion that Ibn ʿAbbād's reanimation of the Shādhiliyya was a revival of the early ṣūfism of Muḥāsibī, also partly explains the compromise of the ṣūfīs with the fuqahā' in order to exclude the more comprehensive and radical type of ṣūfism, such as that of Ibn ʿArabī which the fuqahā' considered a threat to the supremacy of Sharīʿa.

Having found this compromise possible, the fuqahā' eased their opposition to Taṣawwuf as such. There was, yet, another aspect of Taṣawwuf which continued to threaten their status. This threat can be seen in three ways. First, Ṭarīqa-Taṣawwuf required total submission to the Shaykh. This submission undermined the religious authority of the fuqahā'. One event (probably an anecdote) illustrates this tension:

> Qāḍī Abū'l Qāsim al-Sabtī had two sons. One, Abū'l ʿAbbās Aḥmad became qāḍī; the other, Abū'l Maʿālī chose the path of "qawm" (ṣūfīs). He never used or ate anything at his brother's house. After many years he visited Zāwiya Maḥrūq in the outskirts of Granada. He saw Shaykh Abū Jaʿfar Aḥmad al-Maḥdūd and asked him if he could explain a mystery that had been worrying him. The mystery was that he had a torch that always showed him light, but suddenly he lost it. The Shaykh asked the first person entering the Zāwiya to answer that question. This person who appeared to be an illiterate villager answered that Abū'l Maʿālī lost this torch as punishment for some of his actions. After a number of questions it was revealed that Abū'l Maʿālī had taught someone the Divine name of al-Laṭīf which he was not permitted to do. A curse fell on him as a consequence. He became Qāḍī al-Jamāʿa and died a worldly man.[77]

The second aspect of the threat to the fuqahā' was that a number of ṣūfī practices such as dhikr and samāʿ virtually substituted for the rituals prescribed by fiqh. This could not be tolerated by the fuqahā'. Shāṭibī goes as far as to declare insistence on such practices in defiance of Sharīʿa, to be Kufr, and condemns the practitioners to death.[78] To add to the offence caused by these practices, which were considered bidʿa by the fuqahā', another important development took place.

In the thirteenth century the celebration of the Prophet's birthday was introduced into the Muslim West. This celebration took place in mosques. The poets wrote and recited for the occasion. Various forms of dhikr and samāʿ were also part of the celebration. A significant factor in this development was the patronage that rulers provided for this celebration.[79] The fuqahā' could scarcely afford to offer strong resistance to these ceremonies in view of the wide popularity of this "innovation" among all groups of people. The situation forced

them, therefore, to revise their stand on bidʿa.

The third aspect of the threat was economic. As we mentioned earlier, generous donations and trust properties were given to zāwiyas and ribāṭs.[80] This wealth attracted a number of devotees as well as travellers. Ibn Baṭṭūṭa came across ṣūfīs in these centres from almost all corners of the Muslim world.[81] Fuqahā' were appointed for the supervision of the expenses of such donations, although the supervision and maintenance of such properties was left to the shaykh of the zāwiya and his associates.

Some fuqahā' resisted the temptations of Ṣūfī ṭarīqas. According to these fuqahā' the Ṣūfī centres were attracting and encouraging idleness in the society. For many devotees asceticism meant to forsake all worldly occupations and spend one's life in some Zāwiya. The finances of the Zāwiya made it possible to live in such a manner. This practice, however, was creating a large number of unproductive elements in the society who were living on the labours of others. For the already stringent economy of Granadian society this was a very heavy burden.

This economic burden becomes very significant as we shall see that the Granadian economy was in process of changing from an agricultural to a commercial and mercantilistic economy. Even the rural areas could no more support the maintenance of such a burdensome institution as the Ṣūfī Zāwiya or ribāṭ had become. The problem became acute in the days of Shāṭibī. A distinct economic view of the matter, in contradistinction to the older political and theological view

that had motivated the fuqahā' to oppose Ṣūfism now came to be.

The inhabitants of a small town Qanālish,[82] an agricultural town on the borders of Aragon, sought a fatwā concerning the Shar'ī attitude towards a zāwiya al-Ghurabā' in their vicinity. The Chief Qāḍī Al-Balfīqī answered vaguely, justifying the existence of such an institution. The Chief Muftī Ibn Lubb countersigned the fatwā. The people of Qanālish, however, mounted a protest against the fatwā accusing both muftīs of subjecting the people to an unnecessary burden.[83]

The same Istiftā' was then sent to Shāṭibī and Abū 'Abdallāh al-Ḥaffār. Ḥaffār's fatwā spelled out the economic aspect in more detail. A few excerpts from this fatwā are worthy of notice:

> "This band of people who claim their connection with Taṣawwuf, has caused the severest harm to religion in this period and in this part of the world. Their evils have spread throughout the Muslim world and especially in the fortresses and towns and villages which are farther from the capital...They are more dangerous for Islam than the infidels...
>
> They have no virtue...None of them knows how to clean himself or to make ablution...In the name of religion they only know how to sing, to utter nonsensical statements and to encroach upon others' property unlawfully...
>
> What made this band of people to adopt this way of life which is so dangerous for the existence of religion? Was it that they needed things basic for the human being, food, drink, clothing and such things, and they did not know any trade or craft to live from? Or if they knew a trade, did they find it hard to toil to earn their livelihood?...The devil seduced them and suggested to them this path which was full of fun and pleasure. They confuse the ignorant with the practice of dhikr... wearing patched clothes...as these were the signs of the virtuous people of this path...

> A certain scholar said that the people in a city must be like the parts of the body. As every part of the body has a particular use and none of them is futile...so are the inhabitants of a city. The soldiers guard the city, the fuqahā' and judges protect the law (Sharī'a) and also teach it...Therefore one who is of no use in a city whereas he is capable of being so...must be expelled from the city...
>
> A philosopher (ḥakīm) taught his disciples to be like bees in a beehive...they do not let any idle member stay there. They would drive it out of the hive, because it would cramp their space, would use their honey and would spread idleness, and abandonment of trades...
>
> It is incumbent upon whoever can do so to restrain these people who are like a gangrenous sore in the side of religion. He must obstruct the way to this group for those who are inclined towards it. He must expel them from these places. (If he does so) he is a warrior of faith (mujāhid) in this respect."[84]

To conclude, the political power of the fuqahā' declined in the reign of al-Ghanī Billāh, because the factors that strengthened their religious authority, were no more controlled by the fuqahā'. The introduction of madrasas deprived them from the control of institutions of learning which were, until then, a private business of the fuqahā'. Since the madrasas were now controlled by the Sulṭān, the fuqahā' lost their independence. Consequently, they could no more enjoy the influence on the important administrative offices which were previously filled by their privately-taught pupils. Nor could they resist the penetration of Taṣawwuf into the Granadian society. Rather, as a general trend, they eagerly joined Ṣūfī Ṭarīqas.

There were only a few jurists who, nevertheless, opposed Ṣūfī Ṭarīqas. Unlike their predecessors who condemned Taṣawwuf mainly because of political reasons,

these jurists rejected Ṣūfī institutions largely due to economic considerations. The following section examines the economic conditions and developments which shaped the opinions of such jurists. In fact, the change in Granadian economy was also a very important factor in the decline of the religious authority of the fuqahā'.

SECTION THREE

ECONOMIC DEVELOPMENTS [1]

Geography

Muslim Spain under the Banū Naṣr was reduced to the Southern part of Spain. The Naṣrī kingdom extended in the South to the shores of the Mediterranean Sea and the Strait of Gibraltar. For a certain period even the African seaport of Ceuta came within Naṣrī territories. In the North were the principalities of Jaen, Cordova and Sevilla. In the East it extended to the principality of Murcia and its Mediterranean shores. In the West lay the principality of Cadiz and La Frontera.

The kingdom was divided into three provinces (Kūrāt): Gharnāṭa (Granada), Al-Marīya (Almeria) and Mālaqa (Malaga).

The kingdom was crossed in the middle by the lofty mountains of the Sierra Nevada and the steep hills of Basharrat. The depressed areas were traversed by the river Genil (Shanīl), a tributary of Guadalquivir and by the rivers Andrex and Manṣūra. The land was a combination of plains and valleys with thick forests.

The difference between the present geographical conditions and those described by historians is confusing. Today this part of Spain is dry and arid,[2] but

the historians vie with each other in praising the fertility and the greenery of this region. The following description by Ibn al-Khaṭīb is typical of other historical geographical descriptions:

> God Almighty has distinguished this our country by endowing it with gentle hills and fertile plains, sweet and wholesome food, a great number of useful animals, plenty of fruits, abundance of waters, comfortable dwellings, good clothing... a slow succession of the seasons of the year".[3]

The city of Granada, situated south of the Sierra Nevada, was the capital of the kingdom. By the city flowed the rivers Genil and El Derro. In the Southwest were the meadows of La Vega. Granada was surrounded by approximately 300 small towns (qurā).[4]

Population

Granada in this period attracted a great number of immigrants. Fleeing from the various Spanish territories which had been conquered by Christians, or having been persecuted by Christians, the Muslims came to Granada. In addition,

a large number of Berbers kept coming constantly from Africa: they came as Ṣūfīs, mercenaries, students or simply fortune seekers. We have no way of knowing the exact number of the population as the sources generally do not mention it.

Nevertheless, the growing burden of the population in this small kingdom can be seen in the educated guesses in the secondary sources. According to Imamuddin, in the days of al-Ghālib Billāh the population in the city of Granada was 150,000.[5] Seybold estimated the figure in the later period as approxi-

mately 500,000.[6] Over and above the rising numbers, the ethnic diversity of the population also affected the economy of the kingdom.

The bulk of the population in Granada and other cities was composed of the Berbers and Arabs, both usually soldiers and hence fief holders. The Spaniards who were mostly cultivators thus worked for both. The Berbers were hated by the Arabs, who considered themselves more culturally advanced than Berbers, as well as by the Spaniard Muslims who inhabited most of the rural areas.

Economy

Generally speaking prior to the eventful impact of the change in Mediterranean trade, the economy of the kingdom had two aspects: urban and rural. The economic activity in rural areas consisted of agricultural and pastoral occupations. In the urban areas the crafts and commerce were the main productive economic activities. Urban economic activity was largely concentrated on luxury goods, hence the actual burden of production fell upon the rural economy. Village life was severe. This situation forced a number of villagers to go to the cities, which were already few in number. This meant the availability of cheap labour, but since the production of luxury goods had a limited number of consumers, city life also was becoming highly expensive. The impact of Mediterranean trade, however, as we shall see below, shifted the burden of production from rural to urban economy.

Prosperity

There was a marked difference in the standards of living even among urban dwellers. The aristocrats who also owned the sources of production lived a luxurious life. Their wealth was distinctly evident in the ornaments and jewellery worn by the women of this class.[7] Their jewellery consisted of such precious stones as emeralds and rubies, and their dresses were embroidered with gold and silver.

It was, in fact, the prosperity of this section of the population which so much impressed travellers such as Ibn Baṭṭūta who described Granada as the most prosperous kingdom in the West.[8]

Financial Conditions

The revenue of the kingdom consisted mainly of taxes collected from lands. According to one secondary source, the yearly income of the kingdom was 1,200,000 ducats.[9] The permanent deposits in the treasury consisted, of course, of precious stones and diamonds,[10] but the expenses of the kingdom were, however, met by the revenue.

The major source of revenue was land tax, called Kharāj. It was usually 1/9 or 1/10 of the produce, but another 1/5 was also levied as rent of land.[11] Since land was scarce and irrigation facilities were not commonly available, the most fertile lands around Granada were procured by the Sulṭān. These lands were called Mukhtaṣṣ and were leased at very high rent prices. Because of the nature of the lands they were eagerly sought by the people.

In addition to Kharāj, the other sources of revenue consisted of the customs duties collected from in-coming and in-transit commercial ships in the ports of the kingdom of Granada. Another occasional but frequent source of revenue was the proceeds from raids carried out in enemy territory which brought back prisoners, slaves, movable properties, etc.

The taxes were collected in kind, but latterly, more emphasis was given to collection of revenue in cash. There was a complex system of tax collection. The tax collectors, called Musharrifs were responsible to one of the important Kātibs of the Sulṭān, called Ṣāḥib al-Ashghāl .[12] The taxes were collected in the name of the Makhzan which applied to both Islamic and non-Islamic taxes. Even the trust properties belonging to mosques were not exempted.

The provincial and local administration as well as tax collection was in the hands of a Qā'id in each district.[13]

The expenses of the kingdom were very high. The major expenditure was the tribute paid to the kingdoms of Castille and Aragon. According to Imamuddin[14] the amount of such tribute in Ghālib Billāh's days was 250,000 ducats. The second major expenditure was the salaries and compensation paid to the soldiers and mercenaries. In addition, large amounts were also paid to the Banū Marīn to recompense the expenses incurred in the preparation for war against the enemies of Granada.

Since in both modes of expenditure the terms were cash, the country had been geared to a money economy.[15]

Money and Currency

The Naṣrī currency was similar to that of the Muwaḥḥidūn both in type and value. The basic units of money were the Dīnār and the Dirham. Dirhams were usually silver currency and varied in value and fineness. The Dīnār remained comparatively stable, the quality and quantity of gold helping to stabilize its monetary value.[17] From the legal documents it appears[18] that three types of Dīnārs were in currency: the golden Dīnār, the silver Dīnār and the Dīnār ʿAynī (copper). The golden Dīnār was usually of 2 grams in weight containing 22 carats gold. Its monetary value was equal to 5 to 7 silver Dīnārs or 75 silver Dirhams. The Banū Naṣr struck silver Dīnārs in square shape in contradistinction to the round shape of the golden Dinār and the dobla (the well-known non-Muslim gold piece). Contrary to the conjectures of early scholars of numismatics,[19] the silver and ʿaynī (copper) Dināars were not debased coins; but as studies of documents of contracts in the Naṣrī period show, they seem to have been introduced by the Naṣrī rulers according to fixed monetary values, while the gold piece was accepted in the market according to the current price of gold.

We have here the evidence of a money economy in the form of the copper Dīnār. The reason for this development was most probably the rapid growth of trade between Granada and foreign principalities. This trade is discussed at a later point in this section. What concerns us here is the plausable explanation of the copper Dīnār by the fact that because of the need for gold for trade a kind of currency based on credits to the treasury could have been introduced in the

form of the copper Dīnār. Such a development could also be interpreted to mean that because of commercial needs the internal money was devaluated.[20]

Agriculture

Spain had been known for highly developed agricultural methods and ample fertile land,[21] but in the Naṣrī period the extent of Muslim Spain was reduced to Southern Andalusia. The nature of the soil and climatic conditions did not allow a scale of cultivation that permitted self-sufficiency in the production of grains. Often it proved necessary to import grains from North Africa.[22]

The soil seemed to be conducive, however, for the growth of durable plants. Andalus produced a variety of fruits which were eagerly sought at home and in foreign markets as well. For export purposes, however, the cultivation of olives and mulberry trees became very common in the fourteenth century. Even though manufactured with primitive methods, Andalusia even exported olive oil. Mulberry leaves used in rearing silkworms had also gained a commercial value.

As mentioned earlier the Mukhtaṣṣ lands, the best lands of Granada, were leased to cultivators who used to pay the dues in kind. In the fourteenth century, it appears, these lands began to be rented to those tenants who would pay the rent in cash. These tenants hired seasonal labour for cultivation.[23]

By the fourteenth century land had become critically scarce. Evidence of this fact is found in the fatāwā literature where various forms of ownership and complex methods of the division of the property and produce are noted.[24]

The ever growing population and the continuous loss of territories to the Christians were also responsible for the fact that extraordinary forms of ownership appeared in the distribution of cultivable land. A small tract of land might be co-owned by a number of persons.[25] Not only that, but the division and subdivision of property even extended to a tree and its branches; a tract of land was divided among its owners by the number of trees; or a tree, when it was owned by more than one, was divided by its branches.[26]

The extraordinarily intense cultivation even forced the people to use or rent the gardens around their houses for agricultural and commercial purposes.[27]

Besides the seasonal crops, fruit cultivation was a major occupation. A highly developed system of irrigation made higher level lands useful for orchards.[28]

In general, however, it appears that the pressure toward a cash economy was forcing even the rural agricultural economy to change into a certain type of economy, which for lack of a better term, we may call "mercantile" economy. It must, however, be made clear that our use of the term 'mercantile' should not be confused with its technical use in a special sense which refers to the sixteenth century 'mercantile policies' in certain European countries.[29] We are using this term in its simple sense to mean a type of economy that lays stress on trade and commerce, and where money as wealth becomes important in preference to land.

Some of the indicators of the rise of this type of mercantilism are the following:

The use of seasonal labour and contract-workers who received their wages in cash or kind at the end of the contract [30] period was replacing the older system of semi-serfdom for the peasants. Forms of co-operative cultivation where partner and production contributed money in place of land were also current. Evidence for this development is found in the specific cases of rearing of silkworms [31] and of production of cheese.[32]

Industries

The existence of gold, precious stones, amber and metals such as copper and iron [33] in the kingdom of Granada encouraged various industrial activities. These industries had become a major base of the Naṣrī economy. Louis Bertrand tells how the Granadians enjoyed "up to a certain point, industrial wealth."[34]

Among others the major industrial centres were Granada, Malaga and Almeria. The following industries flourished: Weaponry, Silk, Pottery, Leather, Cotton and other textiles.[35] The most profitable industry was silk.

The cities that were busy in the silk industry were Jubiles, Granada, Guadix, Fiñana and Almeria. In Almeria there were about 800 looms for brocaded silk and about 1,000 for embroidered silk. Similarly there were looms for other kinds of silk among which the following were well known in the foreign markets: Usqulāṭun, Georgian, Isphania, ʿUnābī, Maʿajir al-Mudhashsh.[36]

In the fourteenth century, because of the growth of the Italian silk industries,

the Granadian silk industry suffered heavily.[37] Nevertheless, the market demands for raw silk material insured that this industry in Granada remained profitable.[38]

Crafts

The crafts were usually connected with luxury commodities. Many artisans coming from other parts of Spain, had settled in the kingdom of Granada. This influx advanced not only the development of crafts but also turned the craft-industries toward the production of luxury goods. These crafts concentrated on jewellery, golden silk embroidery, decorative pottery and fancy leather among other things.[39]

Trade and Commerce

The most significant phenomenon in the economic history of the Islamic West in the fourteenth century was the quick development of a commercial economy. The coastal cities developed significantly along with the growth of their political influence. This is evident in the case of Ceuta, Malaga, Ronda and Almeria. The Alliance of Ronda and Malaga with Muḥammad V al-Ghanī Billāh meant his remounting the throne of Granada. His capture of Ceuta meant a greatly increased influence in Marīnī political affairs.[41]

Besides political influence, these cities also experienced a rapid growth of the textile, metal, leather, dairy, flour-milling, and ceramic industries and other crafts. The produce was largely meant for foreign markets.

The main cause of the quick development of a commercial economy in this area, according to S. M. Bastieva, was the economic upsurge in the Mediterranean countries in the thirteenth and fourteenth centuries. The cause of that development was the sudden growth of manufacturers in Italy.[42] Trade, however, necessarily required relations with foreign nations. The overseas trade of the Italian cities reached its zenith in the fourteenth century. This trade was carried further by the maritime cities of Catalonia, Provence, Constantinople, Alexandria and others. This activity created in the Mediterranean a wide market which made possible the enormous upsurge of production there and which was conducive to the appearance of mercantilism in Italy.

The emergence of vigorous trade patterns around the Mediterranean made possible a wide sale of agricultural produce in the foreign market. This, in turn, affected Granadian economy by producing a stimulus to commercialize agriculture. Lopez Ortiz, studying the fatāwā literature of this period, concluded that in Granada, the agricultural production was moving towards a mercantilized economy.[43]

Among the materials that Florence, Naples, Catalonia and Provence imported were raw leather, processed leather, olive oil, cotton, silk, wax, etc. The main importer of Granadian raw silk was Florence.[44]

The main seaports of Granada, Almeria and Malaga, were situated at very significant points on the Mediterranean trade routes. They were, thus, in a favourable

position to benefit from the new trade.

Almeria and Malaga were situated on the sea trade route connecting the maritime cities in Western Spain and in West Africa with Naples in Italy. This sea route connected with another sea trade route starting from Sevilla and going through Murcia, Valencia, Barcelona and ending in Marseilles. In terms of land trade Granada was connected with a number of trade routes that spread throughout Spain and which were also connected with the maritime cities. Granada was connected with the land trade routes in Africa through Ceuta which was under her suzeranity at that time. These land routes led to Fez, Tlemcen and Algiers.

The significance given to the safety of these trade routes by the rulers can be seen in the mutual trade pacts between the kingdom and its neighbours in that period. The Banū Naṣr frequently signed trade pacts with their neighbours; or one should perhaps rather say that every treaty included a condition of mutual agreement on the safety of trade routes and merchants. In 684 A.H. in a treaty with Castille the condition read that the Muslim merchants going to Castille would be exempted from taxes.[45] The treaty with Aragon, signed in 695, provided that the cities in the territories of both partners to the treaty would be open to the merchants from both territories and that their lives and merchandise would be safeguarded.[46] In 721 A.H. in the renewal of this treaty an additional condition provided that the boats (ships), shores and ports of each partner would be safeguarded.

Such security pacts with Christian neighbours were essential for the Banū Naṣr as the major part of their trade consisted of exports to Italy by these trade routes. Naples, Catalonia and Provence were the main importers of such Granadian commodities as raw and processed leather, olive oil, cotton and wax. The city of Florence was the major importer of raw silk from Granada.

Money Lending

A natural result of ther mercantilistic activities was the growth of a strong and widespread money-lending class. This money-lending class operated both in Christian and Muslim territories. Most probably the intermediaries in such transactions were Jews. In the literature of that period they were called "transgressors and unjust".[48]

These money lenders controlled the markets where agricultural products were brought for auction. They worked also as intermediaries in auctions.[49] They were also responsible for the exchange of currencies. There is also an indications in a fatwā that they even determined the values of the currencies.[50]

A peculiar and typical product of this economic and political milieu was al-Fakkāk. The term, originally meaning to separate, disjoin, redeem,[51] probably under the influence of the Qur'ānic legal term Fakk-u-raqaba[52] (to liberate someone) came to be used also in commercial legal transactions to mean the redemption of pledges and of debts.[53] Most probably this Andalusian term al-Fakkāk etymologically springs from that usage. In Andalus this term was applied to an intermediary

who was paid by the relatives of a prisoner in the enemy territory to buy the liberty of the prisoner by paying the required amount to the enemy.[54]

To grasp the situation it must be pointed out that despite the truces, payments of tribute, and promises of protection, the Granadians found themselves often invaded by armed bands which cut down fruit trees, carried off crops and cattle and took prisoners. These events were so common that Muslim fraternities along the lines of the French fraternities such as the Ordre de la Merci were established to ransom Muslim prisoners and slaves in Christian territory.[55]

Ibn Baṭṭūṭa witnessed such an incident in Spain. He relates the story that on the coast of Marbella four galleys of a Christian band appeared, and after killing a fisherman, captured eleven horseriders who were travelling to Malaga a little distance ahead of Ibn Baṭṭūṭa. When he reached Malaga and arrived at the main mosque, he found the Chief Qāḍi al-Ṭanjālī already busy talking to a number of jurists and a notable businessman in Malaga. They were collecting a sum to buy back the freedom of the captives.

From the legal literature of this period, it appears that the institution of al-Fakkāk was an already established practice.[57] Under Muslim influence the Castillians also called such intermediaries Alfaqueques. In Castille they were supposed to be responsible for the administration of the property of prisoners of war.[58]

In Andalus, however, although the institution may have originated from pious and selfless interests, yet by the fourteenth century it had more of a commercial nature than anything else. The Fatāwā indicate that al-Fakkāks used to

contact interested persons on both sides and earned a commission from both parties. One fatwā shows that al-Fakkāks bargained about the prices for ransoms, etc., devaluated the currencies, and earned profits from such transactions.[59]

In the light of this and other descriptions of the institution of al-Fakkāk in the sources, it may be rightly assumed that al-Fakkāk belonged to the money-lending class. The assumption gains weight since the sources indicate that al-Fakkāk also traded in silk, advanced money on anticipated earnings and dealt in debased currencies.[60]

From the above survey of economic developments, especially such matters as the emergence of al-Fakkāk, the growth of the Mediterranean trade, the introduction of the devalued copper Dīnār, and the transformation of agriculture into commercialized forms of cultivation and other such facts, it can be seen that the economy was rapidly changing towards a type of mercantilism. This would imply, among other things, the disappearance of institutions that were based on an agricultural economy and the emergence of new ones.

This would mean also that the Mālikī fiqh had to face some essential changes. To justify new institutions it would not be sufficient to attempt to accommodate them under some legal fiction or some legal device. The number and nature of these new institutions forced the fuqahā' to push the problems they faced back to fundamental matters of legal methodology and general principles of legal theory.

SECTION FOUR

LEGAL DEVELOPMENTS

The data available for this section is particularly scanty. Since a description of the legal system and legal developments, however cursory it may be, is helpful to complete the picture of social changes which is the objective of this chapter, this section makes such an attempt.

This section deals first with the legal system and second with legal developments in fourteenth century Granada.

Legal System

Reference has already been made to the institutions of qaḍā' and futyā and the place of Mālikism in the legal system.[1] Not to repeat what has already been said, we will briefly state the main points relating to the legal system.

1. Mālikī fiqh was recognized as the law of the kingdom.
2. Mālikī fiqh was applied on three levels:
   a) On the level of futyā, strictly religious matters including those of exegesis and theology were referred to muftīs, and except for cases of heresy,[2] such matters were beyond the courts' jurisdiction. The opinion of the Muftīs was called fatwā, and its implementation largely depended on the individual conscience.

b) On the level of the courts (qaḍā'), the decision of the judge (ḥākim) was called ḥukm. Although the judge had no executive powers, yet in contradistinction to fatwā, the ḥukm was enforced by government agency. The qāḍī was assisted by a concilium of fuqahā' called mushāwirūn.[3]

c) On the level of the notaries (wuththāq), the Mālikī fiqh was applied to register and validate various kinds of contracts and other types of legal documents. These wuththāq were usually faqīhs and were often appointed also as muftīs and mushawīrs.

3. In matters of procedure the litigants sought the fatāwā of the muftīs in favour of their claims and presented them in the court. The judge reached his decision after consulting the notables in his court. The Qāḍī's decision was final in the sense that neither he nor any other judge could revise this decision; in the opinion of some scholars the decision stood as it was even if the witnesses changed their testimony. In certain matters an appeal could be made to the Sulṭān against the decision of the court.[4]

4. Since Mālikī fiqh covered all matters relating to religion, ethics, family, property, etc., and the muftī could be consulted even on matters which were also in the qāḍī's jurisdiction, a confusion between the jurisdictions of muftī and qāḍī always existed. The function of the

notaries added to the confusion. The notaries were sometimes given limited jurisdictions such as the attestation of a witness or a contract, yet they could not decide the case.

In short, the essential problem of the Granadian legal system became one of confusion of the function of fatwā and ḥukm. The Egyptian Mālikī jurist al-Qarāfī (d. 684 A.H.), whose influence, as has been mentioned earlier, was felt deeply in Mālikī fiqh in Andalus, wrote the following treatise on this problem: Al-iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām.[5]

Qarāfī disagreed with the usual distinction made between fatwā and ḥukm by considering the former as only ʾikhbār (statement) and the latter as ʾilzām (binding).[6] On the contrary, he maintained that both are ʾikhbār ʿan ḥukm Allāh (statement about God's command) and both are "binding". According to him a fatwā is a statement which implies either ʾilzām or ibāḥa (permission), and the ḥukm is a statement which implies either ʾilzām or ʾinshāʾ (preceptive action).[7] In respect of subject-matter, the ḥākim has jurisdiction only in al-ʾumūr al-ijtihādiyya (the matters which were not agreed upon among the Mālikī scholars) and maṣāliḥ dunyawiyya (matters relating to this world); the ḥukm has no jurisdiction in ʿibādāt (ritual and worship) and ijmāʿ.[8]

Qarāfī, however, could not remove the confusion completely as he maintained that both fatwā and ḥukm form part of the function of the imām (in this case the Sulṭān)[9] but whereas he made the muftī responsible to God, he did not define to whom ḥākim was responsible.

Legal Developments

Beside the confusion that existed in the functional aspect of Mālikī fiqh certain new developments had added more to the confusion. We will briefly mention a few of them.

A. The legal status of Andalus: Mālikī fiqh, in certain cases, maintains that the legal status of a territory changes according to its political condition; whether it is on peace terms with another territory or at war. In the fourteenth century Andalus was constantly at war or on peace terms with her Christian neighbours. It even had the status of a vassal state to the principality of Castille. A number of questions in the fatwā literature show the confusion that this situation created in the application of law.[10]

B. Diversity of Laws: The diversity of laws had a number of causes. In many cases the diversity came about because of the differences in the local practices which were recognized in the Andalusian Mālikī Tradition as a source of law.

The diversity of laws was also caused by other factors such as the use of the principle of murāʿāt al-khilāf . These aspects have been discussed elsewhere in detail.[11]

It seems that Ibn al-Khaṭīb became painfully aware of the weakness of the legal system and tried to reform them. He criticised Qāḍī Ibn al-Ḥasan al-Nubāhī in his treatise Khalaʿ al-rasan. He also wrote the following

books on legal theory: Sadd al-Dharī<a fī tafḍīl al-Sharī<a,[12] Alfiya fī uṣūl al-fiqh[13] and Muthlā al-ṭarīqa fī dhamm al-wathīqa.[14] In his Muthlā al-ṭarīqa he strongly criticised the institution and practice of notaries (wuththāq). He condemned them for their ignorance of the Arabic language and of fiqh. His essential criticism of this practice was on the basis of wara<(moral responsibility) that was completely neglected by the legalistic and formalistic trends in the legal practice.[15]

The little information we possess on the actual legal developments in Andalus should perhaps be supplemented by comparison with Christian Spain. It is quite probable that developments similar to those in neighbouring areas took place in Andalus, since both countries underwent the same kind of socio-economic changes. For an understanding of legal developments in Christian Spain it is quite revealing to notice the various stages through which Fuero, an important Spanish legal institution, went.

The institution of Fuero existed before the arrival of the Muslims in Spain. It survived under Muslim rule and later became a stronghold of resistance to the renaissance of Roman law in Spain in the thirteenth and fourteenth centuries.

Fuero, deriving its name from Lex fori, tribunal justice,[16] came to stand for the legal practice of townships and thus took the name of Fuero Juzgo.[17]

Fuero Juzgo also called Liber Judiciorum and Lex Barbara Visigothorum, was a compromise between Visigothic and Roman law, developed during the

seventh century.[18] Fuero Juzgo was a medley of legal rules which included, among others, subjects such as the following: rules for visiting the sick, the graves of the dead, heretics, etc.[19] Under Muslim rule these Fueros incorporated some Muslim elements as well.[20]

In the thirteenth century the administration was faced with the profusion of all kinds of law in Spain. The excessive diversity became threatening to the fabric of the state.[21] The progress of trade also demanded system of uniform laws.

By the middle of the thirteenth century a movement for the reform of laws emerged. A long contest between the supporters of Fueros and the supporters of legal unity began. Two weapons were used to reform Fueros: (1) Exposing the shortcomings of the Fuero system and (2) the renaissance of Roman law.[22] Three Castillian kings Ferdinand III (1199-1252), Alfonso X (1221-84) and Alfonso XI (1311-50) are known as staunch supporters of these legal reforms to bring about the uniformity of law.[23]

In the days of Alfonso the Learned another development was also taking place. In Southern France there arose a school which both there and in Bologna supplanted the glossators (medieval commentators on Roman civil law). Instead of seeing in Roman law a multitude of texts to be examined and interpreted, those of the new trend sought to do two things:

a) systematize Roman law in accordance with the rigid method of Aristotle and in the light of Christian doctrine, and

b) to ascertain what reasons could have motivated its rules. The trend thus marked the beginning of a philosophy of law.[24]

Many scholars from Spain travelled to Bologna to study and teach Canon Law. In Spain, the University of Salamanca became an important centre for the study of Roman and Canon law.[25]

The purpose of the above description is to indicate that factors such as the diversity of laws and the need for reform of local legal practices to bring about the uniformity of laws led scholars to investigate the motive and purpose of law. The attempts of these scholars had very far-reaching effects on the evolution of law in Europe in later centuries. Although this evolution came about two centuries after Shāṭibī, it is not irrelevant to refer to it briefly as it helps in understanding the direction to which the legal philosophy was led by the legal developments in Shāṭibī's period.

As a result of the continuous concern for the philosophy of law in Spain there emerged a group of prominent legal philosophers who are now known as "Spanish Theologian Jurists". Two of these jurists are usually described in the following manner: Vitoria (Fransisco de Vitoria d. 1546 in Salamanca), "the expounder of the law of nations" and Suarez, "the philosopher".[26] Francis Suarez was born in Granada in 1548 and died in Lisbon in 1617. His influence on the later development of the philosophy of law is well-known. His legal philosophy had its pivotal point in the exposition of the end of law which, according to Suarez, was the "Common good of the Community".[27]

Despite the time interval of two centuries between Shāṭibī and Suarez, the similarity in their approach towards law and its end is worth noting. Shāṭibī also investigated the purpose of law and he also found the concept of maṣālih al-ʿibād (the good of the people) to be the objective of law.

Unfortunately the similarity in the legal developments in Muslim Spain with that in Christian Spain does not go beyond this point. There is similarity in the socio-economic factors that led to an investigation of the philosophy of law in both Muslim and Christian Spain. The Jurists' conclusions about the objectives of the law were the same. Yet whereas in Christian Spain these investigations continued and were responsible for the shaping of the concept of law in Europe, among the Muslims this attempt seems to have stopped with Shāṭibī.

NOTES: CHAPTER III

Section One

1. See Muḥsin Mahdī, Ibn Khaldūn's Philosophy of History (Chicago: Phoenix, 1964).

2. See Henri Laoust, Contribution a une etude de la Méthodologie Canonique de Ṭakī-d-Dīn Aḥmad b. Taimiya (Cairo, 1939) and Essai sur les doctrines sociales et polimiques de Ṭakī-d-Dīn Aḥmad b. Taimiya (Cairo: Imprimerie de l'Institut Français d'Archeologie oriental, 1939).

3. See Josef van Ess, Die Erkenntnislehre des Aduddīn al-icī: Übersetzung und Kommentar des ersten Buches seiner Mawāqif. (Wiesbaden: Steiner, 1966).

4. Not to speak of secondary sources, even the primary sources on the Naṣrī period are often confusing. The confusion of the secondary sources is partly due to their indiscriminate use of the primary sources which are often conflicting. For a general history of the period a critical study of the primary sources is indispensible. The two contemporary historians on whom the later sources have depended are Ibn al-Khaṭīb and Ibn Khaldūn. Not only did these two men belong to different courts which were often enemies to each other, but Ibn Khaldūn also had a particular philosophy of history that stresses the role of tribes and families. These differences make their narratives of the same period conflict with one another. Furthermore, the attachments of the two historians to these courts also fluctuated. These changing loyalties also affected their narratives. Ibn al-Khaṭīb revised, added and suppressed much information at various stages of writing the history of this period.

   Only to avoid confusion, we have chosen Ibn al-Khaṭīb's al-Iḥāṭa (Cairo: Maṭbaʿ Mawsūʿāt, 1319 A.H.), as the basic text mainly because this was written before Ibn al-Khaṭīb had been prejudiced against Muḥammad Al-Ghanī Billāh. For the events after 771 A.H., mainly for the story of Ibn al-Khaṭīb's persecution, we have relied upon the information in Al-Maqqarī, Nafḥ al-Ṭīb (ed. M.M.ʿA. Ḥamid, Cairo: Saʿāda, 1949), which derives its information mainly from Ibn Khaldūn's Kitāb al-ʿIbar (Bayrūt, 1959). We have also used Qāḍī Nubāhī's Al-Marqaba al-ʿUlyā, (Cairo, 1948) to supplement Nafḥ al-Ṭīb. Secondary sources have been used only complementarily.

5. Ibn al-Saʿīd, an African traveller, who visited Andalus at that period described the capricious political attitude of the populace as follows:

   > Their attitude towards a sulṭān can be described by the fact that whenever they find a horserider who distinguishes himself among his peers...they rush to his side and appoint him

their king without any consideration for the future...or sometimes there is in the kingdom a soldier of the officer rank (qā'id) who has earned fame for his campaigns against the enemy... They offer him the rulership in one of the fortresses..."

quoted by al-Maqqarī, Nafḥal-Ṭīb op.cit., Vol. I, p.201. Another evidence of this political confusion is the story narrated by Ibn al-Khaṭīb saying that the Andalusian territories were in the hands of robbers and warlords whose alliance Ibn Hūd sought in order to become the sulṭān of al-Andalus.

See Al-Iḥāṭa, op.cit.,II, p.91

6. Ibn Khaṭīb: Al-Iḥāṭa, II, p.90-91. Huici Miranda is of the opinion that Ibn Hūd's insurrection personified Spanish Muslims against the Berber Al-Muwaḥḥidūn. See article "Gharnāṭa" in Encyclopedia of Islam, (New Edition), Vol. II, p.1014.

7. Al-Iḥāṭa, II, p.61.

8. Ibid., p.62.

9. Ibid., p.65. Ibn al-Khaṭīb, however, does not mention the events that made Ibn al-Aḥmar repent his submission to Castille. Ibn Khaldūn narrates further that in making truce with Ferdinand, Ibn al-Aḥmar was satisfying his anger against Ibn al-Jadd, the ruler of Sevilla. He supported the Christians in every manner. But when Ferdinand was not content with taking Cordova and Sevilla but went on capturing more fortresses and important towns, Ibn al-Aḥmar was irritated and repented his decision. See Gaudefroy Demombeynes "Histoire des Benou l Aḥmar", (translation from Ibn Khaldūn's Kitāb al-ʿIbar in Journal Asiatique, 9th series, Vol. XII (1898), p.325.

10. Ibn al-Khaṭīb (Iḥāṭa, II, p.59) mentions that Muḥammad was born on 22 Jumāda al-Ākhira in the year 739 A.H.

11. Ibid., p.4.

12. Ibid., p.9.

13. Ibn al-Khaṭīb attributes this revolt to the negligence of Riḍwān. Ibid., p.11.

14. Ibn Khaldūn, Kitāb al-ʿIbar, Vol. VII, p.637.

15. Ibn Khaldūn provides more details of this event. For him the cause of this revolt was the faqīh Ibn Marzūq - a scholar and ṣūfī connected with the ribāṭ of Abū Madyan. Ibn Marzūq was so influential that Abū Sālim had

left almost all his affairs in Ibn Marzūq's hands. This antagonized other officers at the court. Consequently, ʿUmar b. ʿAbdAllāh, the Wazīr at the court conspired with Garcia Antoine, the Andalusian Christian who was at the head of the mercenary soldiers. Abū Sālim was killed. Soon after ʿUmar b. ʿAbdAllāh, apprehending the plan of Garcia, succeeded in assassinating him and thus became the virtual ruler. Ibn Khaldūn, Kitab al-ʿIbar, Vol. VII, pp.648ff.

16. Ibn al-Khaṭīb gives no detail, and mentions the name of ʿUmar b. ʿAbdAllāh in derogatory terms (Khabīth: wicked), Iḥāṭa, op. cit., p.14. But Ibn Khaldūn, giving the details, takes the credit to himself. He narrates that ʿUmar b. ʿAbdAllāh was his friend, and that he advised ʿUmar to surrender Ronda to Sulṭān Muḥammad V. Kitāb al-ʿIbar, op. cit., p.694. Ibn al-Khaṭīb, in Aʿmāl al-Aʿlām (p.314) however, takes credit for this event by mentioning the same reasons that Ibn Khaldūn gives. Interestingly enough in another place Ibn Khaldūn mentions that ʿUmar b. ʿAbdAllāh, who,after killing Abū Sālim had taken over the Marīnī throne, was looking for a proper candidate for the throne from the Marīnī family. He found the Marīnī prince Muḥammad, then in the custody of the Castillians, to be the most proper choice. Since Muḥammad V was on good terms with the Castillians, ʿUmar b. ʿAbdAllāh promised him the surrender of Ronda if he would procure the release of the prince from Castille. (Vol. VII, p.659).

17. Ibn al-Khaṭīb mentions this in reference to two offices: in case of the Wizāra, he says: "His prudence demanded to neglect this office entirely, even though it was essential in the political and financial administration. (This resolution was made) to avoid the evils that had come out of it before..." (Iḥāṭa, II, p.15). He repeats the same reference in case of Shaykh al-Ghuzāt (p.20).

18. Al-Iḥāṭa II, p.17.

19. Ibid.

20. Ibid., p.48 ff.

21. The details of these campaigns are provided by Ibn al-Khaṭīb, al-Iḥāṭa, II, pp. 48-59.

22. See p.91.

23. Imamuddin, Political History of Spain, (Dacca: Najma, 1961), p.284. Also ʿInān, Nihāyat al-Andalus, op. cit. p.36.

24. ʿAbbādī, in his comments on Ibn al-Khaṭīb's Miʿyār al-Ikhtibār (Mushāhadāt, p.99 no.2) notes that this exchange was well known. Many Spanish Christians knew Arabic; similarly, many Andalusian Muslims knew the Castillian and Angoinese languages. Frequent debates and disputations on religious and academic subjects took place. Ibn al-Khaṭīb states that a Muslim scholar Muḥammad b. Lubb al-Kanʿānī wandered in Spanish lands debating with priests. Another Muḥammad al-Rāqūṭī went to Murcia to teach Jews and Christians. ʿAbd Allāh b. Sahl was well known in mathematics. His fame reached as far as Toledo, and many scholars came to Baeza to study with him.

25. Inan, Nihāya...op.cit., p.432.
Nafḥ al-Ṭīb, Vol. 1, p.207.

26. Muḥammad Riḍwān al-Dāya (ed.), Ismāʿīl Ibn al-Aḥmar, Nathīr Farā'id al-Jumān fi Naẓm Fuḥūl al-Zamān, (Cairo, 1967), Introduction: p.17.

27. Lévi-Provençal, "Naṣrids" in E.I. (1st edition), III, p.879.

28. Inan, Nihāya, p.117.

29. For the lengthy details of this event see Ibn Khaldūn, Al-ʿIbar...Vol. VII, pp.695 ff.

30. Gaudefroy Demombynes, "Histoire des Benou 'l-Aḥmar", p.340: n.61.

31. This Ẓahīr is mentioned by Ibn al-Khaṭīb in his al-Iḥāṭa in those parts which still remain in Ms. preserved in the historical section of Gayangos Collection. We are quoting it here from the excerpts by Muḥammad Kamāl Shabāna, "Shuyūkh Ghuzāt al-Maghāriba fī l Andalus Kamā arrakha lahum Ibn al-Khaṭīb fi Al-Iḥāṭa" in Al-Baḥth al-ʿIlmī, (December-January, 1968), pp.134-136.

32. Ibid. 135 f.

33. Ibid., p.125-126.

34. The details are given by Ibn al-Khaṭīb, Kitāb Aʿmāl al- Aʿlām fī man Būyiʿa qabl al-Iḥtilām min Mulūk al-Islām, op.cit.,

35. Ibn al-Khaṭīb, Al-Iḥāṭa, Vol. II, p.20.

36. For details see the notice of Muḥammad al-Ghanī Billah in Ibn al-Khaṭīb, al-Iḥāṭa, Vol. II, pp.48-59.

37. As quoted by Maqqari, Nafḥ al-Ṭīb, Vol. I., p.202.

38. Inan, Nihāyat al-Andalus, op. cit., 426.

39 Ibid.

40. Abū'l Ḥasan al-Nubāhī, Al-Marqabat al-ʿUlyā..., p.49.

41. See p. 102ff.

42. Ibn Khaldūn, op. cit., p.694.

43. Ibn al-Khaṭīb, Aʿmāl...p.78-79.

44. Ibid. Al-Katībat al-Kāmina fī man Laqaynāhu bi al-Andalus min Shuʿarā' al-Miʾat al-Thāmina, ed. Iḥsān ʿAbbās, (Bayrūt: Dār al-Thaqāfa, 1963) pp.146-152.

NOTES: CHAPTER III

Section Two

1. See p. 86 and Sec. I, n.15.

2. See for instance: R. Dozy, Histoire des musulmans d'Espagne Vol. I (Leiden: 1932), pp.286ff and Levi-Provençal, Histoire de l'Espagne musulmane, Vol. I (Paris, 1950), pp. 149 ff.

3. Ibn Khaldūn, Muqaddima (Cairo, 1320 A.H.), p.425.

4. I. Goldziher, "The Spanish Arabs and Islam", trans. from Spanish by J. de Semogyi, Muslim World, Vol. LIII (1963), p.13 and passim.

5. Quoted by J. T. Monroe, Islam and the Arabs in Spanish Scholarship (Leiden, 1970), p.233.

6. Hussain Monès, "Le role des hommes de religion dans l'histoire de l'Espagne musulmane jusqu'a la fin du Califat", Studia Islamica, XX (1964), 49 ff.

7. Among many others see the recent thesis in Jamīl Abū'l Naṣr, A History of the Maghrib (Cambridge, 1971), p.11.

8. Monroe, op. cit.

9. Monès, op. cit., 50 ff.

10. Provençal (op. cit., p.149) says: "Dès cette époque, en effet, on vit se constituer, principalement dans la capitale..., une sorte d'aristocratie, à la fois religieuse et intellectuelle, composé par les fakihs ou juristes-theologiens malikites".

11. Roger Idris, "Reflexions sur le Malikism sous les Umayyades d'Espagne," Atti del Terzo Congresso di studi Arabi Islamici (Napoli, 1967) p.399.

12. For details see Dozy, op. cit., p.288ff.

13. See above Section 1, n.24.

14. See Section 3, and p. 223ff.

15. E.I.J. Rosenthal, Political Thought in Medieval Islam (Cambridge, 1962), p.44.

16. Salāwī, Al-Istiqṣā' (Dār al-Bayḍā', 1954), Vol. III, p.101, recounts that a Granadian envoy was punished by the Marīnī Qāḍī for drinking.

17. The genealogical superiority is very often expressed in the eulogies of the court poet Ibn Zumruk. This aspect is officially expressed particularly in fanā'al-aswad in al-Ḥamrā', of which the following inscription is very indicative:

وياوارث الانصار لاعن كلالة تراث جلال ليتخف الرواسيا

For details see ʿInān, Al-Athār al-Andalusiya (Cairo, 1956), p.170.

18. Ibn Saʿīd: Al-Mughrib fī Ḥulā al-Maghrib, Vol. I (Cairo. Dār al-Maʿārif, 1953, p.57 and Vol. II, 1955, p.109 (for the explanatory note on the authors of this work see Shauqī Ḍayf the editor's introduction).

19. Ibn al-Khaṭīb, Iḥāṭa: op. cit., II, p.60.

20. See for instance two of Ibn Zumruk's eulogies preserved by al-Maqqarī, Nafḥ al-Ṭīb, Vol. VII, pp. 96-107. The following verses illustrate our point:

وخص انصاره الاعلين صفوته واسكنوا من جوار الله اعلاه
انصار ملته اعلام بيعته مناقب شرفت اثنى بها الله

لاغرو ان فقت الملوك سيادة اذ كان جدك سيد الانصار
السابقون الاولون الى الهدى والمصطفون لنصرة المختار
ورثت هذا الفخر يا ملك الهدى من كل اوى النبي ومن نصر
من شاء يعرف فخرهم وكمالهم فليسئل وحى الله فيهم والسير
أبناؤهم أبناء نصر نجدهم لبسيفهم دين الاله قد انتصر

21. Ibn Saʿīd, as quoted in Nafḥ al-Ṭīb, Vol. I, p.206.

22. See for instance the Ẓahīr of Qāḍī Ibn ʿĀṣim for his appointment as Qāḍī. This Ẓahīr is preserved by al-Maqqarī, Nafḥ al-Ṭīb, Vol. VIII, pp. 262-268.

23. ʿInān, Nihāyat al Andalus, op. cit., pp. 426 f.

24. Aḥmad Bābā, Nayl al-Ibtihāj, (Cairo; ʿAbbās b. ʿAbd al-Salām, 1351 A.H.) p.282.

25. Al-Iḥāṭa, op. cit., Vol. I, p.71.

26. Al-Maqqarī, quotes Ibn Saʿīd saying that the inspector of the market, on his mount, passed through the market along with his assistants. A balance was carried by one of his assistants in which the bread was weighed, as its weight and price were fixed. A small child or a charming girl was sent to the market to buy the bread, which was then weighed and inspected. The same process was followed for meat and other merchandise. For details see Nafḥ al-Ṭīb., Vol. I, p.203ff.

27. The rules of Islamic law in this respect were based on the Qurʾānic verses prohibiting usury and speculative transactions. For instance the verse: "O ye who believe! Devour not usury, doubling and quadrupling (the sum lent). Observe your duty to Allāh, that ye may be successful" (3:129), and "O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork, leave it aside in order that ye may succeed." (5:90).

28. See Abū'l Ḥasan ʿAlī b. Yūsuf al-Ḥakīm, Al-Dawḥat al-Mushtabika fī ḍawābiṭ dār al-sikka, Ed. Ḥusayn Mūnis (Madrid, 1960), pp.52-53.

29. For instance see the notice of Qāḍī Ibn ʿAyyāsh in Nubāhi, Al-marqabat al-ʿulyā , op. cit., pp.20-21.

30. This point is explained by R. Levy, The Social Structure of Islam (Cambridge, 1957), p.291-293.

31. Although it is difficult to find specific evidence on the number and quality of these tracts of land, yet, the large number of fatwas requested about ahbas which were attached to mosques and the fuqaha s complaints when these lands were made subject to tax are indicative of the point we are making. For such fatāwā see Wansharīsī, Al-Miʿyār al-Mughrib (Fas, 1314-15 A.H.), Vol. VII, 68ff.

32. Vide Nafḥ al-Ṭīb, Vol. I, p.205.

33. Ibn Khaldūn, Muqaddima, op. cit., p.407f.

34. Shāṭibī, Al-Muwāfaqāt (Cairo: Raḥmāniyẏa, n.d.), Vol. I, p.97.

35. Paul Nwiya, Ibn ʿAbbad de Ronda (Beyrouth, 1961), p.XXVII, mentions ʾĀbilī, Ibn ʿAbd al-Salām and Qarāfī among them who opposed the establishment of madāris. They regarded such institutions as bidʿa.

36. Levi-Provençal, Inscriptions Arabes d'Espagne (Leyde: Brill, 1931), p.158ff, particularly see n.1, where Ibn al-Khaṭib is quoted calling this madrasa as'bikr al-madāris .

37. Nwiya, op. cit.

38. Nafḥ al-Ṭīb, Vol. 1, p.205.

39. Muḥsin Mahdī, Ibn Khaldūn's Philosophy of History, p.35, n.2.

40. See p.109

41. Qāḍī ʿIyāḍ (d. 544 A.H.) and Ibn Ḥirzihim issued a fatwā giving orders to burn Ghazāli's Iḥyā ʿUlūm al-Dīn. See n. 59,60.

42. Nayl, p.261.

43. Iḥsān ʿAbbās, Introduction to Ibn al-Khaṭīb's Al-Katība al-Kāmina, op. cit., p.10f.

44. Nubāhī, op. cit., p.201.

45. Ibid.

46. Ibid., p.202.

47. Nafḥ al-Ṭīb Vol. VII, p.49ff.

48. Among them the following has been edited and studied by Abdelmagid Turki, in his article "Lisān al-Dīn Ibn al-Ḫaṭīb (713-76/1313-74), Juriste d'aprés son oeuvre inédite, Muṭla al-Ṭarīqa fī Ḍamm al-Waṭiqa (Muthalā al-Ṭarīqa fī dhamm al-Wathīqa) Arabica, Vol. XVI (1969), pp.155-211 and 280-311.

49. E. Sharqāwī, Religion and Philosophy in the Thought of Fakhr al-Dīn al-Rāzī (Unpublished thesis, McGill University, 1970), p.285f.

50. Brockelmann: G.A.L. I, p.667 and SI 921.

51. Makhlūf, Shajarat al-Nūr al-Zakiyya, Vol. I (Cairo, 1930-31), pp.167-168.

52. Ibid., p.218.

53. Muḥsin Mahdī, op. cit., p.30, n.3.

54. Ibid., p.35, n.2.

55. P. Nwiya, op. cit., p.XVIII.

56. J. Spencer Trimingham, The Sufi Orders in Islam, (Oxford, 1971), p.46.

57. Brockelmann, G.A.L. SI, p.830.
Margaret Smith, Al Ghazali, The Mystic, (London: Luzac, 1944), in Chapter XIII mentions other critics of al-Ghazālī and omits Ṭurṭūshī whose refutation of Iḥyā is one of the most significant and voluminous contributions towards a criticism of al-Ghazālī. The reason why she omitted this work is probably her statement about the co-operation between al-Ghazāli and al-Ṭurṭūshī. She said, "...al-Ghazālī in consultation with Abū Bakr Ṭurṭūshī, a well-known authority on law and tradition (d.520/1126), addressed letters of advice to Yūsuf (bin Tāshufīn), urging him to govern with justice..." (p.21). She made this statement on the authority of De Slane's translation of Ibn Khaldūn's statement in this connection. The original statement by Ibn Khaldūn, however, as we quote below, does not imply a co-operation between al-Ghazālī and al-Ṭurtūshī. This misunderstanding probably led her to suppose the above-mentioned fact. Ibn Khaldūn's sentences are as follows:

وخاطبه الامام الغزالي والقاضي ابوبكر الطرطوشي بحضانه على العدل والتمسك بالخير

(Kitāb al-ʿIbar, op. cit., Vol. VI, p.386).

De Slane's translation (Histoire des Berbères, Vol. II, (Paris, 1927), p.82 is as follows: "L'imam El-Ghazzali et le cadi Abou Bekr-et-Tertouchi lui addresserent aussi des lettres de conseils et l'engagèment de la manière la plus pressante à gouverner avec justice..."

58. A. M. M. MacKeen, "The Early History of Ṣūfism in the Maghrib prior to Al-Shādhilī (d. 650/1256)" in the Journal of the American Oriental Society, Vol. 91, 1971, P.402.

59. Muḥammad al-Zabīdī al-Murtaḍā, Itḥāf Sādat al-Muttaqīn, commentary on Iḥyāʾ ʿUlūm al-Dīn, (written in 1193 A.H.), (Cairo, 1893), Introduction, Vol. I, p.10.

60. Ibid., p.27.

61. Ambroxio Huici Miranda, "The Iberian Peninsula and Sicily" in The Cambridge History of Islam. Vol. II (Cambridge: Cambridge University Press, 1970), p.427.

62. Arnaldez, "Ibn Rushd", E.I. new edition, p.910, referring to D. B. Macdonald's view on this point.

63. George Marçais, "Note sur les ribâṭs en Berbérie" in "Mélanges René Basset, Vol. II (Paris, 1925), p.399. Particularly, see his article "Ribāṭ" E.I. (1st ed.), Vol. III, pp. 1150-1152.

64. H. A. R. Gibb, Introduction to "Ibn Baṭṭūṭa: Travels in Asia and Africa 1325-1354, (London, 1963), p.34.

65. Ibn Baṭṭūṭa, Tuḥfa al-Nuẓẓār fī Gharā'ib al-Amṣār wa ʿAjā'ib al-Asfār, Vol. II, Ed. ʿAwāmirī Bek and Jād al-Mawlā, (Cairo, 1934), p.294.

66. ʿInān, Nihāya, op. cit., p.449.

67. See for instance Ibn Qabbāb's appointment to supervise a trust donated by the Sulṭān to a Zāwiya, See p. 104.

68. See p.121f.

69. Shihāb al-Dīn al-Qarāfī, Al-Furūq, Vol. IV, (Cairo: Dār Iḥyā Kutub al-ʿArabiya, 1346 A.H.), p.210.

70. See Ch. VI, p. 263ff.

71. S. Trimingham, op. cit., p.50.

72. Maqqarī, Nafḥ al-Ṭīb, Vol. VII, op. cit., pp. 232-249 gives long extracts from this work.

73. Ibid., p.261.

74. Ibid., p.189-90.

75. P. Nwiya, Ibn ʿAbbād de Ronda, op. cit., pp.XXXIX and XLI relates a similar chain from Ibn Qunfudh. He observed certain historical defaults in this chain, and provides a detailed criticism on this point.

76. It is curious to note that in the third patch Ibn al-ʿArabī (Qāḍī Abū Bakr) and Ibn Ḥirzihim are juxtaposed with Ghazālī. Ibn Ḥirzihim, as has been pointed above, is known for his fatwā against Ghazālī's Iḥyā, and Qāḍī Ibn ʿArabī's commentary bears a general trend of opposition to Ṣūfism.

77. Nafḥ al-Ṭīb, Vol. VII, op. cit., p.124-125 quoting from Al-Fatḥ al-Munīr.

78. Shāṭibī's fatwā issued in 786 A.H., preserved by Wansharīsī, op. cit., Vol. XI, p.34.

79. In the Muslim East the practice of celebrating the Prophet's birthday started earlier, but in the Muslim West, according to Salāwī, it was started by the Marīnī ruler, Abū Yūsuf Yaʿqūb in 691 A.H., from whence it came to Andalus, Salāwī, Al-Istiqṣā, op. cit., Vol. 3, p.290. Ibn Khaldūn, op. cit., pp. 864,881 and 885 mentions how on three such occasions poems were recited. These celebrations lasted for a few days. Verses from the Qurʾān were recited, and animal sacrifices were offered. Maqqarī, Azhār al-Riyāḍ, (Cairo, 1939), Vol. I, p.245. Some fuqahāʾ considered this a bidʿa, and opposed it. Shāṭibī, in a fatwā, refused the validity of a will which wished to dispose of one third of the property for the purpose of the Prophet's birthday celebrations. Wansharīsī, op. cit. Vol. IX, p.181.

80. See p. 117.

81. Ibn Baṭṭūṭa, op. cit., p.294.

82. See for the description of this rural town now called Canales in Ibn al-Khaṭīb, Khaṭraṭ al-Ṭayf fī Rihlat al-Shitāʾwaʾl Ṣayf in A. M. ʿAbbādī, Mushāhadāt Lisān al-Dīn Ibn al-Khaṭīb fī Bilād al Maghrib wa al-Andalus (Iskandariya, 1958), p.33 and ʿAbbadī's note no. 4.

83. See Wansharīsī, Vol. IX, p.31.

84. Ibid., pp. 34-36.

NOTES: CHAPTER III

Section Three

1. The best contemporary source of information on the economy and geography of this period, in our opinion, is Ibn al-Khatib's following two treatises: Khaṭraṭ al-Ṭayf wa Riḥlaṭal-Shitā'wa al-Ṣayf and Miᶜyār al-Ikhtibār fī dhikr al-Maᶜāhid wa'l -Diyār edited and published by A. M. ᶜAbbādī, in Mushāhadāt Lisān al-Dīn Ibn al-Khaṭīb, op. cit. The above must be supplemented with the study of fatāwā of this period (i.e. 14th century) by Lopez Oriz, "Fatwas granadianas de los siglos XIV-XV, Al-Andalus, Vol. VII (1941), pp. 73-127.

2. Levi-Provençal, "Al-Andalus", E.I.^{2}, pp.486-492.

3. Quoted in Maqqarī, Naf ḥ al-Ṭīb, Vol. I, p.124, translation Pascual de Gayangos, The History of the Mohammedan Dynasties in Spain, Vol. I (Cairo: 1902), p.17.

4. Ibn al-Khaṭīb, Al-Iḥāṭa, Vol. I, p.32.

5. Imamuddin, A Political History of Spain, p.294.

6. Cf. Seybold, "Granada", in E.I. (1st edition), Vol. II, p.176.

7. Iḥāṭa, op. cit. I, p.38.

8. Ibn Baṭṭūṭa, translation H. A. R. Gibb, Ibn Baṭṭūṭa, Travels in Asia and Africa 1325-1354, (selection), (London, 1963), p.319.

9. ᶜAbdAllāh al-ᶜInan, Nihāyat al-Andalus, p.430. ᶜInān does not indicate his source but probably he derives this information from Prescott, History of Ferdinand and Isabella the Catholic on which he relies for the most part of the data of this period.

10. A detailed description of the reserves of the Naṣrīd treasury are given by ᶜAbdAllah Muḥammad b. al-Ḥaddād al-Wādī Āshī as quoted by Muḥammad Kamāl Shabāna, "Al-Ḥāla al-Iqtiṣādīya bi'l-Andalus Khilāl al-Qarn al-Thāmin al-Hijrī" in Al-Baḥth al-ᶜIlmī, Ribāṭ, Vol. III (August, 1966), p.137. Unfortunately, Shabāna's reference to the original source is not clear.

11. For this information we have relied on Lopez Ortiz's above-mentioned study. See Ibid, pp.95-97.

12. Nafḥ al-Ṭīb, Vol. I, p.202.

13. Lopez Ortiz, op. cit. p.96.

14. Imamuddin, op. cit., p.294.

15. Lopez Ortiz. op. cit., p.95.

16. Antonio Vives, "Indicacion del Valor en las Monedas Arabigo - Espanolas", in D. E. Saavedra. (Ed.) Homenaje a D. Fransisco Codera, Zaragoza, 1904, p.522. Also, see D. F. Codera Y Zaidin, Tratado de Numismatica Arabi-Espanola, (Madrid, 1879), p.231.

17. See H. W. Hazard's analysis of the metrology of the coins of North Africa (which partly includes Spain as well) in The Numismatic History of Late Medieval North Africa, American Numismatics Society, New York, 1952, pp.48-49. Hazard says that the Zirid dīnār was 4.11 - 4.35 grams in weight and 22-24 milimeters in diameter. The Muwaḥḥidūn introduced double dīnārs averaging 4.55 grams and 27-32 milimeters, whereas their normal dīnar averaged 2.27 grams and 19-22 milimeters. The Naṣrid dinar seems to have been better than its predecessors. Two specimens registered in M. H. Lavoix, Catalogue des monnaies musulmanes de la Bibliotheque Nationale, Vol. V (Paris, 1891), pp.328-329, provide the following data:

    1) Catalogue no: 780: Yūsuf b. Muḥammad (1333-1354), gold; weight 4.65 grams, diameter 31 milimeters.

    2) Catalogue no: 781: Muḥammad V al-Ghanī Billāh (1354-1359 - 1362-1391), gold; weight 4.70 grams; diameter 32 milimeters.

18. Luis Seco de Lucena, in Documentos Arabigo-Granadinos, Instituto des Estudios Islamicos, (Madrid: 1961), studied a number of documents of a judicial nature belonging to fifteenth century Granada. In his analysis he found very interesting data bearing on the social and economic conditions of that period. We have derived our information from Lucena's analysis of currency in these documents as given by him in Ibid., pp.XLVI-XLVIII.

19. Most probably Lucena is here referring to Antonio Vives, op. cit., and Fransisco Codera, op. cit.

20. See Lopez Ortiz, op. cit. p.94f.

21. See such statements by early historians and geographers as quoted extensively by Maqqarī, Nafḥ al-Ṭīb, Vol. I, pp.124-194, but particularly pp.136-138, where the description by Razi, the geographer, is quoted at length.

22. "Andalus" E.I.^{2}, p.491.

23. Lopez Ortiz, op. cit., p.97, 106f.

24. Ibid., p.106 ff.

25. Ibid.

26. Ibid., p.109.

27. Ibid., p.103.

28. In the days of Muḥammad V, the irrigation system was further improved. See Imamuddin, op. cit. p.294.

29. On this point we are relying on E. F. Heckscher, "Mercanti lism" in H. W. Spiegel, The Development of Economic Thought (New York: Science Books, 1966), pp.32-41.

30. Lopez Or tiz, op. cit. p.114.

31. Ibid., pp.114 ff. For details see Ch. V, p.231.

32. Ibid., p.110. For details see Ch. V, p.232.

33. Ibn al-Khaṭīb, Al-Iḥāṭa, Vol. I, p.15.

34. Louis Bertrand and Charles Petrie, The History of Spain, trans. W. B. Wells (New York, 1934), p.204.

35. Ibn al-Khaṭīb, Mufākharāt Mālaqa wa Salā, op. cit., pp. 77-90.

36. Nafḥ al-Ṭīb, op. cit., Vol. 1, 154.

37. S. M. Bastieva, "Ibn Khaldūn et son milieu social", Atti del Terzo Congresso, op. cit., p.138.

38. ʿInān, op. cit., p.429.

39. Ibid., p.428.

40. See p. 87.

41. See p. 92.

42. Bastieva, op. cit.

43. Lopez Ortiz, op. cit., p.95.

44. ʿInān, op. cit., p.428.

45. Ibid., p.97.

46. Ibid., p.100.

47. Ibid., p.110.

48. Lopez Ortiz, op. cit., p.101.

49. Ibid., p.98.

50. Ibid., p.94f.

51. Dozy, Supplement aux dictionnaires Arabes, Vol. II (Paris, 1967), p.275.

52. Al-Qurʾān 90: 12-13: "What would make thee know what is an uphill task? The freeing of a slave or captive."

53. Lane, Arabic English Lexicon, (London: 1874), Vol. 6, p.2431.

54. E.N., Van Kleffens, Hispanic Law until the End of the Middle Ages (Edinburgh. 1968), p.105, no.3, refers to the Hispanic legal term "alfaqueques" meaning the administrator of the property of the prisoners of war.

55. L. Bertrand, The History of Spain, op. cit., p.200. This observation is supported by Ibn Buttuta's narration of such an attempt by the notables in Malaga (below note:53). Ibn al-Khaṭīb also praised the people of Malaga for the purchase of freedom of such prisoners. See Miʿyār al-Ikhtibār, op. cit., p.78.

56. Ibn Baṭṭūṭa, Tuḥfat al-Nuẓẓār...op. cit., pp.290-292.

57. See al-Wansharīsī, op. cit., Vol. II, p.127.

58. See above note 54.

59. Lopez Ortiz, op. cit., p.95.

60. Ibid., p.95.

NOTES: CHAPTER III

Section Four

1. See p. 102ff.

2. See p. 211ff.

3. See p. 104.

4. See p. 220. The story of the litigant in case of ḥabs.

5. Shihāb al-Dīn al-Qarāfī, Al-Iḥkām fī tamyīz al-fatāwā ʿan al-Aḥkām. (Ed.) ʿAbd al-Fattāḥ Abū Ghadda. (Ḥalab: Maṭbūʿat Islāmiyya, 1967).

6. Ibid., p. 18.

7. Ibid., p. 20

8. Ibid., pp. 22-23

9. Ibid., p. 32.

10. This conclusion is drawn from the following sources: Lopez Ortiz, Fatawa Granadinas ...op. cit. p. 91; Wansharīsī, Al-Miʿyār... op. cit. Vol. II, p. 166; Vol. V, 186f.

11. See p. 184f.

12. Nayl, p. 265.

13. Shajarat, p. 230.

14. This treatise was studied by Abdelmagid Turki in "Lisān al-Dīn Ibn al-Ḫaṭīb (713-761/1313-74), Juriste d'après son oeuvre inédite: Muṭlā al-Tarīqa..., Arabica, XVI (1969), pp. 155-211; 280-312.

15. Ibid., pp. 280, 284 and passim.

16. E. N. Van Kleffens, Hispanic Law until the end of the Middle Ages, (Edinburgh: University Press, 1968), p. 124.

17. Ibid., p. 154.

18. Ibid., p. 74.

19. Ibid., p. 77.

20. Ibid., p.79.

21. Ibid., p.145.

22. Ibid., p.146.

23. Ibid., p.147.

24. Ibid., pp.176-78.

25. Ibid.

26. Henry Lacerte, The Nature of Canon Law According to Suarez (Ottawa: University of Ottawa Press, 1964), p.3.

27. Ibid., pp.20ff.

CHAPTER IV

SHĀṬIBĪ: HIS LIFE AND WORKS

This chapter attempts to construct a sketch of certain significant events in Shāṭibī's life which, as we shall see, in the absence of sufficient data about his life, are very helpful in an understanding of the reasons for Shāṭibī's interest in the philosophy of Islamic law.

When writing a biography of Shāṭibī, one's attention is drawn first of all to the scarcity of data about his life, although he was one of the most prominent among Mālikī jurists. An answer to the question of why there should be so little information on so important a man is attempted. This is followed by a discussion of the information available about his life, his career, his disputations with other scholars, and his works.

SOURCES

To my knowledge Aḥmad Bābā's[1] (d.1036/1626) Nayl al-Ibtihāj[2] contains the first biographical notice on Shāṭibī.

Among his contemporaries Lisān al-Dīn Ibn al-Khaṭīb (d.776/1374) and Ibn Khaldūn (d.784/1382) wrote at length about Granada and scholars living there in this period. Although it would be a reasonable assumption that both Ibn al-Khaṭīb and Ibn Khaldūn would have known Shāṭibī, he goes unnoticed in their accounts. Ibn al-Khaṭīb and Shāṭibī had common teachers[3] (and one of the sources even describes Ibn al-Khaṭīb as a pupil of Shāṭibī)[4] and common friends.[5] Ibn Khaldūn wrote a treatise,[6] in response to Shāṭibī's query addressed to the scholars in the West. Nevertheless, neither of these important writers makes mention of Shāṭibī.

A possible explanation for this omission might be that Shāṭibī had not yet written his controversial work, al-Muwāfaqāt, when the other two composed their works. This is quite possible because Shāṭibī refers to Ibn al-Khaṭīb's Al-Iḥāṭa in his work (though without mentioning his name).[7] This reference means that Shāṭibī's work must have been written after the completion of Al-Iḥāṭa, as we believe after 771/1369.[8] This fact also explains Ibn Khaldūn's omission of Shāṭibī's name. Ibn Khaldūn visited Granada in 764-65/1362-63[9] while Shāṭibī had not yet become a sufficiently controversial figure to attract notice at that time.

Among the authors of the Ṭabaqāt of the Mālikīs,[10] Ibn Farḥūn (d.799/1396), author of Al-Dībāj al-Mudhahhab was Shāṭibī's contemporary, but did not mention

him. Since it cannot be established whether Ibn Farḥūn was acquainted with Shāṭibī we cannot be certain that this exclusion of Shāṭibī from al-Dībāj was deliberate. One possible explanation could, however, be suggested.

Ibn Farḥūn was born in Medina and, except for a few journeys to the West,[11] he passed most of his life in the East of the Muslim world. His knowledge of the Muslim West, though generally thorough, was based on secondary sources.[12] Besides, he had already completed al-Dībāj in 761 A.H.[13] As was previously suggested, it is most probable that Shāṭibī had not yet written his al-Muwāfaqāt. Otherwise, Ibn Farḥūn could not possibly have overlooked him. The basis of our conjecture is Ibn Farḥūn's insistence on including in his al-Dībāj only the names of those who had been authors of some books.[14]

Badr al-Dīn al-Qarāfī (d. 1008/1599) is known to be the next writer of Ṭabaqāt after Ibn Farḥūn.[15] His Tawshīḥ al-Dibāj[16] is the complement of al-Dībāj. He too does not mention Shāṭibī. His reasons seem to be the same as those we suggested in the case of Ibn Farḥūn. In a number of places, as Aḥmad Bābā points out in strong language,[17] Qarāfī, lacking sufficient knowledge of the West, confuses the names and kunyas of many well-known scholars.

Aḥmad Bābā is not only the first biographer but also an original authority in this respect. Almost all of the later scholars who have taken notice of Shāṭibī belong to the twentieth century, and they depend largely on Aḥmad Bābā's notice.[18] Aḥmad Bābā treats of Shāṭibī in Nayl al-Ibtihāj as well as in Kifāyat al-Muḥtāj[19]

which supplemented the former. Nayl was written during Aḥmad Bābā's internment period in Morocco, where he was taken as a prisoner after the invasion of the Sudan by the Sulṭān of Morocco in 1591. There, Aḥmad Bābā, though he was without his personal collection of sources, was able to use the books in the possession of Moroccan scholars and in the libraries.[20]

The reasons why Aḥmad Bābā mentioned Shāṭibī while his predecessors did not, could be the following:

First, as a general reason, the Nayl was meant to be a supplement to al-Dībāj; "complementing what was missing in it and supplementing it with (the mention of) those eminent a'imma who came after him".[21]

Second, he was certainly better informed about the learned tradition in the Muslim West[22] than Qarāfī or Ibn Farḥūn, and hence he was capable of making up the deficiencies of al-Dībāj.

Third, he felt this deficiency more strongly because for a long time there was no other work on the subject but that of Farḥūn,[23] and this too suffered from grave faults.

Apart from such general considerations, Aḥmad Bābā's high regard for Shāṭibī may be suggested as a specific reason why Aḥmad Bābā mentioned Shāṭibī. This esteem is reflected in the honorific titles with which he mentions Shāṭibī.[24] His regard for Shāṭibī further manifests itself when he disputes Abū Ḥāmid Makkī's claim for his master Ibn ʿArafa (d.803 A.H.)[25] as "being peerless in taḥqīq

(the skill of applying general principles of (Mālikī) school to particular cases)".[26] Aḥmad Bābā mentions Shāṭibī as one example of scholars who were in no way lesser than Ibn ʿArafa.[27] Elsewhere he says,

> "Among the people of the ninth century (sixteenth) there are those who assert their attainment of the status of ijtihād, while Imāmal-Shāṭibī and Ḥafīd Ibn Marzūq (d.842/1438) declined it for themselves. It is certain that both of them had more profound knowledge (of Sharīʿa) and thus (were) more deserving of this status than those who claimed it.[28]

We have dwelt long on the question of why Aḥmad Bābā first took notice of Shāṭibī while others did not. Let us now discuss Aḥmad Bābā's sources for his biography of Shāṭibī.

Beside the sources mentioned towards the end of Nayl, the most significant among them being Wansharīsī,[29] Aḥmad Bābā used Shāṭibī's own work Al-ʾIfādāt wa'l Inshādāt.[30] This work seems to consist of Shāṭibī's class notes and of anecdotes narrated by his teachers. The extracts from this work, as quoted by al-Maqqarī[31] in his Nafḥ al-Ṭīb and by Aḥmad Bābā in Nayl, indicate that the ʾIfādāt must contain considerable information about Shāṭibī's teachers and himself. If that be so, Aḥmad Bābā's information about Shāṭibī may be taken as first hand.

As to our information in the following pages, it is based mainly on Nayl. We have used the extracts of ʾIfādāt as quoted in Nayl and Nafḥ. We have also used Shāṭibī's al-Muwāfaqāt and al-Iʿtiṣām. The preface of al-Iʿtiṣām explains the circumstances that led to Shāṭibī's thought on sharīʿa passing through various stages and how he was accused of "heresy".[32] Al-Muwāfaqāt refers to the discussions[33] in which Shāṭibī became involved with other scholars.

To sum up, we may say that the information which follows has been compiled from Nayl and from Shāṭibī's own works.

SHĀṬIBĪ'S LIFE

His full name is reported as Abū Isḥāq Ibrāhīm b. Mūsā b. Muḥammad al-Lakhmī al-Shāṭibī. We know virtually nothing about his family or his early life. The most that we can learn by deduction from his nisbas, is that he belonged to the Lakhmī Arab tribe. We know also that his immediate family came from Shāṭiba (Xativa or Jativa). This latter nisba has misled some scholars to maintain that Shāṭibī was born or lived in Shāṭiba before coming to Granada.[34] This is not possible because Shāṭiba was taken by the Christians a few decades ago, and, according to the chronicles, the last Muslims were driven out of Shāṭiba in 645/1247.[35]

Shāṭibī grew up in Granada and acquired his entire training in this city which was the capital of the Naṣrī kingdom. Shāṭibī's youth coincided with the reign of Sulṭān Muḥammad V al-Ghanī Billāh, a glorious period for Granada.[36] The city had become a centre of attraction for scholars from all parts of North Africa. It is not necessary to list here all the scholars who visited Granada or who were attached to the Naṣrī court, names such as Ibn Khaldūn and Ibn Khaṭīb being sufficient to illustrate our point.

Training

We do not know when and what subjects Shāṭibī studied for his training. What follows is the account of some of his teachers, from which an idea of his training may be drawn. It appears that, according to normal practice, Shāṭibī started his training with studies in Arabic language, grammar and literature. In these

subjects, he benefited from two masters. He began his studies with Abū ʿAbd Allāh Muḥammad b. ʿAlī al-Fakhkhār al-Bīrī[37] who was known as the master of grammarians (Shaykh al-Nuḥāt) in Andalus. Shāṭibī stayed with him until the latter's death in 754/1353. Shāṭibī's notes about al-Fakhkhār in the Ifādāt illustrate clearly that he received a thorough training in matters pertaining to the Arabic language.[38]

His second teacher in the Arabic language was Abū'l Qāsim al-Sharīf al-Sabtī (760/1358), author of the well-known commentary on the Maqṣūra of Ḥāzim.[39] He was called "The Bearer of the Standard of Rhetoric".[40] He was chief Qāḍī in Granada in 760/1358.

The famous Andalusian faqīh Abū Saʿīd Ibn Lubb began his lectures in the Madrasa Naṣrīya in 754/1353.[41] Most probably he succeeded al-Fakhkhār on the latter's death. Ibn Lubb was well versed in fiqh and was recognized for his "rank of ikhtiyār (decision by preference) in respect to fatwā".[42] Shāṭibī's training in fiqh was almost entirely completed with Ibn Lubb. Shāṭibī owes much to this man, but he also entered into controversy with Ibn Lubb on a number of issues.[43]

We need not recount the names of all of Shāṭibī's teachers;[44] it seems he benefited from all well-known scholars in Granada as well as those who visited Granada on diplomatic missions. Among such scholars mention must be made of Abū ʿAbd Allāh al-Maqqarī[45] who came to Granada in 757/1356 on a diplomatic mission sent by the Marīnī Sulṭān Abū ʿInan.[46] Maqqarī had an eventful career. Sulṭān Abū ʿInān chose him as his chief Qāḍī, but soon Qāḍī Abū ʿAbd Allāh al-Fishtālī succeeded in having him deposed. Maqqarī was sent to Granada from

whence he refused to return to Fez. The Naṣrī Sulṭān arrested him and sent him back. Abū 'l Qāsim al-Sabtī and Abū 'l Barakāt Ibn al-Ḥājj al-Balfīqī, qāḍīs of Granada, followed him to Fez to secure his release. Nevertheless, Maqqarī was tried by al-Fishtālī and was convicted.[47]

Maqqarī's academic tastes were versatile. He is the author of a book on Arabic grammar. He was known as holding the rank of "muḥaqqiq"[48] (expert on the application of general principles of the Mālikī school to particular cases).

Maqqarī seems to have acquainted Shāṭibī with Rāzism in uṣūl al-fiqh. He started to compose an abridgement of Fakhr al-Dīn al-Rāzī's (606/1209) al-Muḥaṣṣal.[49] He is also the author of a commentary on Mukhtaṣar of Ibn Ḥājib who introduced Razism into Mālikī uṣūl al-fiqh.

Maqqarī is also responsible for initiating Shāṭibī into ṣūfism - a special Silsila of which we have spoken elsewhere.[50] Maqqarī is known for his book al-Ḥaqā'iq wa'l-raqā'iq fī al-taṣawwuf.[51]

Mention must also be made of two of Shāṭibī's teachers who introduced him to falsafa and kalām and other sciences which are known in the Islamic classification of the sciences as the rational sciences (al-ʿulūm al-ʿaqlīyya) as opposed to the traditional sciences (al-ʿulūm al-naqlīyya).

Abū ʿAlī Manṣūr al-Zawāwī[52] came to Granada in 753/1352. Ibn al-Khaṭīb praises him highly for his scholarship in traditional as well as rational sciences. He appears to have run into frequent controversy with the jurists in Granada. He was accused of various things. Finally in 765/1363, he was expelled from the Andalus.[53]

Shāṭibī mentions Zawāwī quoting his teacher, Ibn Musfir, saying that in his commentary on the Qur'ān, Rāzī relied on four books, all written by the Muᶜtazilīs; in uṣūl al-dīn Abū'l Ḥusayn's Kitāb al-Dalā'il, in uṣūl al-fiqh his al-Muᶜtamad, in uṣūl al-tafsīr on Qāḍī ᶜAbd al-Jabbār's Kitāb al-Tafsīr(?), in Uṣūl al-ᶜArabīya and bayān on Zamakhsharī's Kashshāf.[54] This comment seems to imply that Zawāwī and his teacher saw in Rāzī a continuation of Muᶜtazilī kalām.

Al-Sharīf al-Tilimsānī (d. 771/1369) also seems to have been critical of Rāzism. He studied with ʾĀbilī and specialized in the rational sciences. Ibn Khaldūn mentions that Tilimsānī secretly taught Ibn ᶜAbd al-Salām the books of Ibn Sīna and Ibn Rushd.[55] Tilimsānī was well-versed in both the traditional and the rational sciences. Contemporary scholars laid stress on his attainment of the rank of Mujtahid.[56] Ibn ᶜArafa lamented Tilimsānī's death as the death of the rational sciences.[57]

From the above account of his notable teachers it may be concluded that Shāṭibī's training must have been quite thorough in both the traditional and the rational sciences. His main interests, however, as we shall see from the list of his works, were concentrated upon the Arabic language and uṣūl al-fiqh, particularly the latter.

Shāṭibī's Interest in Uṣūl al-Fiqh

Fiqh was a very profitable and hence popular subject, but interest in uṣūl al-fiqh was rare in the Andalus.[58] What induced Shāṭibī to interest himself in uṣūl al-fiqh

was his feeling that the weakness of fiqh in meeting the challenge of social change was due largely to its methodological and philosophical inadequacy. This weakness struck Shāṭibī very early in his training years. He says:

> "Ever since the unfolding of my intelligence for understanding (things) and ever since my anxiety was directed towards knowledge, I always looked into its (the sharīʿa's) reasons and legalities; its principles and its branches. As far as the time and my capacity permitted I did not fall short of any science among the sciences, nor did I single one out of the others.
>
> I exploited my natural capacity or rather plunged into this tumultuous sea...so much so that I feared to destroy myself in its depths...until God showed His kindness to me and clarified for me the meanings of Sharīʿa which had been beyond my reckoning...
>
> From here I felt strong enough to walk on the path as long as God made it easier for me. I started with the principles of religion (uṣūl al-dīn) in theory and in practice and the branches, based on these problems. (It was) during this period (that) it became clear to me what were the bidaʿ and what was lawful and what was not. Comparing and collating this with the principles of religion and law (fiqh), I urged myself to accompany the group whom the Prophet had called sawād al-aʿẓam (the majority)." [59]

One of the most perplexing problems for Shāṭibī was the diversity of opinion among scholars on various matters. Use of the principle of murāʿāt al-khilāf made the problem even more complex. This principle, as we shall see below,[60] was employed to honour differences of opinion by treating them all as equally valid. Because of this attitude, diversity of opinions was proudly preserved even from the earliest days of Mālikī fiqh. Shāṭibī himself recalled that the diversity in the statements of Mālik and his companions used to occupy his mind frequently.[61]

Studying with Abū Saʿīd b. Lubb, Shāṭibī faced such perplexities very often. He states:

> "I once visited our master, Abū Saʿīd b. Lubb, the mushāwir, along with my friends...He said, "I wish to inform you about some of the basic principles on which I relied in such and such a fatwā, and (to explain) why I intended for leniency in that". We knew about his fatwā...we disputed with him on his answer...He said, "I want to tell you a useful rule in issuing a fatwā. This rule is authentically known (as practiced) by the scholars. The rule is not to be hard on the one who came asking for a fatwā." Before this meeting various aspects in the statements of Mālik and his companions used to confuse me. But now God cleared my mind with the light of this discourse." [62]

This satisfaction, however, did not last long. His indulgence in the problem of murāʿāt al-khilāf shows that Ibn Lubb's clarification was not satisfactory. Shāṭibī felt that the body of the law was without spirit, its formalism will remain devoid of reality unless the real nature of the legal theory was investigated.[63] Shāṭibī's works were dedicated to such an investigation.

Shāṭibī's Career

We do not find any allusion to Shāṭibī's career or to his profession. Three conjectures, however, can be made. First, in Shāṭibī's account of the accusations brought by people against himself, on one occasion it can be deduced that he was an imām and also a khaṭīb in a certain mosque. During his period of trial, it can be assumed, he was dismissed from these posts.[64]

The second conjecture can be made on the basis of the fatwās asked from him, that he was a muftī. Since he is never called al-mushāwir, it may be assumed that he was not officially appointed to this office.

He, however, had a number of disciples. From this, a third conjecture can be made, that he taught in the madrasa of Gharnāṭa.

Among his disciples, Ibn ʿĀṣim is noteworthy. He became the chief qāḍī of Granada. He is known for his Tuḥfat al-Ḥukkām, a compendium of fiqhī rules compiled for qāḍīs. He also wrote an abridgement of Shāṭibī's al-Muwāfaqāt.[65]

His Death

Shāṭibī died in 790/1388.[66]

Shāṭibī Accused of Heresy

Sometime during his career Shāṭibī was accused of introducing innovations (bidaʿ). The exact date of this period of trial is not known. The inquisitive mind of Shāṭibī led to discussions and controversies with other fuqahā'. Most probably the period of trial occurred during the time he was writing his book al-Muwāfaqāt, when he corresponded with scholars about a number of subjects.

Shāṭibī's verses in reference to this trial indicate how he felt about these accusations. He says:

> O my people you put me to the ordeal (balayta)
> whereas an ordeal shakes violently,
> The one who whirls with it, until it seems to destroy him,
> (You condemn me) to prevent wrong, rather than to attain
> any good (maṣlaḥa).
> May God suffice me in my reason and religion.[67]

Shāṭibī recounts the story of this ordeal in Al-Iʿtiṣām in the following words:

> "I had entered into some of the common professions (khuṭaṭ) such as khuṭāba (preaching) and imāma (leading the prayers). When I decided to straighten my path, I found myself a stranger among the majority of my contemporaries. The custom and practice had dominated their profession; the stains of the additional innovations had covered the original tradition (sunna)....[68]

> I wavered between two choices; one to follow the sunna in opposition to what people had adopted in practice. In that case I would inevitably get what an opponent to the /social/ practices would get, especially when the upholders of this practice claimed that theirs was exclusively the sunna....The other choice was to follow the practice in defiance of the sunna and the pious ancients. That would get me into deviation /from the true path/ ... I decided that I would rather perish while following the sunna to find salvation...
>
> I started acting in accordance with this decision gradually in certain matters. Soon the havoc fell upon me; blame was hurled upon me...I was accused of innovation and heresy." [69]

Shāṭibī, at this point, enumerates the following charges that were laid against him:[70]

> (1) Sometimes I was accused of saying that invocations(duʿā) serve no purpose...that was because I did not adhere to the practice of invocations in congregational form after the ritual prayer (salāṭ) .
>
> (2) I was accused of rafḍ (extreme shīʿism) and of hatred against the companions...that was because I did not adhere to the practice of mentioning the names of the pious Caliphs in the khuṭba (Friday sermon)...
>
> (3) I was accused of saying that I favoured rising against the aʾimma (the ruler)...that was because I did not mention their names in the khuṭba.
>
> (4) I was accused of affirming hardship in religion...that was because I adhered to the well-established tradition in duties and fatwās, while they ignored it and issued fatwās in accordance with what was convenient to the enquirer...
>
> (5) I was accused of enmity against the awliyāʾ of Allāh (friends of God)... that was because I opposed some of the innovating ṣūfīs who opposed sunna...."

Shāṭibī was accused of bidʿa (heresy) mainly because he opposed the practices of the fuqahāʾ. Particularly, as we shall see later,[71] one of the controversial problems was that of mentioning the name of the Sulṭān in the khuṭba and praying for him towards the end of the ritual prayers. Shāṭibī called this practice a bidʿa.

His action shook the foundations of the political power of the religious élite. On this issue, it is interesting to note that he was opposed by all the qāḍīs in Spain and North Africa as well as by some dignitaries holding government offices.[72]

Shāṭibī's account of his trial for bidʿa, refers to the controversies that brought him into conflict with other scholars. What follows are the details of his main disputations. Here we have limited ourselves to theoretical problems.

SHĀṬIBĪ'S DISPUTATIONS

Taṣawwuf and Fiqh

Shāṭibī was much worried not only by the fact that taṣawwuf comprised a number of rituals which he considered as bidaʿ, but also by the fact that taṣawwuf was having an adverse effect upon fiqh and uṣūl. He did not oppose the ṣūfīs on certain matters if they followed their peculiar practices individually or as a requirement of taṣawwuf. What he opposed was that certain ṣūfīs or certain fuqahā' under the influence of taṣawwuf should suggest that these things were obligatory in a fiqhī sense. The following two issues became very prominent in this concern.

1) The obligation of freeing one's inner self (sirr)

A certain scholar sent an epistle to Shāṭibī in which under the rubric, "what is obligatory for a seeker of the Hereafter to observe and do", he wrote the following:

> "If a certain thing distracts someone from his prayers even for a while, he must free his inner self from this distraction by getting rid of it, even if these distractions number as many as fifty thousand." [73]

Shāṭibī objected to this statement strongly. He disputed its obligatory claim. He argued that if freeing the inner self were a universal obligation, it would lead to absurdity because it demands that people should get rid of their property and abjure their towns, villages and families since these things constitute distractions. He adds that poverty is the major source of distraction, especially if people are occupied with the worries of supporting large families.[74]

2) Submission to a Shaykh

With the introduction of ṭarīqas, ṣūfism passed into a new phase. In the previous phase, more significance was attached to books on taṣawwuf.[75] In the new phase, however, as we have pointed out earlier in the story of Abū'l Maʿālī, the initiation without a shaykh was considered forbidden.[76] Such an emphasis on submission to a shaykh generated a debate among the scholars.

According to Shāṭibī submission to a shaykh led to a belief in the superiority of the shaykh to all other religious leaders, even to claim to be equal to Muḥammad.[77] According to some ṣūfīs, including Qushayrī, ṣūfism was nothing more than spiritual fiqh (fiqh al-bāṭin)[78] It was, therefore, questionable for Shāṭibī that one should submit oneself totally to a shaykh to be initiated into a discipline; the discipline could be known from books.

Shāṭibī composed a query in which he summarized the arguments of both parties and sent this to a number of scholars in North Africa. Three of the responses to this query have come down to us. Those of Ibn al-Qabbāb (d. 779/1377) and Ibn ʿAbbād of Ronda (d. 792/1389) were preserved by Wansharīsī in his Al-Miʿyār al-Mughrib. They are reproduced by Paul Nwiya in Al-Rasā'il al-Ṣughrā of Ibn ʿAbbād[79] and commented and elaborated in his well-known work Ibn ʿAbbād de Ronda.[80] The third answer was written by Ibn Khaldūn in the Shifā' al-sā'il li tahdhīb al-masā'il, available in two editions by Ṭavīt Ṭanjī[81] and by Khalifé.[82]

Ibn ʿAbbād maintained that, "on the whole, the (submission to a) shaykh is an essential fact in the journey on the path of taṣawwuf; no one can deny that".[83] He, however, distinguished between two kinds of shaykhs: Shaykh al-Tarbiya (educator) and Shaykh al-Taʿlīm (instructor). The former is not essential for every "traveller", while the latter is necessary for everyone. He also pointed out that reliance on the "educator" shaykh is the approach of the modern (muta'akhkhirīn) ṣūfīs, while the ancients relied on the "instructor" shaykh.[84]

Ibn ʿAbbād stressed that the initiation to the mystic state (ḥāl) exclusively belonged to special individuals. No one could open its doors except those whom God had chosen for that purpose.[85]

3) Invocation after Prayers

The mention of the ruling Sulṭān or Khalīfa as a symbol of legitimacy had long been accepted in practice. Al-Muwaḥḥidūn gave the practice much more significance by making some additions. Especially the Muwaḥḥid Caliph ʿAbd al-Wāḥid al-Rashīd (630-640/1232-1242), fearing the dissensions among various groups of the family and in order to check a general decline of al-Muwaḥḥidūn, re-established Ibn Tūmart's institutions which had been discontinued by such caliphs as al-Manṣūr (580-595/1184-1199) and al-Idrīs Ma'mūn (620-630/1229-1232).[86] One of such institutions was the invocation of the name of the ruling caliph after the prayers in congregational form. This was an innovation, but it gradually became so much

established that opposition to it was considered a political as well as a religious offence, punishable by death.[87]

Contrary to the claim of the other fuqahā' about the consensus on the acceptance of this practice, Shāṭibī argued that it was a bidʿa and that scholars had always expressed their dissent against this practice. When this practice was introduced into Spain in the twelfth century, some of the Mālikī fuqahā', namely Abū ʿAbd Allāh b. Mujāhid (d. 574/1178) and his disciple Abū ʿImrān al-Mīrtalī, opposed it at the risk of their lives.[88]

The practice continued even after the Muwaḥḥidūn, obviously for political reasons. Most probably it was Shāṭibī who publicly opposed this practice by disregarding it whenever he was leading the prayers. This public act of defiance raised havoc for Shāṭibī. The issue became a subject of heated discussion; Shāṭibī, however, did have some followers. From a letter written by Shāṭibī to one of his followers, it appears that an imām who rejected this practice in favour of Shāṭibī's position was deposed from his imāma and was denied all other privileges and was put to trial.[89]

The first two refutations offered against Shāṭibī were the following: one by the Qāḍī of Andalusia, Abū'l Ḥasan al-Nubāhī's Masʾalat al-Duʿā Baʿd al-Ṣalāt,[90] the other by the muftī and mushāwir of Granada and Shāṭibī's teacher Abū Saʿīd ibn Lubb. The book is called Masʾala al-

'Adᶜiyya ithr al-ṣalāt.[91]

Shāṭibī's disciple Abū Yaḥyā ibn ᶜĀṣim (d. 813/1410) then wrote, refuting Ibn Lubb and supporting Shāṭibī.[92] Muḥammad al-Fishtālī, the Qāḍī al-Jamāᶜa in Fez wrote a refutation of Ibn ᶜĀṣim, supporting Ibn Lubb, entitled Kalām fī 'l-duᶜā baᶜd al-ṣalāt ᶜalā al-hay'a al-maᶜhūda.[93] IbnᶜArafa (d. 803/1400), the Qāḍi of Tūnis, also entered into the discussion when he was asked for a fatwā on this issue by someone in Granada.[94]

Shāṭibī considered this practice of duᶜā a bidᶜa, while the other fuqahā' accused him of introducing a bidᶜa by opposing the practice. One result of this discussion was that a rather clear definition of "bidᶜa" emerged in Shāṭibī's discussion of this issue.

Allowance for the Disagreeing Opinion (Murāᶜāt al-Khilāf)

It has been stated earlier that the aspect of disagreement in Māliki fiqh was the problem that struck Shāṭibī's mind early in his career and which continued to perplex him even in later times.[96] He wrote to many scholars and disputed with them on the many facets of this matter. His contemplations of this issue and his discussion about it led him to the conclusion that formed the basis of his doctrine of maqāṣid al-sharīᶜa (the objectives of islamic law). In view of its significance, a detailed discussion of this problem is in order.

Because of various historical reasons which do not concern us here, Mālikī fiqh abounded with disagreement on a number of cases. This was a very perplexing phenomenon for a tradition which upheld the consensus of scholars and the unity of the practice. Consequently scholars were occupied in a perennial discussion on this issue.

Very broadly speaking, in the course of time, during the development of the Mālikī tradition in Spain, four positions were taken on this issue. First, some scholars, foremost among them Ibn ʿAbd al-Barr (d.463/1079), denied the existence of "disagreement" in Mālikī fiqh. This position was taken generally by some other ancient scholars also.[95] It was essentially this position that Shāṭibī came to adopt after lengthy discussion. Shāṭibī's views are discussed towards the end of this section.

Secondly, the position was taken under the influence of the taṣawwuf. Since Ṣūfīs feared that an indulgence in cases where disagreement in opinion existed might lead some astray in seeking for lenient opinions, they regarded it as an obligation to avoid the cases of disagreement. They considered these lenient opinions as instances of rukhṣa (concession) in contrast to ʿazīma (regular) cases which were the only path to be followed by a resolute person.[96]

Shāṭibī traced this trend to the teachings of Qushayrī on the basis of which in a later period upholders of the position had adopted the following formulation: "al-waraʿ bi'l khurūj ʿan al-khilāf" (piety consists in avoiding (the cases of) disagreement).

Under the impact of taṣawwuf, this position had been accepted by a number of fuqahā' as well. Shāṭibī did not question the attitude of ṣūfīs towards rukhṣa as an attitude appropriate to the khawāṣṣ (special, élite) and Arbāb al-Aḥwāl (the people of mystical states), but he did oppose this trend insofar as it meant the

imposition of an impossible obligation for general people. He took this stand because the jurists had gone as far as to consider "wara<" as obligatory for every one.[97]

Shāṭibī wrote to scholars in Spain and North Africa. Among the fatwās in answer to his query, Ibn <Arafa's fatwā is available to us as preserved by Wansharīsī.[98]

In his question, Shāṭibī states that scholars such as Ghazālī, Ibn Rushd and Qarāfī maintained that piety consisted in avoiding "disagreement". The basis of their argument was that the cases disagreed upon, in the details (furū<) of shar< were like mutashābihāt (equivocal statements) which the sayings of the Prophet urged to be avoided. Shāṭibī found it logically impossible to maintain such a position, as the seven points which he used to refute it, show.

Ibn <Arafa's answer, however, can be summarized as follows. He explained that the cases of disagreement were very few and that to avoid them was not only possible but obligatory. The reason was that these cases, being equivocal, had equally forceful arguments in favour and against the issue; such a situation would then be conducive only to an arbitrary decision. Ibn <Arafa insisted that to opt for the less convenient was the result of the fear of severe punishments from Allāh. This fear was the reason why Ibn Ḥazm condemned those who sought for convenience in the sharī<a. Ibn <Abd al-Salām also condemned the trend to choose the more convenient of any two fatwās.[99]

The third position regarding differences of opinion was that held by scholars who

considered the existence of "disagreement" as proof of permissibility. Shāṭibī distinguished "disagreement" from murāʿāt al-khilāf[100] which is discussed below. He stated this position in the following words:

> "Often a fatwā on a certain question recommended abstention (manʿ) (from the matter in question). It was said, "Why do you recommend abstention whereas the problem is disagreed upon?" Thus the disagreement becomes the proof of permissibility simply because it is disagreed upon; neither because of certain evidence in favour of the soundness of the argument for its possibility, nor on the basis of some authority more worthy to be followed than the one who demanded abstention." [101]

The fourth position was that of murāʿāt al-khilāf. This principle not only admitted the existence of disagreement but also stressed the need to give its full consideration, so as to regard both conflicting opinions as valid. Although it was a commonly accepted position, Shāṭibī differed and disputed it with a number of scholars. Among them the names of Ibn Qabbāb, Fishtālī, Ibn ʿArafa and Sharīf al-Tilimsānī are known to us.[102] To help in appreciation of the problem, it is advisable to summarize this discussion.

The main points of the question that Shāṭibī posed to the scholars are the following:

In Granada there arose a problem in which different opinions were attributed to Mālik. According to the uṣūl al-fiqh rules about contradiction as explained below, every one of these different opinions had to be rejected. It was further realized that such disagreement existed in the major part of the Mālikī tradition. If the rules of contradiction were applied, most of the Mālikī tradition would have to be rejected. As a measure of necessity (ḍarūra), Mālikī fuqahāʾ adopted

the principle of murāʿāt al-khilāf, but the application of this principle posed a number of problems.[103]

Shāṭibī illustrated the use of this principle in a number of cases. In a particular case of marriage when scholars disagreed on the validity of the marriage, it was to be considered void. Yet in reference to its effects an allowance was to be made for the opinion that favoured its validity. Hence matters such as inheritance...etc., were to be applied as if the marriage were valid. The problems that this position raised for Shāṭibī were the following:

i) It disregarded the established principle of uṣūl al-fiqh, that the consideration of time could declare one of those opinions as 'later' and hence more reliable.

   Another principle relevant to cases of contradictory opinions was also disregarded. It stated that if two contradictory opinions are attributed to a mujtahid both of them should be suspended until one of the two can be established with certainty.

ii) The Mālikī scholars were not consistent in applying this "allowance" (murāʿāt al-khilāf). In some cases they denied the "allowance", while in other cases they insisted on it. This inconsistency makes the soundness of this principle doubtful. On the other hand, it renders its application arbitrary.

iii) Thirdly, assuming the soundness of this principle, its basis in the Sharīʿa as a principle of fiqh is not known. Apparently this problem refers to the evidence (dalīl). The difference between two statements (qawl) must inevitably be so because they are based on two different evidences which are contradictory to each other in the sense that the opposite of one is the requirement of the other.[104]

Thus murāʿāt al-khilāf would mean granting each one of such statements what is required by the other, entirely or partially.

Sharīf al-Tilimsānī answered the question[105] by refuting Shāṭibī's argument that among two statements of an imām or a mujtahid, the later in time eliminates the earlier. Tilimsānī questioned the consideration of the time factor in such cases. His argument was that this consideration implied the principle of abrogation (naskh) which is applicable only to statements originating from the lawgiver (shāriʿ). He distinguished among shāriʿ, "mujtahid muṭlaq" and "mujtahid fī'l madhhab". Since it was the shāriʿ alone who could institute laws and who could withdraw them, it was, therefore, in his statements alone, that in case of contradiction the later would abrogate the earlier. The Mujtahid, whether "muṭlaq" or "fī al-madhhab," did not make laws but rather sought and decided in favour of one of the evidences. The mujtahid muṭlaq sought evidence in the commands of the sharīʿa; the mujtahid fī madhhab sought evidence in the statements of a mujtahid muṭlaq whom he considered the imām for his madhhab. The differences of opinion in the case of mujtahids was, therefore, based on the difference in choice of evidence. The evidences, which were derived from the sharīʿa, in the instance of each of the opinions could not be invalid. Hence the question of later and earlier, with the effect of one eliminating the other, could not arise in the case of mujtahid.

Although Tilimsānī did not spell out his view yet it can be concluded from his answer that he did not oppose the principle of murāʿāt al-khilāf. If one follows his

argument more closely, one may see that he regarded this principle as necessary. Since all the different opinions of mujtahids are supposed to be based on certain evidences from the shār iʿ by neglecting any of them one would be committing the wrong of rejecting sharʿī evidence.

Tilimsānī's elaboration, however, did not answer Shāṭibī's question. It admitted that the basis of difference lay in the choice of legal evidence, but it did not explain how one could claim the existence of two or more contradictory pieces of evidence in sharīʿa bearing on the same case.

Ibn ʿArafa's answer[106] was longer than others. His answer consisted partly of the arguments already seen in Tilimsānī's answer and partly of whittling down Shāṭibī's use of terms to contradictions.

He explained the principle of murāʿāt al-khilāf from a different perspective. He defined murāʿāt as abiding by the implications of sharīʿa evidence in a given case (madlūl) in such a way as also to abide by the implications of other evidence in another case. In other words, as a matter of fact, the principle of murāʿāt implied abiding by the implications of both evidences in those aspects in which a mujtahid prefers one piece of evidence to another. In this way, he was neglecting neither of them but was rather abiding by the both at the same time.

Abū ʿAbd Allāh al-Fishtālī adopted Ibn ʿAbd al-Salām's view in his answer. In reference to an action which is considered wrong by one mujtahid and is regarded as correct by the opponent, Fishtālī distinguished between two situations, one before

the occurrence of the action and the other after its occurrence. According to him, the prohibition was absolute in the former situation, but once the action had taken place, an allowance must be given to the opponent's opinion for the sake of public convenience.[107]

Ibn al-Qabbāb's answer was very succinct and brief. He regarded murāʿāt al-khilāf as one of the best principles of Mālikī fiqh. He defined it as granting to each one of the two pieces of evidence its value (ḥukm). He, however, distinguished between two situations; one was a case of disagreement where it was inevitable to prefer one opinion over the other. Of this type are the cases of taʿāruḍ (conflict) and tarjīḥ (preponderance). Second was the situation where both evidences led to the same conclusion or in some sense complemented each other. Such an instance was a case of murāʿāt al-khilāf.[108]

Shāṭibī's Views

Shāṭibī was not satisfied with these answers. They were either irrelevant or they tried to explain away the evident meaning. For the most part these answers treated the problem of murāʿāt like that of tarjīḥ. The only answer that pleased Shāṭibī was that of Ibn al-Qabbāb who agreed with him that the problem was really very abstruse.[109]

Shāṭibī contemplated this problem for some time and reached his own conclusions. He came to believe that there was no place for "disagreement" in sharīʿa such as that which constituted the basis of murāʿāt al-khilāf. Hence the principle of murāʿāt was a false problem.

The main conclusion that Shāṭibī reached was the unity of the origins of sharīʿa. He maintained that, "all rules of sharīʿa originate from one statement, even though there may be a diversity of rules."[110]

The basis of this conclusion was the following five points:[111]

(i) A large number of Qurʾānic verses stress the original unity of sharīʿa and, further, they condemn "disagreement".

(ii) If disagreement were permissible, there would be no place for the question of abrogation. The need for abrogation means only that two evidences are so contradictory to one another that one has to be replaced by the other.

(iii) If the existence of disagreement were permitted, it would imply the imposition of an impossible obligation. In other words, to command someone to obey two contradictory orders at the same time is to put him under an impossible obligation.

(iv) The legal theorists (uṣūliyīn) recommend a decision in favour of preponderance of one of the contradictory evidences over the other. This fact implies the non-permissibility of "disagreement".

(v) It would be absurd to maintain that both of the contradictory commands are intended by the lawgiver because one would negate the other.

Apart from the linguistic, geographical and historical causes of "disagreement", there were certain factors in sharīʿa itself that seem to favour disagreement. Among these three factors are worth noting:[112]

First, the existence of mutashābihāt (equivocations) in the Qurʾān. These equivocations make allowance for disagreement of opinions, expressed either in inter-

pretation or in suspension of the judgment. Further, it cannot be denied that mutashābihāt were intended to be equivocal by the Lawgiver. Shāṭibī discussed the problem of mutashābihāt in detail in al-Muwāfaqāt. He maintained that there was no tashābuh in the fundamentals of sharīʿa.[113]

Shāṭibī also disputed the assertion that tashābuh was the intention of the Lawgiver. Dealing with the matter in detail, he distinguished between two intentions (irādāt) of the Lawgiver. One was al-khalqiyya al-qadriyya (creational predestined intention) in which human will had no place.[114] The second was al-ʾamriyya al-tashrīʿiyya (imperative legal intention) in which Divine Will did not impose itself on human will. Shāṭibī argued that mutashābihāt belong to the second category of Divine intention. There, disagreement is not intended by the Lawgiver, because the Qur'ān states that only one of the interpretations is correct. If disagreement were allowed, then every interpretation would have to be regarded as correct.

Second, an analogy is drawn from the sharʿī permission for the exercise of ijtihād (legal reasoning) which, it is maintained, would naturally lead to disagreement. Shāṭibī refuted this argument by referring it back to the problem of tashābuh. He maintained that not every conclusion reached by a mujtahid was correct. Its correctness or error depended on its correspondence with the intention of the Lawgiver which does not favour disagreement.[115]

Third, an analogy was drawn from the existence of the principle of rukhṣa in sharīʿa. This principle, which means to opt for a concession from regular rules in special

cases, allows for the existence of disagreement.

Shāṭibī refuted this argument by stressing that rukhṣa does not mean to opt for one of two equally applicable rules in a case. If it were arbitrary, it would not be allowed in sharīʿa. The principle of rukhṣa is applicable only in those cases where it becomes hard or impossible to abide by the regular rules. Thus, in fact, rukhṣa has to do with two different rules in two different cases, not two different rules in a single case, which is the meaning of disagreement.[116]

To conclude Shāṭibī's arguments, it may be said that he understood khilāf (disagreement) essentially as taʿāruḍ al-ʾadilla (contradiction of evidences) while for others it meant essentially tasāwī al-ʾadilla (equal validity of evidences). Hence, for Shāṭibī khilāf involved the problem of tarjīh al-ʾadilla (preponderance) while for others it involved only the problem of jamʿ (combining) or murāʿāt (making allowance).

Shāṭibī's methodological objection concerned the distinction made by Mālikī scholars between muttafaq ʿalayhi (agreed upon) and mukhtalaf fīhi (disagreed upon). They stressed that in case of the former, consideration could be given only to that evidence on which it was decided to be "agreed". In case of mukhtalaf fīhi, however, the evidence on which the opposing decision was based must also be considered. Shāṭibī viewed the above standpoint as inconsistent. If it were sharʿī evidence which provided the basis of a decision, then why was it to be disregarded if it opposed a muttafaq ʿalayh? Why should a decision be considered as mukhtalaf fīhi when it was based on a sharʿī evidence?

To agree with the upholders of khilāf would mean, for Shāṭibī, to believe in the existence of contradictions or diversity in the principles of sharīʿa. This belief would be a negation of the unity of the origins of sharīʿa.

It was, however, difficult to explain this unity in the presence of an obvious diversity of evidences in the sharīʿa. Shāṭibī, in his investigation of this problem, came to conclude that the unity of sharīʿa could be explained by the unity of the intentions of the Lawgiver. The result of these investigations was his doctrine of maqāṣid al-sharīʿa (the objectives of sharīʿa). This doctrine constitutes the basis of Shāṭibī's legal thought. An elaboration of this doctrine and its theoretical and methodological implications are discussed later.

HIS WORKS

The following is a list of Shāṭibī's works known to us. They belong mainly to two fields; Arabic language and grammar, and jurisprudence.

1. Sharḥ ʿalā al-khulāṣa fī al-naḥw. A commentary on Alfīya by Ibn Mālik, in four parts:

   Mentioned in:

   (i) Al-Maqqarī, Nafḥ al-Ṭīb, Vol.VII, 275; (ii) Kaḥḥāla, Muʿjam al-Muʾallifīn, 1,118, (iii) Sarkīs, Muʿjam Maṭbūʿāt al-ʿArabīya, 1090; (iv) Fihris al-Azharīya, IV, 255; (v) Nayl, 48; (vi) Al-Makhlūf, Shajarat al-Nūr al-Zakīya, 231; (vii) Zirkalī, al-Aʿlām, 1,71.

   Ms. al-Azharīya /1487/ 10806. Beginning:

   اللهم انا نحمدك على ما علمت ، ونشكرك على ما انعمت

   Four volumes containing Parts I, II, III and V, written in old naskh. Copyist's name: ʿUmar b. ʿAbd Allāh al-Manẓarāwī. The completion of the third part by the copyist is dated 868 and the fifth 872 A. H. Each page contains 27 lines: 27 cm.[117]

2. ʿUnwān al-ittifāq fī ʿilm al-ishtiqāq.

   Mentioned in:

   (i) Nayl, 48; (ii) Al-Aʿlām, 1,71; (iii) Shajara, 231; (iv) Kaḥḥāla, Muʿjam, 1,118; (v) Iḍāḥ al-maknūn [Al-Baghdādī, Iḍāḥ al-Maknūn, (Cairo, 1945)], 127.

3. Kitāb uṣūl al-naḥw.

Mentioned in:

(i) Nayl,49; (ii) Al-Aʿlām,1,71; (iii) Shajara,1,231. Shāṭibī mentions both of the above books (i.e. nos. 2 and 3) in his Sharḥ al-Alfīya but Aḥmad Bābā recalls reading elsewhere that Shāṭibī destroyed both of those works in his life-time.[118]

4. Al-Ifādāt wa'l inshādāt / inshā'āt.

Mentioned in:

(i) Nafḥ, VII,187-192,276-301; X,139-140; (ii) Nayl,48; (iii) Sarkīs, Muʿjam, 1090; (iv) Al-Aʿlām,1,71; (v) Kaḥḥāla, Muʿjam,1,119; (vi) Shajara,231; (vii) Nwiya, Ibn ʿAbbād,252. As mentioned earlier, the extracts of this work in Nafḥ and Nayl show that this was Shāṭibī's collection of class notes and discussions.[119] Maqqarī and Aḥmad Bābā, both have used it as a source of information about the scholars whom Shāṭibī mentioned in this work.[120]

5. Kitāb al-Majālis. A commentary on the chapter of sale (buyūʿ) in the Ṣaḥīḥ of al-Bukhārī. Mentioned in: (i) Nayl,48; (ii) Shajara,231; (iii) Sarkīs, Muʿjam, 1090; (iv) Al-Aʿlām,1,71.

6. Al-Muwāfaqāt. The original title being ʿUnwān al-taʿrīf bi asrār al-taklīf. An epitome of this work was done by Qāḍī Abū Bakr b. ʿĀṣim (d.829 A.H.)[121]

Published: (a) First published in 1302/1884 in Tunis by the Tunis government

press, edited by Ṣāliḥ al-Qā'ijī, ʿAlī al-Shanūfī and Aḥmad al-Wartantānī.

(b) Reprint of the first part of the above in Kāzān in 1327/1909 with an introduction in Turkish by Mūsā Jār Allāh.

(c) Third (in fact, the second complete) print in 1341/1923 in Maṭbaʿ Salafiya, Cairo, edited by Muḥammad al-Khiḍr Ḥusayn, the rector of Al-Azhar, and partly by Muḥammad Ḥasanayn al-ʿAdawī, the administrator of the Religious Department, Government of Egypt.

(d) Fourth print in Maṭbaʿ Muṣṭafā Muḥammad (n.d.), edited with extensive notes by Shaykh ʿAbd Allāh Darāz.

(e) Fifth print in Maṭbaʿ Muḥammad ʿAlī, Cairo, in 1969, edited by Muḥammad Muḥiy al-Dīn ʿAbd al-Ḥamīd.

A summary view of its contents is presented in Appendix A.

7. Kitāb al-Iʿtiṣām.

(a) Partly published in Al-Manār, XVII, (1333/1913).[122]

(b) Published in Maṭbaʿ Muṣṭafā Muḥammad, probably in 1915. This edition was edited by Muḥammad Rashīd Riḍā, the editor of Al-Manār. This edition is based on an incomplete Ms. from the library of Shanqīṭī.

(c) The book was briefly reviewed by D. S. Margoliouth in J.R.A.S., 1916, (p.398).

A summary view of its contents is presented in Appendix B.

8. A Medical treatise. Ms. University of Leiden: 139r-140r; CCO 1367; Warn/Or. 331-(3b).

The University of Leiden holds this Ms.[123] The treatise is not mentioned by any major authorities on Shāṭibī. The catalogue, however, attributes this treatise to Shāṭibī and, significantly enough, it describes it as having been written down by his (Shāṭibī's) pupil (?) Ibn al-Khaṭīb.[124]

The probability that Shāṭibī was the author of this treatise is heightened by the following points. Among Shāṭibī's teachers, there is mention of one al-Shaqūrī.[127] We have no further information about him. From other sources we know that a family from Shaqūra was known as a family of physicians. Among them Abū Tamām Ghālib al-Shaqūri and Abū ʿAbdullāh al-Shaqūrī are known as the authors of medical treatises.[126] We also know that Ibn al-Khaṭīb was associated with both of these men. He is also the author of certain medical treatises.[127]

From these facts, it might conceivably be argued that Shāṭibī, having been taught by one of these Shaqūrīs, had an education in medicine and hence could be the author of a medical treatise.

NOTES: CHAPTER IV

1. This is Aḥmad Bābā (d. 1036/1626), the author of Nayl al-Ibtihāj. For details on his life and works see M. Cheneb, "Aḥmed Bābā" in EI, (1st ed.), Vol. I, 191-2; Levi Provençal, "Aḥmad Bābā", EI., (2nd ed.) Vol. I, 279-280; J. O. Hunwick, "Aḥmad Bābā and the Moroccan Invasion of the Sudan (1591), Journal of Historical Society of Nigeria, II (3, 1962), 311-28; same author, "A new source for the biography of Aḥmad Bābā al-Tinbukti (1556-1627)", Bulletin of the School of Oriental and African Studies, XXVII (1964), 568-593; Muḥammad Makhlūf, Shajarat al-Nūr al-Zakiyya (Cairo, 1349 A.H.), Vol. I, 298.

2. Available to us in two editions; in Maghribī script, (Fas: Maṭbaᶜ Jadīda, 1317 A.H.); second edition, printed on the margin of Ibn Farḥūn, Al-Dībāj al-Mudhahhab (Cairo, 1351). (Henceforth the reference Nayl will refer to the latter edition).
The question of Aḥmad Bābā's sources for Nayl has been dealt with by scholars with varied competence. To my knowledge the best review is still that by Cherbonneau which is mainly a re-enumeration of the sources which Aḥmad Bābā himself mentions towards the end of Nayl (p.361).
Cf. the following:
1. E. Fagnan, "Les Ṭabaqāt Malikites" in D. F. Saavedra, Homenaje à D. F. Codera, (Zaragoza, 1904), 110.
2. Cherbonneau, "Lettre a M. Defremery sur Aḥmed Bābā le Tombouctien, Auteur du Tekmilet ed-Dibādj", Journal Asiatique, 5e serie, I (1853), 93-100.

3. Ibn al-Fakhkhār al-Bīrī, Abū ᶜAbd Allāh al-Maqqarī, Abū ᶜAbd Allāh al-Tilimsānī and Abū'l Qāsim al-Sabtī are some of such common teachers. Cf. Maqqarī, Nafḥ al-Ṭīb, (Cairo: Maṭbaᶜa Saᶜāda, 1949), VII, 187 gives an extract from al-Shāṭibī's Ifādāt where al-Shāṭibī mentions Ibn al-Khaṭīb among others who attended with him al-Maqqarī's lectures in 757 A.H.

4. See p. 199.

5. Ibn Zumruk whom Ibn al-Khaṭīb patronized and who later replaced Ibn al-Khaṭīb when the latter defected to Tlemcen, was a close friend of al-Shāṭibī. See Nafḥ al-Ṭīb, X, 139 and F. de la Granja, "Ibn Zamrak", in E.I.(2nd ed.) Vol. III, 972-73.

6. Ibn Khaldūn's Shifā' al-Sā'il li Tahdhīb al-Masā'il, ed. by Muḥammad b. Ṭāvīt al-Ṭanjī (Instāmbul, 1957) was written in response to a query sent to scholars in the west of whom the names of Ibn Qabbāb and Ibn ᶜAbbād are confirmed by Wansharīsī. The attribution of this treatise

to Ibn Khaldūn has been doubted by scholars (see: Ṭalbī, "Ibn Khaldūn", E.I. (2nd edition), Vol. III, p.828. Ṭanjī, the editor of this work, however, argues in detail in favour of such attribution. He is of the opinion that it was Shāṭibī whose taqyīd (query) is referred to in this treatise. See his Introduction, p.ṭ.

7. Shāṭibī Al-Iʿtiṣām, ed. Rashīd Riḍā, (Cairo, 1915), Vol. II, 84, quotes an extract saying "As narrated by one of our contemporary writers" which exactly corresponds with Al-Iḥāṭa, (Cairo, 1319 A.H.), Vol. I, p.75.

8. Various dates have been suggested for the year when Al-Iḥāṭa was completed. For instance Mahdī, Ibn Khaldūn's Philosophy of History (Chicago, 1964), p.35, n.5, suggests 763/1361-62. This date is not possible because (1) Ibn Al-Khaṭīb enumerates among the works of Ibn Khaldūn, already completed, a treatise on logic which he wrote for Sulṭān Muḥammad V of Granada. We know that Ibn Khaldūn's stay in Granada was in 764-65. Hence the date of Al-Iḥāṭa must be after 765/1363. 2) Secondly, Al-Iḥāṭa recounts the events in the year 771/1369 (op.cit. Vol. II, p.58), which places the date of its completion after 771/1369. It is because of the second evidence that we believe that Al-Iḥāṭa must have been finally completed in 771/1369.

9. Nafḥ al-Ṭīb, IV, 195-201.

10. For details on the literature of Mālikī Ṭabaqāt see: E. Fagnan, 'Les Ṭabaqāt Malikites' op.cit. pp.105-113.

11. Nayl, p.30

12. For instance, al-Qabbāb was a well-known jurist in this period, but Ibn Farḥūn derives his information about him from Al-Iḥāṭa (of which probably the fragments were available to him). Al-Qabbāb's commentary on Qawāʿid al-Islām is noticed in the following manner: "someone among my pupils mentions that he (i.e.al-Qabbāb) wrote a commentary on Qawāʿid al-Islam". Al-Dībāj al-Mudhahhab, Op.cit. p.41.

13. The author's note at the end of the book sets the date of its completion in 761 A.H. (Ibid., p.362). There are, however, many entries which mention dates beyond 761 (e.g. pp.83, 330); one of them even mentions the date 803. Fagnan (op.cit., p.110) considers such entries as later interpolations and to him the date of its completion is certainly 761.

14. Al-Dībāj, p.2.

15. See Fagnan, op.cit. p.111.

16. Still in Manuscript form. (Bibliothèque Nationale de Paris No. 4627, aussi No. 4614; Zaitūna, No. 3245) vide Fagnan op.cit. p.111.

17. See for instance Nayl, pp.51, 52, 88.

18. Among these notices we may mention the following:

    Ignaz, Goldziher, Streitschrift des Ġazālī gegen die Baṭinijja - Sekte (Leiden, 1916), pp.32-34, where he discusses Al-Muwāfaqāt.
    D. S. Margoliouth, "Recent Arabic Literature" in J.R.A.S. (London, 1916), pp.397-98, where he reviews al-Iʿtiṣām.
    Among the biographical notices: Brockelmann, Supp. II, 374-75; Muḥammad Makhlūf, Shajarat al-Nūr al-Zakiyya, (Cairo, 1349), p.231; Ismāʿīl Pāshā Baghdādī, Iḍāḥ al-Maknūn, supp. to Kashf al-Ẓunūn (Cairo: Bahiyya, 1945), Vol. II, p.127; Maḥmūd Ḥasan al-Toniki, Muʿjam al-Muṣannifīn, (Beirut, 1344), Vol. IV, p.448-454; ʿAbd al-Mutʿāl al-Saʿīdī, Al-Mujaddidūn fī l-Islām (Cairo, Namūdhajiyya, n.d.), pp.307-12; Fāḍil b. ʿĀshūr, Aʿlām al-Fikr al-Islāmī fī Tārīkh al-Maghrib Al-ʿArabī, (Tunis: Najāḥ, n.d.), pp.70-77; Yūsuf Ilian Sarkīs, Muʿjam al-Maṭbūʿāt al-ʿArabiyyah wa'l Muʿarraba, Vol. I, (Cairo, 1928) p.1090; Khayr al-Dīn Zirkilī, Al-Aʿlām, Vol. I (2nd ed., 1954), p.71; Kaḥḥāla, Muʿjam al-Muʾallifīn (Dimashq, 1957), Vol. I, pp.118-19.

19. The extract of the relevant entry of this work is available to us in Al-Muwāfaqāt, (Tunis edition, 1302), Vol. IV, as an appendix, pp.1-4.

20. Nayl was completed in 1005 A.H. (Fagnan, op. cit.). For details on this invasion and Aḥmad Bābā's life, see the sources mentioned above in n.1.

21. Nayl, p.12.

22. Compare the sources mentioned towards the end of al-Dībāj by Ibn Farḥūn and those mentioned by Aḥmad Bābā for his Nayl. Aḥmad Bābā's sources mostly relate to the Muslim West, while Al-Iḥāṭa is the only source related to the Muslim West, which is mentioned by Ibn Farḥūn.

23. Nayl, p.16.

24. Nayl, p.46.

25. A well-known and influential scholar in Tunis in Shāṭibī's time. He was imām of Zaytūna mosque for 50 years. He was the foremost among Ibn Khaldūn's rivals when the latter was staying in Tunis. He had correspondence and discussions with Shāṭibī on the question of murāʿāt al-Khilāf. See Ibn Maryam, Al-Bustān fī Dhikr al-Awliyā' wal-ʿUlamā' bi Ti limsān, Ed. Muḥammad b. Cheneb (Algiers, 1326 A.H.), pp.194-195.

26. Nayl, p.277.

27. Ibid.

28. Ibid., p.217.

29. Abū'l ʿAbbās Aḥmad al-Wansharīsī (d. 914/1506), Al- Miʿyār al-Mughrib wa'l Jāmiʿ al-Muʿarrab ʿan Fatāwā ʿUlamā' Ifrīqiya wa'l Andalus wa'l Maghrib, (Fās, 1314 A.H.)

30. See Nayl, pp.69, 283, 346.

31. Maqqarī supplies lengthy extracts from Al-Ifādāt in Nafḥ Vol. VII, pp.187-192 (regarding Abū ʿAbd Allāh al-Maqqarī); pp.276-301 (about Ibn al-Fakhkhār al-Bīrī), and Vol. X, pp.139-40 (about Ibn Zumruk).

32. Al-Iʿtiṣām, op.cit. pp.9-12.

33. Al-Muwāfaqāt, Vol. IV, pp. 150f.

34. I. Goldziher, Streitschrift des Ġazālī gegen die Baṭinijja-sekte (Leiden, 1916), p.32, said that Shāṭibī "dem aus Xativa stammenden, später in Granada lebenden". The same mistake was carried out by Brockelmann, G.A.L.S. II, p.374; "aus Xativa, gest in Granada". Asin Palacios was also misled by the nisba, as he stated that Shāṭibī lived in Shāṭiba, see Asin Palacios transl. by M.L. de Céligny. "Un Précurseur Hispano-Musulman de Saint Jean de la Croix". Etude Carmélitaines, 1932, p.121-22, vide P.Nwiya Ibn ʿAbbād, op.cit. p.173, n.2.

35. Levi-Provençal, "Shāṭiba", E.I. (1st ed.) Vol. IV, p.337.

36. See p. 86ff.

37. See above note no. 3 and Nafḥ al-Ṭīb, op.cit., Vol. VII, p.275; Shajara op.cit., Vol. I, p.228.

38. Nafḥ al-Ṭīb, Vol. VII, pp.276-278; 297-301.

39. Kaḥḥāla, Muʿjam, op.cit. Vol. VIII, p.252.

40. Shajara op.cit. Vol. I, p.233.

41. Nayl, p.219.

42. Shajara, p.230.

43. See pp.182, 222ff.

44. Nayl, p.47.

45. Nafḥ al-Ṭīb, Vol. VII, p.134.

46. Al-Iḥāṭa, Vol. II, p.139.

47. Nayl, p.250

48. Shajara, p.232.

49. Nafḥ al-Ṭīb, Vol. VII, p.206.

50. See p. 117f.

51. Nafḥ al-Ṭīb, Vol. VII, p.232-249.

52. Nayl, op.cit. p.245, 346; Shajara, I, p.234. Zawāwī was alive until 770 A.H.

53. Nayl, p.346.

54. This extract from Shāṭibī's al-Ifādāt is quoted by Aḥmad Bābā in Nayl, p.346 and by P. Nwiya, in Ibn ʿAbbād de Ronda, p.XXXIX, No. 2.

55. Muḥsin Mahdī, op.cit. p.35, n.2; Nayl, p.256.

56. Nayl, p.256.

57. Nayl, p.258.

58. The lack of interest in uṣūl al-fiqh is observed by Ibn Saʿīd as quoted by Maqqarī in Nafḥ al-Ṭīb, Vol. I, p.206.

59. Al-Iʿtiṣām, op. cit. Vol. I, p.9.

60. See p. 184ff.

61. Nayl, p.221.

62. Ibid.

63. Al-Muwāfaqāt, Vol. I, op.cit., p.22.

64. Shāṭibī, in a letter to his friend, implies that dismissal from the office of imām or Khaṭīb of a mosque was common after one had opposed bidᶜa practices. See Wansharīsī, Miᶜyār al-Mughrib, Vol. XI, p.109.

65. Leon Bercher, (ed. Transl. and Comments on) Ibn ᶜÂçim al-Mâlikî al-Gharnâṭî, Al-ᶜÂçimiyya ou Tuh'fat al-hukkâm fi nukat al-ᶜuqoûd wa'l ah'kam, (Alger, 1958), Introduction, p.III.

66. Nayl, op.cit. p.49.

67. Ibid.

68. Al-Iᶜtiṣām, op.cit. p.9f.

69. Ibid., p.11.

70. Ibid., p.11 ff.

71. See p. 182ff.

72. See p. 183ff.

73. Al-Muwāfaqāt, Vol. I, p.102.

74. Ibid., 1.103.

75. Ibn Khaldūn, Shifā'al-Sā'il, op.cit., describes the controversy between those who attached significance to books and those who favoured the necessity of Shaykh, in the form of an interesting dialogue. See pp.79-85.

76. See p. 118f.

77. Al-Iᶜtiṣām, op.cit., p.208.

78. Ibn Khaldūn, Shifā'al-Sā'il, op.cit., p.11.

79. P. Nwiya (Ed.), Aṗ-Rasā'il as-Sugrā, (Beiruth: Imprimerie Catholique, 1958), pp.106-115, and Appendice C pp.125-138.

80. P. Nwiya, Ibn ᶜAbbād de Ronda, (Beiruth: Imprimerie Catholique, 1956), pp.209-13.

81. Ṭāvīt Ṭanjī. op.cit. Our references to Shifā' are based on this edition.

82. P. Khalifé. (ed.) Ibn Khaldūn, Šifā as-Sā'il litahzīb al-masā'il (Beyrouth, 1958).

83. Ibn ᶜAbbād, Ar-Rasāīl as-Ṣugrā (ed. P.Nwiya) op.cit., p.106.

84. Ibid., p.107.

85. Ibid., p.109.

86. A. Bel, "ᶜAbd al-Wāḥid al-Rashīd", E.I. (1st ed.) Vol. I, p.66.

87. Al-Iᶜtiṣām, op.cit., Vol. II, p.237.

88. Ibid., pp.237-8.

89. Al-Wansharīsī, Al-Miᶜyār, Vol. XI, p.109.

90. Lévi-Provençal, introduction to Al-Nubāhī, Al-Marqabat al-ᶜulyā, p.ṭ.

91. Shajara, op.cit. p.231.

92. Ibid., p.247

93. Nayl, op.cit. p.266.

94. Wansharīsī, Al-Miᶜyār, Vol. VI, pp.258ff.

95. Al-Muwāfaqāt, op.cit. Vol. IV, p.151.

96. Ibid., pp.144-45. Ṣūfīs views on rukhṣa are discussed in Al-Iᶜtiṣām, Vol. I, p.169.

97. Al-Muwāfaqāt, op.cit. Vol. I, p.104.

98. Al-Miᶜyār, op.cit. Vol. VI, p.254-270.

99. Ibid., p.267.

100. Al-Muwāfaqāt, Vol. IV, p.141.

101. Ibid.

102. Al-Miᶜyār, op.cit. pp.254-280.

103. Ibid., p.254.

104. Ibid.

105. Ibid. and Nayl op cit., p.262.

106. Al-Miʿyār, op.cit., p.261ff.

107. Ibid., p.274.

108. Ibid.

109. Ibid., p.271.

110. Al-Muwāfaqāt, Vol. IV, p.118.

111. Ibid., pp.118-132.

112. Ibid., pp.211-214.

113. Ibid., Vol. III, p.96.

114. Ibid., Vol. III, p.119ff.

115. Ibid., Vol. IV, p.127.

116. Ibid., p.144ff.

117. Fihris Maktaba Al-Azhariya, V (Cairo, 1946), p.255; also see ʿAbd al-Ḥafīẓ Manṣūr, Fihris Makhṭūṭāt al-Maktaba al-Aḥmadiyya bi Tūnis, (Beyrut: Dār al-Faṭḥ, 1969), pp.316-319.

118. Nayl, op.cit., p.49.

119. See above. Recently P. Nwiya (Ibn ʿAbbād de Ronda, (Beyrouth, 1956), pp. XXXIX, 252), has consulted this Ms. in Morocco. The present writer has, however, failed to locate it.

120. See above notes 31, 54.

121. Shajara, I, p.247.

122. These extracts from al-Iʿtiṣām were mistaken for extracts from Al-Muwāfaqāt by I. Goldziher, and the same mistake was carried on in Brockelmann.

123. Voorhoeve, Handlist of Arabic Manuscripts, (Library of University Leiden), (Lugduni: Batavorum, 1957), p.438.

124. Ibid.

125. Nayl, p.47.

126. See Renaud, "Un médecin du royaume de Granade: Muḥammad as-ṣaqūrī," Hesperis Vol. XXXIII (1946), pp.31-64.

127. Renaud, "Deux ouvrages perdus d'Ibn al-Ḫaṭīb: Identifiés dans des manuscrits de Fès - Conclusion sur Ibn Al-Ḫaṭīb médecin", Hesperis, XXXIII (1946), pp.213-225. Also Nayl, pp.264-265.

CHAPTER V

SOCIAL CHANGES AND LEGAL THEORY

In Chapter III we discussed in general the political, social, religious, economic and legal developments in fourteenth-century Granadian society. In the course of that discussion we indicated how the society was undergoing some significant changes. The spread of ṣūfī ṭarīqas, the influence of Razism, and the establishment of a madrasa system were particularly important contributions to the decline of the supremacy of the fuqahā'. More significant were the economic changes caused by new developments in Mediterranean trade that geared the Andalusian economy to a type of mercantilism. These changes were immediately felt in the domain of Islamic law. The existing legal system was not prepared to accommodate these new circumstances.

In a number of situations, the new practices apparently came into conflict with the teachings of Islamic law. Perplexed, the people asked the jurists to solve the resultant problems. The jurists, in their responsa (fatāwā) made an attempt to reconcile the new practices with Islamic law or to reject them.

This chapter studies a segment of these answers with the following questions in mind:

a) What subject matters in Islamic law were affected by these social changes and to what extent?

b) In which subject matters did the jurists adopt the social changes?

c) To what extent were these social changes related to the social conditions discussed in the preceding chapters?

d) How did the legal theory respond to these social changes? What methods were used to adopt or reject these changes?

For the purpose of this chapter we have limited our study to the fatāwā of one jurist - Abū Isḥāq al-Shāṭibī. This study is, therefore, based on Shāṭibī's fatāwā which are available in the following sources:

1) Al-Wansharīsī, Al-Miʿyār al-Mughrib...., 12 volumes.[1]

2) Lopez Ortiz, "Fatawa Granadinas...."[2] In this study, in addition to the above-mentioned al-Miʿyār, Lopez Ortiz used another collection of fatāwā that still exists in manuscript form.[3]

3) Certain references to Shāṭibī's fatāwā in the following: Al-Muwāfaqāt, Al-Iʿtiṣām, Nayl al-Ibtihāj.

The total number of fatāwā studied in this chapter is 40 and they may be distributed in these categories:

i) Exegesis: 1
ii) Theological matters: 2
iii) Ritual and worship: 12; cleanliness, rituals, prayers
iv) Family: 5; divorce, inheritance
v) Property: 5; objects of property, waqf
vi) Taxes: 3; zakāt, kharāj
vii) Contract: 11; sale, hire and lease, society
viii) Procedure: 1; witness

i) Exegesis

Responding to a request, Shāṭibī explains in this fatwā the meaning of an ḥadīth qudsī[4], in which God is quoted showing His affection and closeness by becoming the ears, hands and feet of a person who endeavours to approach Him. Shāṭibī finds that this ḥadīth implies anthropomorphism, but without denying the authenticity of the ḥadīth, he explains how the

apparent anthropomorphic implications can be removed by the method of ta'wīl (interpretation).

Strictly speaking, "exegesis" is not a fiqhī subject matter; the fiqh books generally do not include discussions on this subject. Yet exegesis often finds a place in fatāwā. Such questions, however, arise out of certain problems which are indirectly related to practices which may come into conflict with the teachings of Islamic law. The response in question was most probably prompted by the spread of ṣūfism in the Andalus.

ii) Theological matters

Again, discussions about theology are not one of the subjects treated in fiqh books, yet it is a very common subject in fatāwā. It may also be argued that since a larger part of the provisions of Islamic law are applicable only to Muslims, the question of "who is a Muslim", even though a theological question, is quite relevant to fiqh.

In addition to the above, Shāṭibī's two fatāwā reveal another aspect of the relevance of dogma to fiqh. A dogma may sometimes impose restrictions on certain acts.

Shāṭibī was asked about a ṣūfī who interpreted Qurʾānic terms to his own advantage, claiming that commands about worship were metaphoric. The ṣūfī also insisted that direct knowledge of God was possible and that books did not provide true knowledge.

Shāṭibī in very clear terms declared that the ṣūfī was a kāfir, and that he must be sentenced to death (wājib al-qatl). This "ṣūfī" rejected and ridiculed the "sharīʿa" and its transmission and mocked the names of God.[6]

This fatwā appears to disagree with Shāṭibī's view on heresy. As Fazlur Rahman has pointed out, Shāṭibī categorically states that "it is not possible to locate absolutely the capital errors of these sects so that they may be stigmatized as kuffār."[7] Shāṭibī is quite clear, Rahman observes further, that erroneous beliefs and practices can and must be exposed but that it is impossible to locate absolutely the holders of these practices."[8]

The above-cited view of Shāṭibī does not correspond with his absolute belief in the kufr of an individual ṣūfī or in the unacceptability of the practices mentioned in the fatwā. We do not, however, here face a contradiction. Rahman's observations are derived from a certain context where Shāṭibī is discussing a problem of heresiology.[9] Is it possible to define firqa nājiya (the saved sect), the sect which is on the right path to the exclusion of others? Shāṭibī, there, is dealing with the impossibility of such a definition. This stand, however, does not mean that the beliefs and practices implying kufr cannot at all be located; Shāṭibī's stress is rather on the impossibility of locating the one sect with the absolute truth.

The other fatwā related to this subject matter concerned the wax industry. For their Christian customers the Muslim artisans manufactured wax candles resembling hands in prayer. This resemblance apparently violated the teachings of Islam about strict monotheism that forbade any representation of the human figure in sculpture or paintings, since such an attempt would resemble God's act of creation. Shāṭibī dismissed the objection and declared this industry lawful. Quoting earlier Mālikī jurists, Shāṭibī argued that what is forbidden is the representation of the complete figure; a figure without its head in particular had been previously permitted in Mālikī fiqh.[10]

iii) Rituals and worship

A number of new practices, mostly under the influence of ṣūfism, had been introduced in this domain. These new practices were considered ʿibādāt. In his response to the inquiry about these practices, Shāṭibī condemned them on two grounds: first, that they were bidʿa (innovations) and second, that they imposed certain practices as religious obligations, whereas the act of imposing such an obligation belongs only to God. The practices condemned by Shāṭibī in this regard included the following:

a) Reciting in congregation the Qurʾānic chapter Yāsīn on the occasion of bathing the deceased in preparation for burial.[11]

b) The practice of the group of people called ṣūfiyya who assembled in some zāwiya, performing dhikr (chanting the names of God or some such formula), singing and reciting poetry.[12]

c) Congregational recital of the Ḥizb[13] (certain prayer formulas).[14]

d) Recital of certain books in congregation in the mosques.[15]

e) The congregational invocations after the regular prayers (ṣalāt).[16]

f) The practice of insisting on the completion of the recital of the Qurān in the month of Ramaḍān.[17]

g) Saying loudly the takbīrs (the formulae declaring the Greatness of God) on the eve of ʿĪd prayers.[18]

h) Shaking hands and embracing each other after the ʿĪd prayers.[19]

i) Adding certain sentences in the ʾadhān (call to prayer).[20] In Al-Iʿtiṣām, Shāṭibī refers to the practice of adding the following in the call for morning prayers: "The day dawned, praise be to God".[21]

j) Taṣbīḥ al-Ghabīr: it had become the practice of the people after the burial of the deceased, to gather for seven days and recite the Qurān loudly in congregation. Shāṭibī considered the custom equivalent to maʾtam (mourning) which was forbidden in Mālikī fiqh.[22]

Whereas the above ten responses emphatically rejected the common religious practices as bidʿa, there were two customs in regard to which Shāṭibī showed flexibility. In Mālikī fiqh uncleanliness (najāsa) is a legal qualification (ṣifa ḥukmiyya) in opposition to sensory (ḥissiyya) or rational (ʿaqliyya) qualification.[23] Cleanliness (ṭahāra) can be determined only on legal bases. Khamr (wine) and mayta (a corpse) are unclean according to the Qurʾān.[24] Accordingly if either of these two

happens to fall into something, they make that thing unclean, and that uncleanliness cannot be removed by sensory or rational methods.

Two such situations arose, and were referred to Shāṭibī for an opinion. In one case a piece of earthenware was made unclean by khamr;[25] the other case concerned some unclean thing (in another similar fatwā this "unclean thing" was ink made unclean by the dead body of a mouse in it)[26] fallen on the Qur'ān. Other muftīs declared these things unclean and their usage not permissible; the earthenware to be disposed of and the Book to be buried.[27]

Shāṭibī, however, had a different solution. In the case of the earthenware, he held that if it were enameled, it could be cleaned with water in an ordinary manner. Otherwise, it should be washed thoroughly with hot water. If hot water is not available, then it might be washed with cold water but allowed to soak for a while. Its cleanliness would then be decided by ascertaining that water standing in it does not change its colour, flavour or smell.[28]

In the case of books, Shāṭibī advised that if water would not harm or efface the writing, the books should be cleaned with water; otherwise the uncleanliness should be removed as much as possible by other means and the book allowed to stay as it was.[29]

iv) Family

Someone repudiated his wife with the regular expression of the formula of divorce, and after some time he also pronounced ẓihār (another form of repudiation by expressing the formula: "You are for me as the back of my mother"). Afterwards, however, he neither expressed repudiation nor revoked it. Shāṭibī was asked about this case; whether the divorce had occurred or not. Treating ṭalāq and ẓihār as two distinct acts, Shāṭibī advised that in the Mālikī school one declaration of repudiation was revokable (raj<ī) and not definite (bā'in). Hence, in this case, since the declaration of repudiation was not repeated, the marriage was not yet dissolved. If the man still wanted to resolve the marriage, the dissolution was possible only after paying the kaffāra (penalty) for ẓihār.[30]

The other three cases under this category concerned inheritance. Whereas the above case of divorce does not appear to have emerged from the changing conditions of the society, the following three were quite possibly related to these changes.

A certain Muslim committed apostacy. Soon after, his father died. Since in Mālikī law an apostate is not entitled to inherit from his Muslim father, this person immediately reconverted to Islam. Shāṭibī denied the son the right of inheritance on the following ground: First the cause of the transfer of the deceased person's property to the other inheritors was the "death

of the owner", not the "disposal of the property", hence the right of inheritance belongs to whoever was rightful heir at the time of death. If the other heirs wished, they might give the son some part of the inheritance as a gift; or alternatively he could be granted assistance from Bayt al-Māl.[31]

An opposite opinion in favour of the son was possible but Shāṭibī insisted that the common practice of the Mālikī school be adhered to. It appears that a strict attitude was adopted to discourage apostacy, the growth of which is conceivable under changing circumstances.

In another case of inheritance, the wife of a cloth merchant, on the death of her husband, withheld a certain amount of clothing. The heirs claimed that this clothing was part of the inheritance. The wife claimed that her husband gave the clothing to her as gifts, but she could not produce any witnesses. Shāṭibī advised that in such a case, where there was a possibility that the clothing was part of the merchandise belonging to the deceased husband, the wife's statement could not be accepted without witness. Nevertheless the heirs should be asked to declare under oath that they did not know whether the deceased had made such gifts.

Shāṭibī, however, explained that there would be no dispute if the clothing belonged among the household articles or had already been in use by the wife.[32]

Shāṭibī took a similar stand in another case of inheritance, where the wife claimed that the house in which she and her husband had lived had been given to her by her husband as a marriage gift (shawār).[33]

v) Property

a) Objects of property: As referred to earlier[34], some of the cultivated land around Granada along the river Manṣūra (?) was quite steep. For the purpose of irrigation small dams had to be built and the users had to take turns using the waters. These turns were strictly determined and were often passed on to the heirs as transferable rights. At times, however, some heirs either gave up cultivation or allowed their land to become barren, so that they had no use for the water. They, therefore, began to sell their portion of water to the actual users.

A dispute arose out of such a situation, and Shāṭibī was asked about it. He emphatically declared that the water was not an object of property, and that its use could not be owned by any person. He, however, distinguished between two kinds of water; such water as is in rivers and in desert ponds was not the object of property, while those waters which were either purchased with or belonged to a land, which itself was private property could become the object of property. Yet no right of ownership could be claimed on the waters of rivers by virtue of the building of dams.[35]

b) Ḥabs: The question on this subject was most probably asked by Abū ʿAbd Allāh al-Ḥaffār, who was appointed as supervisor of awqāf.[36] Someone willed that one third of his estate be demarcated as waqf (trust), for the purpose of celebrating the birthday of the Prophet.

Shāṭibī, in his response to the inquiry about this will, resolved that such a will was unlawful and hence could not be executed. The reason for its unlawfulness, according to Shāṭibī, was that the celebration of the Prophet's birthday was an innovation and hence unlawful.[37]

The other two responses relating to waqfs indicate the confusion in the practice of waqf as well as the juridical strictness in abiding by the rules of waqf.

For the maintenance of mosques certain aḥbās (trust properties) were attached to them. The officer in charge of these aḥbās decided to rearrange the distribution of the income among various mosques, so that the income of some of the mosques be increased. Shāṭibī was consulted; he explained that the income of the mosques could be increased either from bayt al-māl or from aḥbās. Whereas there were some restrictions in the case of aḥbās, there was nothing against such an increase from bayt al-māl. This view is based on the distinction between the opposing motives of bayt al-māl and ḥabs; whereas the essence of the latter is taʿyīn (specification), the basis of the former

is ʿadam taʿyīn (non-specification). Because of taʿyīn, the increase from aḥbās would become problematic. Re-arrangement of the distribution of trust income was not possible if it was definitely known that the trust was specified for a certain mosque or a certain purpose. It would be possible only if it were known that a certain number of aḥbās were specified for mosques but that the mosques were not specified individually. Shāṭibī, however, explained that, formerly, these aḥbās had been specified, but later, due to negligence, or because they were considered analogous to bayt al-māl, these specifications became confused. Then the share of each mosque was decided at the discretion of the officer in charge. In fact, it was not permissible to combine various trusts in order to increase the income of mosques.[38]

Shāṭibī took a similar view in another case of aḥbās. Someone bought the trees on a tract of land that was adjacent to a ḥabs property. A doubt passed through his mind that this tract of land might be the anqāḍ (the demolished and unused part of an estate) of that ḥabs. In Māliki fiqh, the act of sale of a ḥabs property is legally void and if this act were knowingly committed, it was punishable by the court.[39] Yet it was a common practice in the Andalus to sell the anqāḍ of a ḥabs and, after the ḥabs and milk (ordinary property) were confused or joined deliberately, to share the income of such a sale. The person concerned asked Shāṭibī what to do.

Shāṭibī replied that the practice of combining ḥabs and milk is like mixing ḥalāl (lawful) and ḥarām (forbidden). As for the sale of anqāḍ the legal view was not as categorical as on ḥabs itself. The Mālikī scholars had different opinions. Yet Shāṭibī explained that this difference of opinion, in fact, emerged from the different bases of analogy. Ibn Mawwāz made the anqāḍ analogous to 'arāḍī sulṭān or 'arāḍī bayt al-māl (crown land) and therefore, permitted flexibility in the sale and long-term lease of anqāḍ. Shāṭibī differed on this point on the basis of his distinction between bayt al-māl and ḥabs.

He advised the person in question to go to the court for the cancellation of the sale contract; otherwise, he should appeal to the Sulṭān. This person accordingly appealed to the Sulṭān after securing fatāwā from ʿAbd Allāh Ibn al-Ḥaffār and Ibn ʿAllāq which were endorsed by Shāṭibī. The Sulṭān accepted the opinion of the muftīs and referred the case to the qāḍī concerned. Despite the Sulṭān's orders, the upholders of the practice prevailed upon the qāḍī. They shouted and condemned the plaintiff for opposing the practice. The qāḍī, for fear of disturbances, gave a verdict in favour of continuing the practice.[40]

vi) Taxes

In the three fatāwā pertaining to taxes, Shāṭibī departed from the traditional viewpoint. In fact, Lopez Ortiz interpreted this departure as

"the skill of an economist from the fiscal point of view".[41] Two of these fatawa concerned kharāj and one was about zakāt.

In view of the deteriorating financial conditions, the Sulṭān levied a few additional taxes. One of these new sources of revenue was a tax levied on the building of walls in or around Granada. The muftī of Granada, Ibn Lubb, declared such taxes unlawful, because they were not provided for in sharī<a.

Shāṭibī disagreed with Ibn Lubb. He viewed taxation from the point of view of maṣlaḥa (public weal). His idea was, and he quoted Ghazālī and Ibn al-Farrā' in his support, that the safeguarding of public interests was essentially the responsibility of the community. In situations when they could no longer carry out this responsibility, the community transfer it to the public treasury and contribute from their wealth for this purpose. With this aim in view, the public treasury is in constant need of such contributions. Especially in circumstances similar to those found in Shāṭibī's period, when the treasury had to pay a heavy tribute to the enemy, the levying of new taxes was quite in order.[42]

Shāṭibī applied this criterion even to zakāt. According to al-Mudawwana al-Kubrā, zakāt on merchandise for sale could be levied only after the merchandise was sold and after one year had passed; it was to be levied on the price earned from the merchandise.[43] Accordingly

the artisans did not pay any zakāt on their products, because, first, only a few of these products would be sold immediately and the rest would remain as potential money not yet taxable. Second, the condition of allowing one year to pass would be hard to meet if the investment in these products was an on-going process.

Shāṭibī viewed this practice in the light of the changing economic conditions, which gave these artisans ample opportunity for production and yet allowed them to avoid zakāt. Shāṭibī, therefore, opined that the products of the artisans should be taxed, as they were potentially sold merchandise.[44]

vii) Contracts and Obligations

One very conspicuous impact of the changing economic conditions can be seen in the area of contracts and obligations. The demand for raw materials in foreign markets generated extensive trade activities within Spain and with neighboring principalities. On the other hand, these trade demands were confronted with the rising number of the population and the scarcity of resources within Andalus. It was quite understandable that such a situation necessitated the freedom of contracts to meet social demands.

In practice, as we shall see below, a number of new and complex forms of contracts emerged, but they did not always satisfy the stipulations

of Islamic law. Islamic legal theory did not lay down any general principles of contract and obligation; yet its insistence on avoiding ribā (unjustified enrichment) and gharar (hazard, risk) put restrictions on a number of contracts of sale and association. Despite such restrictions, the scholars of Islamic law have observed that Islamic commercial law showed much flexibility and that custom played an important role.[45] We should keep this observation in mind as we turn now to the responses which Shāṭibī made to inquiries about contracts.

a) Contracts of Sale: Shāṭibī was asked about a widespread commercial practice of Muslims in the Andalus who traded commodities such as weapons with the Christians; such trade was prohibited by the Mālikī scholars for obvious reasons. But in the particular case of the Andalus, the Muslims were forced to trade such commodities for food and clothing. The question was whether special concessions might not be granted to the Muslims of Andalus because of their peculiar circumstances. The second question was whether that prohibition applied to the sale of candles to Christians, candles were used to invoke prayers against Muslims. The third problem was whether the ʿattārs (pharmacists and general merchants) were obliged to abide by that prohibition.

In his response, Shāṭibī, first of all, denied any special concession

to al-Andalus. Cities (or countries) could not be classified on these bases; even the hādin (the inhabitant of a country which was on truce terms with another) or ḥarbī (at war) territories could not claim such concessions. The only distinction that the Mālikī jurists maintained concerned the sale of food commodities. He allowed such sales to an hādin but not to an ḥarbī . Shāṭibī did not allow such contracts of sale to Christians even on the basis of dire need for food articles in the Andalus.

As to the question about candles, if they were known to be used against Muslims, their manufacture and sale would both be unlawful.

Prohibitions, however, could not be imposed on the ʿattārs, because they are merely salesmen; they do not know for what purpose their merchandise may be used and have among their customers both Muslims and Christians.[46]

It is obvious, in this response, that Shāṭibī did not allow the sale of arms and other such articles which would eventually be used against the Muslims; yet this did not mean that trade with Christians was to be stopped altogether. The circumventing method of permitting the ʿaṭṭārs to make such contracts of sale shows that the jurists did allow consideration for the dire needs of the people, even though as a general principle they would deny it.

It appears that Shāṭibī considered such demands from the merchants as

pedantic. Someone asked him if the common practice among the saffron merchants to mix the yellow stigma of saffron with the white styles of its pistils was not ghashsh (adulteration), analogous to the mixing of saffron with yellow colouring powder. Shāṭibī agreed that adulteration of saffron with yellow colouring powder was not permitted, but he disagreed with the analogy made to the practice of mixing the stigmas and styles of saffron. Rather, in his opinion, such 'mixing' was analogous to the 'mixing' of fig seeds with figs and raisin stems with raisins. In fact, the matter comes down to the question of cutting the stigma of the saffron to remove it from its styles. In common practice, to do this is considered inconvenient. Since failure to cut the stigma does not make much difference in weight and its removal is not considered necessary, this practice should not be regarded as adulteration.[47]

Shāṭibī was consulted in another case of sale contract. Someone handed his merchandise over to a sales agent on the basis of a suggested price. A buyer suggested a different price, the agent informed the owner, and the latter agreed to that price. The agent, however, asked the buyer to raise the price to which he agreed. Thus the agent sold the merchandise for more than the price agreed upon between him and the owner. Shāṭibī was asked if such a sale contract was valid.

He responded that, since the stipulation of a contract of sale (the offer, ʾījāb, and acceptance, qubūl) had been fulfilled, the contract was valid and it could not be revoked. As to the question of the agent charging a price higher than the one consented to by the owner, this fact did not invalidate the contract, because the owner's acceptance and bid to sell at a particular price was commonly understood as "sell it at this price if there be no higher offer", not as "sell it at this price only and do not accept higher offers".[48]

b) Contracts of Lease and Partnership: Beside the cases mentioned above in the category of sales, the rest of the cases pertaining to contracts overlap with the categories of lease and partnership. Two of the cases are even related to the category of 'joint ownership'. We have juxtaposed all these cases here, without imposing our own classification. The purpose of such treatment is to indicate the confusion in the original treatment of the cases.

With the exception of one which concerns the 'joint ownership of food', the rest of the cases in this category are related to agricultural contracts. For a full explanation of the context of the problems in these cases a few remarks about the Mālikī law on agricultural contracts must be made.

In broad terms the agricultural contracts are considered analogous to 'contracts of sale', and in a specific sense they are 'contracts of the sale of usufruct' (ijāra). Having inherited the confusions and un-

certainties about sale contracts in the early development of Mālikī theory and practice in Medina, Mālikī fiqh has become very complicated in regard to such questions. First confusion arose between two types of contracts for the lease of land; musāqāt the lease of a plantation of fruit trees, and muzāraʿa the lease of a field. Early Mālikīs maintained distinctions between the two and regarded muzāraʿa as valid only if the field were situated in the middle of the plantation.[49] Later, however, it seems that this stipulation was no longer observed, and muzāraʿa came to be closer to a contract of partnership and musāqāt to that of hire of services. The second source of confusion was the prohibitions that concerned ribā al-faḍl (inequality in exchange of the same stuff), which implied the prohibition of the lease of one agricultural property for another and gharar (hazard, risk) or juzāf (undertermined quantities) which invalidated most agricultural contracts since the object of the contract, e.g. wages, was often undetermined. The third source of confusion was the failure to distinguish among contracts for hiring of services, contracts of lease of land and contracts of partnership. All three are treated as contracts of lease but the stipulations are often borrowed from other types of contract of sale. Furthermore, the stipulations of ijāra, that the period of time must be determined and the task be defined, were often ignored in muzāraʿa and musāqāt.

Santillana marked out four basic types of contracts of muzāraʿa in Mālikī fiqh involving situations where:[50]

a) The land, the labour, the seed, the animals and the tools of cultivation are shared by two parties, the produce to be shared by both.

b) The land is common, one party provides the seeds, the other party provides the labour and the animals.

c) One party provides the land and the seeds, the other the labour and the animals.

d) One party provides the land and part of the seed, the other provides the other part of the seed and the labour as well as the animals.

These types of arrangements indicate that muzāraʿa in Mālikī fiqh is a contract of partnership (since it is also called shirka fī al-zarʿ), rather than a contract of sale; yet in reference to the distribution of the produce there is much similarity to a contract of sale of usufruct or to a contract of hire and lease. We turn now to the specific responses.

The mukhtaṣṣ lands belonging to bayt al-māl were leased to cultivators with the stipulation that every thing needed for cultivation would be provided by the cultivator himself and, furthermore, that he had to pay 1/5 plus 1/10 (or 1/9 if the land was provided with irrigational or other facilities) of the produce.

When Shāṭibī was asked about this practice, he declared such contracts invalid because the contract confused two distinct obligations; the obligation to pay 1/5 which was the rent on the land and the obligation to pay 1/10 which was the tax on the land.[51]

Lopez Ortiz further observed that such contracts were not even valid instances of muzāraʿa according to Mālikī fiqh since the landowner did not contribute anything more than just the land.[52]

Another source of confusion was the practice of hiring the farm labour. The regular types of contract of muzāraʿa did not allow this. If the hire of labourers was considered to be the hire of services, then it was restricted by two stipulations:

a) the wages could not be paid from the produce of the land, and
b) an uncertainty existed in the payment of the wages.

These questions were raised in the case of contracts of labour and partnership regarding the collection of olives and the rearing of silk worms.

In the case of picking olives Ibn Sirāj responded to an istiftā that the contract for the hire of labour to collect olives could be considered musāqāt if the olives were not yet ripe. The contract would then consist of taking care of trees, irrigation...etc. The labour could be contracted for in this case on the promise of payment of 1/4 or so of the produce. But if the olives were ripe and the task was only to collect them, such a promise of wages would make the contract invalid because the task was uncertain and the price of the olives undeterminable.

Shāṭibī, however, explained further that if the task were to collect the

olives by picking them from the branches or by shaking the trees, the contract was invalid and the wages unlawful. However, if the task were to collect olives that were already on the ground, a contract for the hire of labour may be allowed because in this case the labourer could guess how much he would eventually receive in wages.[53]

In the case of rearing silkworms, Ḥaffār, drawing an analogy with the musāqāt-type of contract argued that a contract could be made only when the mulberry trees had grown leaves. The owner of the trees would contribute his share of leaves (1/2, 1/3, 2/3 or whatever had been agreed upon). The partner would also contribute his share of leaves. The owner of the silkworms would pay wages to the other in proportion to his share of leaves. In other words, this would be a case of partnership, and each of the partners would contribute his known shares. The common practice, on the other hand, was to contract before the appearance of the leaves and to pay the wages from the leaves or in silkworms.

Shāṭibī responded that, in principle, the wages not be paid from the produce, but if the case were made analogous to muzāraʿa by equal partnership in leaves, silkworms...etc., such payment could be allowed because, in that case, the labour would stand equal to half of the partner's share of leaves.[54]

A more complex case of partnership was the practice of pooling milk

to make cheese. Shāṭibī explained that, in principle, the mixing of milk in unequal quantities to make cheese could not be allowed because it resembled muzābana (a contract for barter of dried dates for fresh dates). The practice may also be associated with gharar and ribā which are prohibited. Yet the mixing of milk could be allowed by consideration of tashīl (convenience) and raf' ḥaraj (removal of hardship). The consideration of ḥaraj becomes relevant in this case because it would be inconvenient to produce cheese individually by keeping every partner's share of milk separate.[55]

A peculiar case of partnership had to do with the produce of a tree owned by more than two persons. The question was asked whether it were permissible to distribute the produce equally.

Shāṭibī did not allow such distribution because the matter of the tree was actually a case of partnership and not of joint ownership. Hence the distribution of the produce must be according to known shares. Shāṭibī suggested that to make such a distribution convenient the branches of that tree should be marked for every partner and then the produce be divided accordingly.[56]

c) Contract for hire of services: Shāṭibī was asked whether it was allowed for an imām (leader of prayers) to live on income from the ḥabs of a mosque, without any other vocation. Shāṭibī responded that the office of imām was a vocation, and if the person in question performed his duties, it was lawful for him to live on such income.[57]

An interesting case was the emergence of the appointment of mu'īn al-dhabḥ. In the meat market a person was hired by the butchers to supervise the killing of animals and to keep accounts of animals, meat and skins. He was paid partly by the butchers and partly by the sale of the meat. Shāṭibī was asked whether such an appointment was lawful.

Shāṭibī replied that if the consideration governing the appointment of mu'īn al-dhabḥ was to safeguard maṣlaḥa (public interest) in the observance of sharī'a rules about the killing of animals, then in view of fasād al-zamān (corruption of contemporary conditions) or the ignorance of religious teachings, such an appointment could be allowed. If such considerations did not exist and the person was not qualified to carry out the rules, his appointment would fall into the category of reprehensible things. Furthermore, such a practice would impose upon the people hardships in those matters in which God allowed convenience. The Prophet Muḥammad used to eat meat brought by badawīs after simply saying the name of God.[58]

Abū 'Abd Allāh al-Ḥaffār asked Shāṭibī if an increase in his salary received from the bayt al-māl was lawful. Shāṭibī replied that it was lawful only on two conditions:

i) that the amount of work had increased.

ii) that the increased wages were commensurate with the increased work.

When Ḥaffār received that answer he wrote again saying that he had been receiving that increase already for thirty years and that the practice of the community had allowed him to do so. He asked Shāṭibī what he should do. Shāṭibī answered that he was not obliged to return the overpayment; what deserved consideration in this case was the morality of receiving such an increase, not whether the practice of the community allowed it or not.[59]

viii) **Procedure**

Shāṭibī was asked about the legal nature of lawth (incomplete evidence leading to presumption of guilt in case of homicide), in a case where there was one eye witness of the murder and two witnesses of the culprit's confession. According to Mālikī law the requirements of proof in such a case are the following:

i) the confession of the culprit, and
ii) two eye witnesses of the murder,
iii) one witness on the basis of qasāma (declaration on oath by several persons), and
iv) strong circumstantial presumptive evidence.[60]

The evidence in the above case did not fulfil the requirements completely, but it was evidence of presumption. Shāṭibī was asked whether it was lawth. He responded that lawth could be described as accepting weaker evidence that could prove harm. Accordingly, the evidence in this case would be regarded as lawth. Shāṭibī, however, explained that the difference of opinion among Mālikī

jurists on the legal effectiveness of lawth is based, in fact, on the fact that the efficacy of lawth depends largely upon the discretion of the judge (nāẓir al-qaḍiyya).[61]

Conclusion:

To conclude this chapter we recapitulate the above with reference to the questions that we raised in the introduction. A fuller statistical analysis of the fatāwā is given in a tabulated form. Brief answers to the questions are attempted below.

The first question concerned the subject matter of Islamic law that was confronted by the impact of social change. Out of the 40 cases 34 implied social change. Among them the following categories are included:

1) Theological matters (2/2 implied change)
2) Ritual and worship (11/12)
3) Family (3/5)
4) Property (4/5)
5) Taxes (3/3)
6) Contracts and obligations (11/12)

The following table shows, in detail, the attitude towards the adaptation to social changes in Shāṭibī's fatāwā.

Subject matter	Total number of cases	Those which imply social change		Related to the general social conditions			Shāṭibī's attitude		
		yes	n/a	yes	no	n/a	accepted	rejected	n/a
1. Exegesis	1	-	1	1	-	-	-	-	1
2. Theological matters	2	2	-	2	-	-	1	1	-
3. Ritual and worship	12	11	1	10	2	-	1	11	-
4. Family	5	3	2	3	-	2	3	2	-
5. Property	5	4	1	4	-	1	-	4	1
6. Taxes	3	3	-	3	-	-	3	-	-
7. Contract and obligation	11	11	-	11	-	-	6	5	-
8. Procedure	1	-	1	-	1	-	-	-	1
TOTAL	40	34	6	34	3	3	14	23	3
PERCENTAGES	100	85	15	85	7.5	7.5	35	57.5	7.5

The second question concerned the adaptation to social change by the jurists. Out of the 40 cases Shāṭibī adapted law to social change in 14 and rejected adaptation in 26. The details are as follows:

	Adaptation to social change	Rejected adaptation to social change
1. Exegesis	-	-
2. Theological matters	1	1
3. Ritual and Worship	1/12	11/12
4. Family	3/5	2/5
5. Trust (Property)	-	4/5
6. Taxes	3/3	-
7. Contract and Obligation	6/11	5/11
8. Procedure	-	-

The subject matters in which Shāṭibī rejected adaptation to social change most often were ritual and worship, family and trust. He showed flexibility with respect to theological matters and taxes. In contracts and obligations, he accepted and rejected cases almost equally, although he accepted adaptability more often than he rejected it.

As to the third question, whether these changes were related to the general social conditions or not, it may be seen that out of 40 cases, 34 were related to such conditions; two cases of ritual and one case of procedure were not the result of such conditions, whereas the rest of the cases were posed by social changes.

The fourth question concerns the method of adaptation to or rejection of adaptation to social change by the jurists. Broadly speaking, in rejecting adaptation of law to several social changes two different principles are invoked by Shāṭibī. In matters relating to theological matters, ritual and worship, and

trust he rejects adaptability of law to the social changes by declaring these changes bidʿa (innovations). It is obvious that these matters particularly concern religion or relate primarily to a matter between man and God. It is very important to note that Shāṭibī does not invoke this principle in other matters. Apparently a social change affecting the above mentioned subject matters implied, for Shāṭibī, the imposition of a new obligation or the rejection of an earlier obligation in the name of religion. This must have led him to an investigation of the philosophical question of religious authority - to whom did it belong? An analysis of Shāṭibī's concept of bidʿa can provide us with an answer to this question in the particular context of our dissertation.

The second principle employed in rejecting social change, especially in cases of contracts and obligations, was that of 'unjust enrichments' and 'risk'. This principle can be understood as the negative side of the other principles such as tashīl (convenience), ʿadam ḥaraj (removal of hardship) and maṣlaḥa (public good) on the basis of which he accepts social changes especially in matters of taxes and contracts.

The use of such general principles was prompted because of the failure or confusion of the regular methods of interpretation usually employed by the jurists. Among such regular methods the following are used in these fatāwā but found insufficient.

First is the method of analogy. This method is used in three ways:

a) Proximate analogy with a precedent that is very close to the case in question.

b) New analogy to refer to a precedent which was not usually employed to make analogy. e.g. - the production of making cheese analagous to olive oil.

c) To adjust the case in a way to suit the requirements of analogy. As in the case of rearing silkworms, analogy was sought with muzāraʿa by restructuring the form of the contract. This method of analogy forced the jurists to be casuistic, and even then the results were not very satisfactory. Consequently, they had to refer to general principles.

Second was the method of abandoning strict adherence (taqlīd) to Mālikī fiqh in order to borrow from other schools. This method, though employed by other jurists, was rejected by Shāṭibī as it led to a diversity of legal practices and also because it did not help to solve the problems. The method still depended on analogy.

The third method which was used in contracts was to divide the contract into different moments and parts of the contract so as to find analogies applicable to each.

In short the usual fiqhī methods generally proved to be insufficient to meet the new changes, and, hence, the jurists turned to general principles. An obvious result of such a trend was that more attention was paid to uṣūl al-fiqh in order to investigate the foundations, objectives and purposes of Islamic law.

It would not be accurate to presume that Shāṭibī alone was facing these problems. It is true that Shāṭibī invoked the general principle of maṣlaḥa more often than other jurists, still, it is important to note that other contemporaries of Shāṭibī, Ibn ʿAllaq (d.707 A.H.), Ibn ʿĀṣim (d.811 A.H.), Ibn Sirāj (d.818 A.H.) and others whose fatāwā were studied by Lopez Ortiz also frequently refer to such principles as tashīl, ḍarūra...etc.

Not only did lengthy discussion go on between various jurists about such matters as qiyās, ikhtilāf, and the role of custom, but the question of mashhūr madhhab and such subject matters were also discussed, indicating the interest of the jurists in legal theory.

Another important factor stimulating the interest in legal theory was the fact that the nature and form of contracts, which have a fundamental significance in every legal system were changing in that period. The factor of labour, and especially of seasonal labour, had brought a new dimension to the problem of wages. The new forms of contracts did not fit into the old framework of agricultural contracts for lease of land. The fuqahā' who still considered hired labour a sharika fī-l-zarʿ found in application contracts considered in this way too complicated and too unjust to be convenient for any of the parties.

The above analysis has revealed how the impact of social change was felt in the fatāwā in this period. It has further shown that the older legal concepts failed to answer the problems raised by the social changes. We have also seen that because of this failure, Shāṭibī and other jurists resorted to general philo-

sophical principles such as maṣlaḥa. The failure of older legal concepts and resort to general principles caused the jurists to reflect on basic matters of legal theory.

Finally, the above analysis has shown that a change in method and substance of fiqh had taken place. Such a change logically called for a theoretical justification of the adaptation of law to social changes. Shāṭibī sought this justification in the principle of maṣlaḥa as we shall see in the following chapters. There were, however, certain theoretical and methodological objections raised by the jurists against using maṣlaḥa as a method of legal reasoning. Shāṭibī's analysis of maṣlaḥa cannot be fully understood without a general understanding of such objections. The following chapter, therefore, outlines the development of the concept of maṣlaḥa in uṣūl al-fiqh prior to Shāṭibī.

NOTES: CHAPTER V

1. These fatāwā are recorded by Al-Wansharīsī, Al-Miʿyār al-Mughrib ʿan fatāwā ʿulamā' Ifrīqiya wa'l Andalus wa'l Maghrib (Fās, 1314-1315 A.H.) at the following places:

   Vol. I, 22,24,229,267,267-68;
   Vol. II,230,401-403;
   Vol.III,163;
   Vol.IV,146;
   Vol.V,17,18,19,50-51,186-189,192;
   Vol.VI,254-279;
   Vol.VII,68-69,70-74;
   Vol.VIII,238;
   Vol.IX,163-165,181,478;
   Vol.XI,31-37,82-83,87,88-91,96-98,107-111;
   Vol.XII,6,7,8,11,16,19,28,201-211.

2. Lopez Ortiz, "Fatwas Granadinas de los Siglos XIV y XV", Al-Andalus, VI(1941), pp.85,89,93,97,98,102,109,114,120,123.

3. Caisiri, Bibliotheca Arabica Hispana Escurialenisis, I, 460/no:1,096. vide Lopez Ortiz, op.cit.

4. Ḥadīth qudsī, in opposition to the ḥadīth nabawī, represents those sayings of the Prophet in which the actual "word of God" is believed to be found, whereas ḥadīth nabawī represents the sayings attributed to Muḥammad. See Shorter Encyclopedia of Islam, article "Ḥadīth", 117.

5. Al-Miʿyār, Vol. XI , 96f.

6. Ibid., Vol. II, 401-403.

7. F. Rahman, Islamic Methodology in History (Karachi, 1965),166.

8. Ibid.

9. Al-Iʿtiṣām, Vol.II,208ff. Rahman's reference to Shāṭibī (Al-Iʿtiṣām, III,178) needs to be corrected. According to our text of Al-Iʿtiṣām the quotation is located at Ibid., Vol. II,p.251.

10. Al-Miʿyār, op.cit., Vol.XI,87.

11. Ibid., Vol. I, 267.

12. Ibid., Vol. XI, 31-33.

13. Most probably the practice of ḥizb was introduced into the Andalus with the Shādhilīya. The most well-known ḥizb, ḥizb al-baḥr, which was supposed to be chanted while crossing the sea, is attributed to Abū'l Ḥasan Shādhilī. See D. B. MacDonald, "Ḥizb", E.I. (2nd ed.), Vol. III, 513-14.

14. Al-Miʿyar, Vol. XI, 88.

15. Ibid.

16. Ibid., see also Ch. IV. p. 182f.

17. Ibid., 89.

18. Ibid.

19. Ibid.

20. Ibid., Vol. I, 229.

21. Al-Iʿtiṣām, Vol. I, 207.

22. Al-Miʿyār, Vol. I, 267.

23. Ibn ʿArafa (d. 803 A.H.), Ḥudūd Fiqhiyya, vide Abū ʿAbd Allāh Muḥammad al-Raṣāʿ, Sharḥ Ḥudūd Fiqhiyya (Tūnis, 1350 A.H.), 12-13.

24. The fiqhī conclusion on the prohibition of khamr is based on the following verses: 2:219; 5:90-91. "O you who believe, intoxicants (khamr) and games of chance are only an abomination of Satan's handiwork, so be ye away from it so that ye may be successful". The prohibition of mayta is based on the following verses: 2:173; 5:3; 16:115. "Verily He hath forbidden unto you what dieth of itself..."

25. Al-Miʿyār, Vol. I, 22.

26. Ibid., Vol. I, 25.

27. Ibid.

28. Ibid., 22.

29. Ibid., 25.

30. Ibid., Vol.IV, 146.

31. Ibid., Vol.IX,163.

32. Ibid., Vol.IX, 478.

33. Ibid., Vol.III, 163.

34. See p. 124.

35. Al-Miʿyār, Vol.VIII,238.

36. Ibid., Vol.VII,74.

37. Ibid.

38. Ibid., Vol.VII,68.

39. Ibn ʿĀşim, Tuḥfat al-Ḥukkām...Ed. by L. Bercher. (Alger, 1958),174. See also Bercher's note: 873, p.387. وحيث يسيح ما عليه حبسا يرد مطلقا وبح علم أسا

40. Al-Miʿyār, Vol.VII,70-74.

41. Lopez Ortiz, op.cit.,97.

42. Ibid.,85; Nayl,49; Miʿyār, Vol. XI,101-107.

43. Al-Mudawwanat al-Kubrā, Vol.I, (Baghdād, 1970),268. Saḥnūn asked Ibn Qāsim about a case where someone inherited certain merchandise, which he decided to sell; would there be zakāt on this merchandise. Ibn Qāsim said no, because:
لا تكون هذه السلعة للتجارة حتى يبيعها، فإذا باعها استقبل بالثمن حولا من يوم باعها، لأنه يوم باعها صارت للتجارة.

On p.294, Mālik states about zakāt on fruit as follows:
فليس فيها زكاة ولا في اثمانها حتى يحول على اثمانها الحول من يوم تقبض اثمانها

44. Lopez Ortiz, op.cit.,97.

45. Udovitch, Partnership and Profit in Medieval Islam (Princeton, 1970), pp.7f.,9,10.

46. Al-Miʿyār, Vol.V,186-187.

47. Ibid.,19.

48. Ibid., Vol.V,192.

49. D. Santillana, Istituzioni di dritto Musulmano Malichita, Vol. II, (Rome, 1938), 306. See also Mudawwana, Vol. VI,21.

50. Santillana, loc.cit.

51. Lopez Ortiz, op.cit.,97.
Shāṭibī's fatwā is understood better in the context of the following two stipulations of musāqāt, mentioned by Ibn ʿĀṣim

(i) ..... ولا تصح [المساقاة] مع كراء

(ii) والدفع للزكاة ان لم يشترط بينهما بنسبة الجزء فقط

Ibn ʿĀṣim, Tuḥfa, op.cit., 162, 164.

52. Lopez Ortiz, op.cit.

53. Ibid., 109.

54. Al-Miʿyār, op.cit., Vol.V,50.

55. Ibid., 187.

56. Lopez Ortiz, op.cit.,102.

57. Al-Miʿyār, op.cit., Vol.VII, 68.

58. Ibid., Vol.IX, 98.

59. Ibid., Vol.VII, 74.

60. Ibn ʿAṣim, op.cit., 226.

61. Al-Miʿyār, Vol.II, 230.

CHAPTER VI

THE CONCEPT OF MAṢLAḤA BEFORE SHĀṬIBĪ

Shāṭibī's doctrine of maqāṣid al-Sharīʿa, which is analysed in the following chapter, is, in fact, a continuation of the discussion of the concept of maṣlaḥa that had appeared in major works of uṣūl al-fiqh prior to Shāṭibī. It is, therefore, necessary to review briefly the major problems in the treatment of this concept in traditional Muslim jurisprudence.

Etymologically the word maṣlaḥa is an infinitive noun of the root ṣ-l-ḥ. The verb ṣaluḥa is used to indicate when a thing or man becomes good, uncorrupted, right, just, virtuous, honest, or alternatively to indicate the state of possessing these virtues. When used with the preposition li it gives the meaning of suitability. It is also said of a thing, an affair or a piece of business which is conducive to good or that is for good. Its plural form is maṣaliḥ. Ṣalāḥ is its synonym, and mafsada is its exact antonym. Mafsada is the synonym of fasād. In Arab usage, it is said: naẓara fī maṣāliḥ al-nās, which means: "He considered the things that were for the good of the people." The sentence fī'l-amr maṣlaḥa is used to say: "In the affair is that which is good [or cause of good]."[1]

In the Qur'ān various derivatives of the root ṣ-l-ḥ are used, but the word maṣlaḥa does not appear there. The Qur'ān uses ẓalama ('He did wrong') [V:39] and fasada ('He/it corrupted') [XXVI: 125; XXVII: 48; VII:142, II: 220] as

opposite terms to ṣaluḥa. Ṣāliḥ, the active participle of ṣ-l-ḥ, occurs very frequently in the Qur'ān. On one occasion the meaning of this term is elaborated textually as follows:

> "They believe in God and in the last day and enjoin goodness and forbid evil and hasten to do good deeds, and these are the righteous ones (Ṣāliḥīn)".[2]

It is quite often claimed that maṣlaḥa as a principle of legal reasoning - broadly speaking, to argue that "good" is "lawful" and that "lawful" must be good - came to be used at a very early period in the development of fiqh. The use of this principle is attributed, for instance, to the early jurists of the 'Ancient schools of law' or even to the companions of the Prophet. Among the founders of the schools of law, it is associated with Mālik b. Anas. There seems, however, to be a confusion in these statements in equating the use of maṣlaḥa as a general term with its use as a technical term. The early use of maṣlaḥa may have been in its general sense similar to other terms such as ra'y. Rudi Paret has observed that the word maṣlaḥa as a technical term is not used by Mālik or Shāfiʿī; hence this concept must have developed in the post-Shāfiʿī period.[3]

Paret's observation, however, does not refute the possibility that considerations similar to maṣlaḥa were employed by pre-Shāfiʿī jurists. Such considerations do not, however, seem to have been formulated in technical legal terms. The pro-ponents of the use of maṣlaḥa in the early period have, apparently, confused the early similar considerations with maṣlaḥa. It is, therefore, not incorrect to say that the post-Shāfiʿī development of the concept of maṣlaḥa was a continuation

of such early methods of reasoning as were not yet formally defined. Later, when Shāfiᶜī's definition of the method of reasoning in terms of sources and his insistence that all methods must be linked with the revealed texts through qiyās, prevailed over other methods of reasoning, the concept and method of maṣlaḥa was also seen, especially by Shāfiᶜī jurists in terms of 'sources'.

From Imām al-Ḥaramayn Juwaynī's (438/1047) Al-Burhān, it appears that by his time the validity of reasoning on the basis of maslaha had become a problem controversial enough to bring forth three schools of thought in this respect to it. Some Shāfiᶜīs and a number of mutakallimūn are claimed to have maintained that the acceptable maṣlaḥa is only that which has a specific textual basis (aṣl). The mursala (a maṣlaḥa not based on such an aṣl) and the like are contradictory to the textual evidence (dalīl), hence not valid. The second school of thought is attributed to some followers of Shāfiᶜī and to Ḥanafīs in general. They believe that maṣlaḥa, even if it is not supported by a specific basis, can still be used, provided that it is similar to those maṣāliḥ which are unanimously accepted or which are textually established. The third school is attributed to Mālik who held that a maṣlaḥa is abided by without any consideration of the condition of similarity or whether it corresponds with the texts or not.[4]

This comment by Juwaynī does not help us in determining the dates of the use of maṣlaḥa but it is very significant to note what divides these schools on maṣlaḥa. First the comment shows that the method of reasoning on the basis of maṣlaḥa was different from an other method of reasoning which sought its basis in the revealed texts. Secondly if we also accept the attribution of maṣlaḥa to the

names of the jurists given in this comment, the comment also shows that the method of maṣlaḥa in its early formulation by Mālik and his followers was independent of the consideration of 'sources' or 'bases' and further that maṣlaḥa was accepted by others if it conformed to 'sources' - to the text in the case of the first group and to ijmāʿin the case of the second group. They rejected only maṣlaḥa mursala because it did not conform with the sources. This explains why the concept of maṣlaḥa which originally was not necessarily conceived and confined within the framework of 'sources', came to be seen, particularly by later Shāfiʿīs, in reference to 'sources'. This confused the discussion of the concept of maṣlaḥa as we shall see at a later moment. One indication of this confusion that may be noticed in the following analysis, is the tendency to discuss maṣlaḥa at two levels, i.e., first in terms of need and effectiveness, and second in reference to sources. When talked about in terms of validity these two levels were confused.

Juwaynī analysed maṣlaḥa, or munāsib which is often used synonymously, as an ʿilla and divided it as such into five categories. First is the category where its maʿnā (significance) is rationally understandable and where it is related to certain essential necessities (ḍarūra) which are inevitable. The second category concerns what is a general need (al-ḥājat al-ʿāmma), but below the level of ḍarūrī. Third is the category which belongs to neither of the above, but rather concerns something which is noble (mukarrama). The fourth category is similar to the third, yet, in terms of priorities, the fourth comes later. The fifth category concerns those maṣāliḥ, whose maʿnā (significance) is not obvious,

and is not demanded by ḍarūra, nor by ḥāja nor is it required by mukarrama. Examples of this category are the purely physical ʿibādāt.[5]

Maṣlaḥa as a technical term is not used in the Ẓāhirī jurist Ibn Ḥazm's (456/1065) Al-Iḥkām fī Uṣūl al-Aḥkām, or in Ḥanafī jurist, Pazdawī's (d. 482/1089) Uṣūl.

The terms maṣlaḥa and masāliḥ are used by the Muʿtazilī Abū'l Ḥusayn al-Baṣrī (d. 478/1085) both in a general sense and as technical terms. To him maṣāliḥ are good things, and maṣlaḥa means goodness. Baṣrī discusses maṣlaḥa in reference to Istidlāl (reasoning) and ʿilla (reason), and in arguments against his opponents who maintain that maṣāliḥ cannot be known through reasoning at all. At one point he defines al-maṣāliḥ al-Sharʿiyya as those acts which we are obliged to do by the Sharīʿa such as ʿibādāt.[6] Related to these acts are the means to achieving the Sharʿī commands; these means are also connected with maṣāliḥ. These means are dalīl, ʾamāra, sabab, ʿilla, sharṭ. The illustrations of these terms are given respectively as follows: the validity of consensus, analogy, the sunset for ṣalāt, measurability for ribā, the conditions in contracts of sale. All of these means are connected with maṣlaḥa.[7] For instance, the connection of amāra and ʿilla is evident in what follows:

> "When a correct sign (amāra) indicates (dallat) a quality (waṣf) being (ʿilla) reason, we decide that it is the basis of maslaha...It indicates that the basis of maṣlaḥa is to be found wherever an ʿilla is found".[8]

For Baṣrī, then, maṣlaḥa is an end for which ʿilla and other related terms are

means. Baṣrī, however, does not elaborate what these maṣāliḥ are and what is the connection between al-maṣāliḥ aš-Šarᶜiyya which he mentions, and other maṣāliḥ which he does not mention.

In the following centuries, however, the concept of maṣlaḥa advanced quite significantly. There are two main stages in the development of this concept, before Shāṭibī. One is represented by Ghazālī in the early Twelfth Century, the other by Rāzī in the early Thirteenth Century.

In Ghazālī's al-Mustaṣfā, the problem of maṣlaḥa is discussed more clearly and fully than by Baṣrī.

Ghazali defines maṣlaḥa as follows:

> "In its essential (aṣlan) meaning it [maṣlaḥa] is an expression for seeking something useful (manfaᶜa) or removing something harmful (maḍarra). But this is not what we mean, because seeking utility and removing harm are the purposes (maqāṣid) at which the Creation (khalq) aims and the goodness (ṣalāḥ) of Creation consists in realizing their goals (maqāṣid). What we mean by maṣlaḥa is the preservation of the maqṣūd (objective) of the law (Sharᶜ) which consists of five things: preservation of religion, of life, or reason, of descendents and property. What assures the preservation of these five principles (uṣūl), is maṣlaḥa and whatever fails to preserve them is mafsada and its removal is maṣlaḥa." [9]

Maṣlaḥa as understood in the above definition is then divided into the following three categories. First, the type maṣlaḥa which has a textual evidence in favour of its consideration. Second is the type which is denied by a textual evidence. The third is the type where there is neither a textual evidence in favour, nor in contradiction. The first category is valid and can be the basis for qiyās.[10] The

second is obviously forbidden. It is the third category which needs further consideration. Accordingly, the element of maṣlaḥa contained in the third category is further examined from the viewpoint of its strength (quwwa). From this angle there are three grades of maṣlaḥa: ḍarūrāt, ḥājāt, taḥsīnāt or tazyīnāt. The preservation of the above-mentioned five principles is covered in the grade of ḍarūrāt. This is the strongest kind of maṣlaḥa. The second grade consists of those maṣāliḥ and munāsabāt which are not essential in themselves but are necessary to realize maṣāliḥ in general. The third grade is neither of the above but exists only for the refinement of affairs.[11]

Keeping this classification in mind, only that maṣlaḥa mursala - i.e. that which is not supported by textual evidence, will be accepted which has three qualities: ḍarūra, qaṭ'iyya, kulliyya. Ghazālī illustrates the point with an example:

> "If unbelievers shield themselves with a group of Muslim captives, to attack this shield means killing innocent Muslims - a case which is not supported by textual evidence. If Muslim attack is withheld, the unbelievers advance and conquer the territory of Islam. In this case it is permissible to argue that even if Muslims do not attack, the lives of the Muslim captives are not safe. The unbelievers, once they conquer the territory, will rout out all Muslims. If such is the case, then it is necessary to save the whole of the Muslim Community rather than to save a part of it. This would be the reasoning which is acceptable, as it refers to the above three qualifications. It is daruri because it consists of preserving one of the five principles, i.e. protection of life. It is qaṭ'ī because it is definitely known that this way the lives of the Muslim community will be safe. It is kullī, because it takes into consideration the whole of the community, not a part of it.[12]

The other two grades of maṣāliḥ, however, are not admissible if they are not supported by a specific textual evidence. If these are supported by the text, the

reasoning is then called qiyās, otherwise, it is called istiṣlāḥ which is similar to istiḥsān,[13] and, hence invalid.

Ghazālī counts istiṣlāḥ along with istiḥsān among the methods of reasoning which do not have the same validity that qiyās has. He calls such methods "uṣūl mawhūma" - those principles in which the mujtahid relies on imagination or on his discretion rather than on the tradition.[14]

The above definition and classification of maṣlaḥa have a particular place in Ghazālī's structure of the discussion of uṣūl al-fiqh. A brief analysis of this structure will reveal the place that Ghazālī gave to the concept of maṣlaḥa. Ghazālī divides the discussion of uṣūl in al-Mustaṣfā into six parts. Apart from the first two parts which deal with introductory matters such as definition of uṣūl and an introduction of methods of logic, the remainder of the four parts discusses the following subject matters of uṣūl: Ḥukm (command); al-ʾAdilla al-arbaʿa, the four evidences, i.e. Qurʾān, sunna, ijmāʿ and ʿaql; method of reasoning (istithmār), i.e. interpretation and analogy; and taqlīd and ijtihād. The above treatment of maṣlaḥa appears as an annex to the discussion of the four evidences, where he argues that maṣlaḥa is not one of the four reliable evidences.[15] Also it is significant that it is not discussed in the part dealing with methods of interpretation and analogy, although its connection is implied.

References to maṣlaḥa, however, appear in other parts also. In the part on ḥukm, where Ghazālī discusses the essential meaning (ḥaqīqa) and its four components, maṣlaḥa is mentioned occasionally. The four components of ḥukm, according to

Ghazālī are the following: (1) Ḥākim (the one who gives judgment; the legislator, sovereign); (2) Ḥukm (the judgment); (3) Maḥkūm ʿAlayh (subject of command, mukallaf); (4) Maḥkūm fīhi (the object of command, the act /of Mukallaf/).

Discussing the meaning of ḥukm, he deals with the question of whether the goodness or badness of acts (both human and divine) is known objectively or through sharʿ. His description of ḥasan is similar to his above definition of maṣlaḥa in its essential meaning.[16] At one point he even uses the term maṣāliḥ in place of ḥasan.[17] He frequently refers to mafsada in the course of his analysis of maḥkūm fīhi, in dealing with the question whether only voluntary acts are objects of command or not. He regards it a mafsada if involuntary acts are also considered as objects of command.[18]

Reference to maṣlaḥa is made again in the part on methods of reasoning. Dealing with the method of qiyās (analogy), he explains that qiyas has four components: (1) aṣl, the root to which analogy is made; (2) farʿ the branch for which analogy is sought; (3) ʿilla, the reason on the basis of which analogy is made; (4) ḥukm, the judgment to which the analogy leads. Ghazālī clarifies that qiyās, here, must be distinguished from qiyās in philosophy. This distinction lies, apart from the difference in the form of reasoning, in the conception of ʿilla itself. The ʿilla in fiqh is not 'cause' but merely a 'sign'.[19] Naturally then the methods of finding the ʿilla are also different. The evidence in which the ʿilla is sought is naqliyya (traditional), meaning the Qurʾān, Sunna and ijmāʿ. The ʿilla is either explicit (ṣarīḥ), or it is implicitly indicated (īmāʾ), or it is known from the sequence and order of the command (sabab and tartīb). The fourth manner of finding the ʿilla is

istinbāṭ (inference). The only valid methods of istinbāṭ are two: 1) Al-sabr wa'l-taqsīm (observation and classification; method of exclusion), and 2) munāsaba (affinity).[20] It is in reference to munāsaba that maṣlaḥa as a main element of affinity with Shar' is frequently discussed.

Ghazālī defines munāsib as "that which, like maṣāliḥ, becomes regulated (is achieved rationally intaẓama) as soon as it is connected with the command (ḥukm)".[21] For a discussion of the meaning, classification and grades of munāsib, Ghazālī refers to the annex which is significantly enough the discussion of maṣlaḥa and its grades.

Munāsaba and maṣlaḥa are, however, not identical. Although Ghazālī analyzes munāsib also in terms of effectiveness and validity in the same way as he does with maṣlaḥa, yet the details vary. Among the various classifications of munāsib, one is of particular significance for us, as it explains the relationship of munāsib to maṣlaḥa as well as the difference between istiḥsān and istiṣlāḥ in the eyes of Ghazālī. Munāsib is divided into four categories: first, the munāsib which is suitable to and is supported by a specific textual evidence. Second, that munāsib which is neither suitable to nor is supported by the textual evidence. Third, that munāsib which is not suitable to but is supported by textual evidence. Fourth, that munāsib which is suitable to but not supported by textual evidence.[22] Ghazālī adds that in the above classification the first category is acceptable to all jurists. The second category is called istiḥsān which clearly means to make law according to personal discretion. The fourth is called istiṣlāḥ or istidlāl mursal. It is clear from this classification that maṣlaḥa is the basic consideration for deciding the suitability or munāsaba of

something which istiḥsān lacks. But again the munāsaba of maṣlaḥa further depends on its suitability or conformity to the text in general; otherwise it will fall into the category of istiḥsān.

From Ghazālī's treatment of maṣlaḥa, it can be concluded in general, that his predilection for theologization of fiqh [23] and for qiyās as a method of reasoning, led him to examine the concept of maṣlaḥa with reservations. From the point of view of theology, he rejected the conception of maṣlaḥa in terms of human utility; furthermore, he subjected it to scrutiny on the basis of revealed texts. Secondly, he made the method of reasoning by maṣlaḥa subordinate to qiyās. He did not reject maṣlaḥa altogether, as he did with istiḥsān, but the qualification he provided for the acceptance of maṣlaḥa, did not allow it to remain an independent principle of reasoning.

Furthermore, with the above limitations on the concept of maṣlaḥa, he could not bring into focus in the discussion the other elements which are quite relevant to maṣlaḥa, such as taklīf, ḥaqīqa al-ḥukm, fahm al-khiṭāb, niyya, taʿabbud, etc. The discussions of these elements are scattered through various chapters in his al-Mustaṣfā. Also, he did not see the necessary relationship among different categories of maṣlaḥa.

Some of the above points were taken into consideration by some jurists after Ghazālī, but more systematic consideration was given them by Shāṭibī, as we shall see later.

Ghazālī's classification and definition was followed by a number of jurists. At least according to the channel of the uṣūl works that is mostly known to us, Ghazālī's influence, particularly in reference to maṣlaḥa, is very strong. As Ibn Khaldūn

noticed, Baṣrī's book al-Muʿtamad and Ghazālī's al-Mustaṣfā remained a major source of influence for later writers on uṣūl, until the appearance of Rāzī's monumental work al-Maḥṣūl.[24] Al-Maḥṣūl combined the above two works and reformulated a number of concepts. Rāzī's Maḥṣūl then in turn became a source of considerable influence for later uṣūl works. This influence is evident from the number of commentaries and abridgements on al-Maḥṣūl that were written in later periods. This work influenced even Mālikī and Ḥanafī uṣūl which had so far taken exception to Shāfiʿī influence. We need not go into details, but it must be mentioned that Qarāfī (684/1285), Ibn Ḥājib (646/1249) and Ibn ʿAbd al-Salām, whom Shāṭibī knew and in general opposed, were largely under the influence of Fakhr al-Dīn al-Rāzī's (606/1209) Maḥṣūl.

Razi's Maḥṣūl[25] is structured more on the pattern of Baṣrī's al-Muʿtamad than on Ghazālī's al-Mustaṣfā. Rāzī deals with definitions of the basic terms in the introduction. Significantly enough, the discussion about the meaning and classification of ḥukm and the question of the goodness of acts constitute more than half of this chapter. The scheme of the rest of the chapter is exactly the same as that of Baṣrī. The references to maṣlaḥa are made, therefore, in the introduction, where the question of the goodness of acts is discussed, in the chapter concerning qiyās, where the question of munāsaba as a manner of finding ʿilla is dealt with, and in the last chapter where al-Maṣāliḥ al-mursala are discussed as one of the ways of knowing the commands of Sharīʿa in addition to qiyās.

Razi does not define maṣlaḥa but it seems that in his thinking munāsib and maṣlaḥa

are quite closely associated with each other. He gives two definitions of munāsib. First, munāsib is defined as "what leads man to what is agreeable (yuwāfiq) to him both in "acquisition" (taḥṣīl) and "preservation" (ibqā')." [26] He explains that taḥṣīl means to seek "utility" (*manfaʿa*), and manfaʿa is pleasure (ladhdha) or its means. Ladhdha is to achieve what is suited (mulā'im). Ibqā' is explained similarly as removing harm, maḍarra, which is 'alam (pain) or its means. Both ladhdha and 'alam are evident and cannot be defined. Thus munāsib in its final analysis is related to ladhdha in the positive sense and to 'alam in the negative sense.

The second definition of munāsib is as that which is usually suited (fi'l ʿādāt) to the actions of the wise. [27]

Rāzī then clarifies that the first definition is accepted by those who attribute ḥikam and maṣāliḥ as causes or motives to God's commands. The second definition is employed by those who do not accept the above causality. [28] This explanation takes us back to Rāzī's own view on the problem of causality and God's commands. This question is first dealt with in the course of discussion whether the goodness or badness of things is rational or established by Sharʿ. He argues that inasmuch as the definition and understanding of good as something "suited to nature (of man)", or as "a quality of perfection" is concerned, undoubtedly good and bad are rational. The point in question is, however, whether good and bad can be defined in reference to praise or blame as the Muʿtazila have done. [29] Rāzī, after detailed analysis concludes that, if defined in the latter sense, good and bad can be established only by Sharʿ. [30] The question then is whether what is praised in God's commands corres-

ponds with the rational good or not. If it corresponds, can this correspondence be understood as cause or motive?

Rāzī answers this question in detail in his discussion of munāsaba as a manner of ʿilla. He argues that to prove that munāsaba can be ʿilla, there are three premises to be established: first, that God issued the commands for the maṣāliḥ of the people; second, that the case in question consists of a maṣlaḥa, and third, that it can be shown that the probable reason for God's issuing this particular command is this particular maṣlaḥa.[31] Giving six proofs, he establishes the first premise that the commands are issued because of maṣāliḥ. He explains, however, that in contradiction to the Muʿtazila the fuqahā' do not regard maṣlaḥa as gharaḍ (personal motive); they rather view it in terms of maʿnā (significance) or ḥikma (rationale). In fact, there is not much difference between the two positions. The difference is as follows: whereas the Muʿtazila believe that God is obliged to consider maṣlaḥa, the fuqahā'stress that He is not obliged to do so. God has done so because of His grace.[32] The second premise needs no explanation. The third premise, that this particular command attributes a specific motive to God's acts and Commands, is a position which Rāzī does not accept.[33] Rāzī resolves this problem by explaining it in the following terms:

> Muslims believe that the revolving of the heavens, the rising and the setting of the stars, the continuity of their forms and the lights are not obligatory, yet it has been God's custom to continue them in one state. Inevitably it provides the probability that this will continue tomorrow and after tomorrow with the same qualities... To sum up, if a certain thing occurs repeatedly many times, it gives the probability that when it happens it will happen the same way... Now, when we observe Sharā'iʿ, we find that the commands and maṣāliḥ occur together, without being separated from each other, this is known inductively.....34

To sum up, Rāzī stresses that no motives or causes can be attributed to God's acts or commands; yet he admits that God's commands are for the maṣlaḥa of the people, and this maṣlaḥa or munāsaba can be considered ʿilla for that command. The paradox in this position is resolved by two explanations: first, that these maṣāliḥ have occurred together with God's acts, only accidentally, not in terms of cause and effect and, secondly, that it has happened this way not as a necessary correlation between maṣlaḥa and command, because God is not obliged. Rather, God has acted as He has as a Grace, so that a sign may be established to make known His command.

Rāzī has offered these explanations in view of the possible objections against his admission of taʿlīl afʿāl-Allāh, (to attribute causes to God's acts). It is significant to note that Rāzī recounts the possible criticism of his position in lengthy detail while his own defense is very short and quite unsatisfactory. The criticism consists of more than ten objections.[35]

Rāzī's answer to this criticism is very short. Two main points in his answer are as follows:

> "We have explained that God's commands are issued (mashrūʿa) because of the maṣāliḥ. As to the rational arguments that you have enumerated, they are not applicable here (ghayr masmūʿa). Because if they are established they would infringe upon the legal obligation (taklīf), whereas the controversy over analogy (qiyās), whether in favour or in opposition, is based on the acceptance of the obligation. This well-considered answer suffices all what you have mentioned. 36

> Secondly, your criticism applies to those "who maintain that to attribute maṣāliḥ as ʿilla to God's commands is rationally necessary. It is not applicable to the one who holds that it is not obligatory for God but He has done so because of His Grace." 37

Thus Rāzī could maintain that munāsaba or maṣlaḥa were evidences for ʿilla, and could still insist that God's commands had no motives. It is with this reservation that Rāzī apparently accepted the first definition of munāsib. This is also the reason that he divides munāsib into two categories: Ḥaqīqī (true) and iqnāʿī (apparent). Ḥaqīqī is that munāsib which consists of either a maṣlaḥa in this world or one in the hereafter. Iqnāʿī only appears to be a munāsib; in fact, it is not.[38]

Like Ghazālī, Rāzī also divides maṣlaḥa into ḍarūrī, ḥājī and taḥsīnī. He divides munāsib according to taʾthīr and shahādat al-sharʿ (textual evidence), and mulāʾama.[39] With the exception of certain differences of detail, he is generally in agreement with Ghazālī.

In general, the attempt at theologizing the concept of maṣlaḥa in Ghazālī was completed by Rāzī with much more emphasis. Ghazālī objected that a conception of maṣlaḥa in reference to human utility alone and independent of God's determination, is not theologically possible. Rāzī gave this general objection a specific theological content. He made it clear that even to attribute the consideration of maṣlaḥa in terms of human utility to God's commands, is to attribute causality to His acts and hence theologically impossible. Both of these positions led to a kind of ijbār (determinism).[40] Both implied that God's commands demand obedience in their own right, not because of maṣlaḥa. If there existed the content of maṣlaḥa in Sharīʿa, it was

to be explained by the grace of God or by accident, as Rāzī held. These positions rendered the question of moral and legal responsibility meaningless. Rāzī admitted such implications of his position for the question of taklīf as well as for the problem of reasoning by analogy, but he did not elaborate it further.

Briefly, the concept of maṣlaḥa which was originally a general method of decision for jurists and as such a free principle, came to be limited by the opponents of this concept through two considerations. First, there was theological determinism which tended to define maslaha as whatever God commands. Second, there was a methodological determinism which, aiming to avoid the apparent arbitrariness of the method, tried to subject maṣlaḥa to qiyās so as to link it with some more definite basis. Both considerations were inadequate. First, in order to decide that something is maṣlaḥa, even to say that God's commands are based on maṣlaḥa, some criterion outside these commands has inevitably to be accepted. This was precisely what theological determinism denied. Second, to proceed by qiyās, one must seek the ʿilla, which was either denied because of theological reasons or was interpreted so as to mean "sign". The implications of this position are obvious. On the one hand, it insisted that further extension of rules must be in units; every new deduction must have a specific link in Sharīʿa. It denied the extension of law as a whole. On the other hand, it refused to take social needs into consideration, because it insisted upon deducing laws from specific rulings of Sharīʿa, not even from the general intent of the law.

If we may take general note of major works on usul during the period between Rāzī and Shāṭibī, we can see in these works four trends. The first trend refers to those

whose conception of maṣlaḥa is either dominantly similar to that of Rāzī or who have simply juxtaposed Ghazālī's and Rāzī's definitions of munāsib and maṣlaḥa. Among Mālikī jurists Shihāb al-Dīn al-Qarāfī (684/1285) [41], and among Ḥanafī's Ṣadr al-Sharī'a Maḥbūbi (747/1346) [42], stay closer to Rāzī. Accepting Rāzī's criticism of maṣlaḥa, Qarāfī even went further. He raised serious doubts whether maṣlaḥa could ever be defined and justified in clear terms. [43]

Jamāl al-Dīn al-Isnawī (771/1370) [44] and Tāj al-Dīn al-Subkī (771/1369) [45] combine Ghazālī and Rāzī. Sa'd al-Dīn al-Taftāzānī (792/1290) [46] interprets the Ḥanafī position, mainly that of Pazdawī (482/1089), in reference to Rāzī.

The second trend refers to those jurists who reject maṣlaḥa mursala as a valid basis of reasoning. In this category fall the Shāfi'ī jurist Sayf al-Dīn al-Āmidī (631/1234) [47] and the Mālikī, Ibn Ḥājib (646/1249). [48] In their arguments against maṣlaḥa mursala both follow Ghazālī rather than Rāzī. To them maṣlaḥa is acceptable only if it is textually supported.

The third trend is illustrated by the Shāfi'ī jurist, 'Izz al-Dīn Ibn 'Abd al-Salām (660/1263). He was inclined towards taṣawwuf. [49] There is a noticeable inclination towards sufistic interpretation of law in his treatment of the concept of maṣlaḥa. This needs a detailed observation.

To Ibn 'Abd al-Salām maṣlaḥa means ladhdha (pleasure) and faraḥ (happiness) and the means leading to them. [50] The maṣāliḥ are then divided into two kinds, maṣāliḥ of this world and the maṣāliḥ of the hereafter. The former can be known by reason,

while the latter can only be known by naql (tradition, revelation).[51] In view of the people's knowledge, however, maṣāliḥ differ according to the level of the approach of the people. The lowest level of maṣāliḥ is that which is common to all men. Higher than this is the level on which the adhkiyā' (the wise people) conceive maṣāliḥ. The highest level is peculiar to the awliyā' Allāh (friends of God, sufis) alone. The awliyā' and aṣfiyā prefer maṣāliḥ of the hereafter to those of this world. "The reason is that the awliyā' are anxious to know His commands and laws [in their reality], hence their investigation and reasoning (ijtihād) is the most complete one".[52]

Elsewhere, Ibn ʿAbd al-Salām divides maṣāliḥ as "rights" into two major divisions. First are the Rights of God, and second, the Rights of men. The Rights of God fall into three categories: rights which belong purely to God such as maʿārif (gnosticism) and aḥwāl (mystic states); second, rights which combine rights of God and those of men such as Zakāt; and third, those which combine rights of God, and of His Prophet, and of the people in general. The rights of men are also of three categories: rights of nafs (self), rights of men toward each other, and rights of animals toward men.[53]

The above references, which are recurrent themes in his Qawāʿid al-Anām, indicate that Ibn ʿAbd al-Salām's legal thinking was deeply influenced from a mystic viewpoint. For instance, he did not reject ḥuqūq al-nafs, but a maṣlaḥa aiming at the realization of such rights was lower in rank than one which aimed at maʿrifa and aḥwal.

In fact, Ibn ʿAbd al-Salām represents the stage where the Ṣūfī conception of maṣliḥ came to permeate uṣūl al-fiqh. It is not possible at this point to go into details of the Ṣūfī conception of human maṣāliḥ and its history. It must, however, be pointed out that at a very early stage in sufism, rejection of ḥuẓūẓ al-nafs (pleasures of the animal soul) became significant as a means of controlling the nafs. In Sarrāj's (378 A.H.) al-Lumaʿ, ḥuẓūẓ al-nafs are frequently opposed to ḥuqūq al-nafs.[54] Zuhd is defined as abandoning the ḥuẓūẓ.[55] The ḥuqūq are defined as aḥwāl, maqāmāt, maʿārif, etc.[56]

Ḥuẓūẓ had its apparent connection with maṣāliḥ, and more particularly, with the question of rukhṣa (legal allowance) in case of hardship. The Ṣūfī stress on zuhd, waraʿ and ikhlāṣ required abandoning of ḥuẓūẓ. An obvious example of this encroachment of taṣawwuf on fiqh and uṣūl al-fiqh may be seen in Qushayrī's waṣiyya (will) to his disciples where he advised them against opting for such allowances because "when a faqīr falls down from the level of ḥaqīqa to that of rukhṣa of Sharīʿa, he dissolves his covenant with God and violates the mutual bond between him and God."[57]

Closer to the period of Shāṭibī, the opposition to ḥuẓūẓ appears still stronger. Abu'l-Ḥasan al-Shādhilī (656 A.H.) with whom Ibn ʿAbd al-Salām's connections are claimed,[58] used to define tawḥīd (unification) in terms of abandoning the ḥuẓūẓ al-nafs.[59] He also explained it as a curse from God when someone is found indulging in the ḥuẓūẓ so as to be barred from ʿubūdiyya (servitude).[60]

Ibn ʿAbbād al-Rundī (792/1390), the famous Shādhilī Ṣūfī, with whom Shāṭibī was in correspondence on matters relating to taṣawwuf and fiqh, also stressed the rejection of ḥuẓūẓ. Commenting on the Ḥikam of Ibn ʿAṭā Allāh, Ibn ʿAbbād said that "the nafs always seeks ḥuẓūẓ and runs away from ḥuqūq; hence if you are confused in two matters, always choose what is harder for the nafs". [61]

Elsewhere, commenting on the ḥikma: "The coming of fāqāt (trial by wants and needs) is a happy occasion for the disciples", Ibn ʿAbbād explained that the Ṣūfī, contrary to a common Muslim, finds pleasure by losing his ḥuẓūẓ. Situations of neediness provide a disciple with purity of heart, which is not achieved by ṣawm (fasting) or ṣalāt (praying), because in ṣawm and ṣalāt there is a possibility of hawā (desire) and shahwa (lust). [62]

The Ṣūfī view of obligation to God, thus, had serious implications for maṣlaḥa in terms of human utility. It not only denied human interest as a basis of consideration, but also insisted on abandoning human interests to purify the obligations as "complete obedience to God". These implications were not generally recognized by the jurists. Ibn ʿAbd al-Salām accepted the Ṣūfī view, but in his attempt at synthesis between the two he was led either to deny maṣāliḥ of this world altogether, or to accept the two on separate grounds. [63]

The fourth trend is represented by Ibn Taymiyya (728/1328) and Ibn Qayyim al-Jawziyya (751/1350). Ibn Taymiyya tried to find a middle way between the two extremes of total rejection and total acceptance of maṣlaḥa. He considered maṣlaḥa

mursala similar to the methods of Ra'y, Istiḥsān, kashf (mystic revelation) and dhawq (mystic taste) of whose validity he was suspicious,[64] and hence rejected them. On the other hand, he refuted the moral implications of the denial of maṣlaḥa to the commands of God.

Ibn Taymiyya also counts maṣlaḥa mursala as one of the seven ways of knowing the commands of God, along with the traditional sources of law. He defines maṣlaḥa mursala as follows:

> "[It is a decision] when a mujtahid considers that a particular act seeks a utility which is preferable, and there is nothing in shar' that opposes this [consideration]. 65

Ibn Taymiyya, however, concludes that to argue on the basis of maṣlaḥa mursala is to legislate in matters of religion, and God has not permitted this. To do so is similar to istiḥsān and taḥsīn ʿaqlī.[66] He admits that Sharīʿa is not opposed to maṣlaḥa, but when human reason finds maṣlaḥa in a certain case where there is no supporting citation in the text to be found, only two things are meant. Either there definitely is a Text which the observer does not know or one is not dealing with a maṣlaḥa at all.[67] The obvious assumption in Ibn Taymiyya's arguments is that all the possible maṣāliḥ are already given in the Text. The other assumption is, of course, that all of God's commands are based on maṣlaḥa. The latter assumption is of particular significance to Ibn Taymiyya, as it has to do with the moral responsibility of man, a matter which he stressed very much. He condemned both the Muʿtazila and the Jabriyya in reference to the question of maṣlaḥa. The Muʿtazila argued that God is

obliged to command only what is good for man. They conceived God's actions as analogous to man's actions. They assumed that whatever is morally obligatory for man must be obligatory for God. Ibn Taymiyya refuted this. But he also refuted the Jabriyya position that God's commands are not based on maṣlaḥa. He questioned their assumption that the intention of maṣlaḥa is a limitation upon God's acts. The Jabriyya argued that a command does not necessitate will (irāda). Ibn Taymiyya saw in this argument a theological advantage, but morally such a doctrine was harmful. Ibn Taymiyya, therefore, set out to analyse this generally-accepted doctrine. He clarified that in reference to God there are two kinds of wills (irāda), al-irāda al-shar'iyya al-dīniyya (the legal religious will) and al-irāda al-qadriyya al-kawniyya (the potentive creative will.) When God commands, He wills the first kind of will.[68]

The consideration of maṣlaḥa, or as Ibn Qayyim, following Ibn Taymiyya, often calls it, Siyāsa, plays an important part in explaining legal obligations, legal reasoning and legal change in Ibn Qayyim's I'lām al-Muwaqqi'īn. He expounds the principles of Ḥanbalī fiqh, and enumerates the following five as sources and principles: (1) Nuṣūṣ, (2) the Fatāwā of the companions of the Prophet, (3) selection from the opinion of the companions, (4) Ḥadīth Mursal (a report of a saying of the Prophet which lacks a link in the chain going back to the Prophet.) (5) Qiyās l'il-ḍarūra.[69] Thus it is in reference to the three sources that the consideration of maṣlaḥa is expounded. Ibn Qayyim explains that it is valid to attribute 'illa to the commands of God, because the Qur'ān and the Sunna of the Prophet themselves are replete with examples where reasons are given to explain the command.[70] The larger part of the I'lām is devoted to illustrating how various commands are based

on certain reasons which he calls ḥikma or maṣlaḥa.

The following passage contains a clear statement of his views on maṣlaḥa. In a chapter where he explains how "fatāwā may change according to the change in times and places, etc...", he says:

> "This chapter is of great utility. Out of ignorance, grave errors have been committed regarding the Sharīʿa, which have caused hardship, difficulty and obligations that are not required by Sharīʿa; as is known, the magnificent Sharīʿa, which keeps the highest level of public interest, does not bring forth these things. The foundations of Sharīʿa are laid on the wisdom and on the interest of the people in this world and in the hereafter. Sharīʿa is all justice, kindness, interests [of the people] and wisdom. Hence any case which departs from justice to injustice.... from maṣlaḥa to mafsada, is not part of Sharīʿa even though it has been imposed by literal interpretation [of the texts of Sharīʿa]."[71]

The fifth trend is illustrated by Najm al-Dīn al-Ṭawfī (716/1316). He justified the use of maṣlaḥa even to the extent of setting aside the text. He stressed maṣlaḥa as the basic and overriding principle of Sharīʿa. Maṣlaḥa, therefore, prevails over all other methods such as ijmāʿ.[72] Ṭawfī regards maslaha as a fundamental principle.

Ṭawfī's preference of maṣlaḥa over against texts and ijmāʿ was also prompted by his belief that textual sources as well as the opinions on which ijmāʿ is claimed were diverse, inconsistent and often self-contradictory. The principle of maṣlaḥa provided a consistent method of decision.[73] Ṭawfī, however, did not elaborate on a concrete criterion of maṣāliḥ, how they are to be decided, especially in a case where there is a question of choosing among more than one maṣlaḥa. He goes on to the extreme of suggesting a decision by drawing of lots.[74]

To sum up, the concept of maṣlaḥa with its simple beginnings unfolded its various aspects as it came into contact with theology, taṣawwuf, logical analysis and, most significantly, with social and legal changes. Theological determinism introduced by Ashʿarī jurists appears largely in the discussion of taklīf. To Ashʿarīs, obligation is created by divine command. The Muʿtazila refuted this sense of theological determinism. They differentiated between two senses of obligation: taklīf and wujūb, the latter was rational and ethical, while the former was theological.[75] In other words, mere command does not oblige man to act; it only informs him. What obliges man is the knowledge of good and bad, or of useful and harmful. Commenting on this position, G. F. Hourani concludes that this interpretation should have been acceptable to the legal concept of obligation. Yet there were certain complexities. First, if legal obligation is based on one's knowlege of utility, it may lead to arbitrariness, and furthermore this criterion in its absolute sense is not universally applicable. All the things which are apparently useful also have certain elements which are harmful either to the person concerned or to others. Second, all the rules of Shari a do not conform to the rule of utility; there are obvious hardships and disadvantages in obeying them. Third, to preserve an order and a system the decision of utility cannot be left to the individual; who should then decide?

Still another aspect of the relationship of maṣlaḥa and taklīf was brought forth by Ṣūfīs. The consideration of seeking utility and avoiding harm leads one to view obligation in a formal sense. Whenever there is a choice between hard and soft, a

maṣlaḥa-oriented person chooses the latter. Not only that, to avoid harm to himself, one seeks devices which are legal; and since he is a utility seeker, he feels satisfied by escaping the full implications of legal obligation. To Ṣūfīs, this attitude, even in its lawful aspects, was quite opposite to the meaning of obligation towards God. They opposed this attitude as ḥuẓūẓ of nafs (lower soul) who is one of the enemies of the traveller on the path to God.

Shāṭibī tried to find an answer to above questions. He concentrated on the concept of maṣlaḥa itself, in contrast to other jurists who focussed on maṣlaḥa mursala. At a point where Shāṭibī rejects the connection of the method of reasoning by maṣlaḥa with bidʿa, we find an elaborate discussion of why and how he did not agree with the general understanding of the term maṣlaḥa mursala by other jurists.[76]

Refuting the association of maṣlaḥa mursala and bidʿa as maintained by some jurists,[77] Shāṭibī asserts that the two are completely opposed to each other.[78] He argues that first of all the jurists are not agreed upon the definition of maṣlaḥa mursala. Even Ghazālī expressed two different views on this point.[79] Secondly, Shāṭibī explains, that munāsib mursal which is neither specifically supported by the legal texts nor is it rejected, is not a bidʿa. One finds in it two categories. First, where munāsib mursal agrees with the general function (taṣarrufāt) of Sharīʿa, Maṣlaḥa mursala belongs to the second category. The validity of the first category is limited. On the contrary, maṣlaḥa mursala is supported by the existence of the genus which is common between maṣlaḥa mursala and Shari a, and this genus is considered valid by Sharīʿa. This validity is not based on a specific evidence but on its consideration as a whole.[80]

Shāṭibī illustrates maṣāliḥ mursala with ten examples. Among them are the following: the collection of the Qur'ān; determining the penalty for using intoxicants; allegiance to a less qualified person for an office in the presence of a better qualified one.[81] He finds three elements common in all the ten examples. First is the element of suitability with the objectives (maqāṣid) of Sharī'a.[82] Maṣāliḥ mursala do not conflict with the fundamentals or with the evidences of Sharī'a. Second, they are rationally intelligible. Maṣāliḥ mursala do not belong to ta'abbudāt because the latter are not rationally intelligible in detail. Shāṭibī gives more than ten examples to prove this point.[83] Thirdly, maṣālih mursala refer to the following principles: protection of (human) necessities; removal of impediments which are harmful to religion; and protection of an indispensible means to the end of law.[84]

Shāṭibī, thus, shows that the acceptable maṣāliḥ cannot be equated with bid'a and that they are not limited to the category of ḍarūrī, as some jurists have maintained; they cover other categories as well. In fact, the above explanation of maṣlaḥa mursala conforms to Shāṭibī's concept of maslaha which is of fundamental significance to his doctrine of maqāṣid al-sharī'a.

Shāṭibī's doctrine of maqāṣid al-Sharī'a is an attempt to establish maṣlaḥa as an essential element of the ends of law. He treats the problem of the relativity of maṣlaḥa, the relationship of taklīf and maṣlaḥa, ḥuẓūẓ and maslaḥa in sufficient detail. He tries to refute the implications of theological determinism and the dilemma of the relativity of maṣlaḥa first by suggesting study this problem

on two levels. On the first level he discusses the maqāṣid of the lawgiver and on the second level he deals with the maqasid of the mukallaf (subject of law). By proposing that maṣlaḥa is the objective of the lawgiver on the first level, he suggests that it is the legislator who decides what is maṣlaḥa. Still, Shāṭibī stresses that this decision is not final for all times to come. But the objective of the mukallaf (the subject of law) which also includes the legislator insofar as he is mukallaf, is obedience.

The scheme of Shāṭibī's discussion of maqāṣid is as follows:

I. Qaṣd of the Shāriʿ (lawgiver and legislator)

   i) First aspect: The primary intention of the lawgiver in instituting law as such.

   ii) Second aspect: His intention in instituting it so as to be intelligible (ifhām).

   iii) Third aspect: His intention in instituting it to demand obligation (taklīf).

   iv) Fourth aspect: His intention in including the mukallaf under its command.

II. Qaṣd of the mukallaf.

The discussion in the first aspect deals with maṣlaḥa, its meanings, grades, characteristics and its relativity or absoluteness. The second aspect discusses the linguistic dimension of the problem of taklīf which was overlooked by other jurists. A command constituting taklīf (obligation) must be understandable by all of its subjects, not only in words and sentences but also in its linguistic and cultural

meaning. Shāṭibī discusses this problem by explaining two terms: dalāla aṣliyya (essential meaning) and ummiyya (intelligible to commonality). The third aspect analyses the notion of taklīf in reference to qudra (power), mashaqqa (hardship) etc. The fourth exposes the aspect of ḥuẓūẓ in relation to hawā and taʿabbud.

On the second level, i.e. that of mukallaf, Shāṭibī is largely discussing the question of intention and acts.

For details we turn to the next chapter.

NOTES: CHAPTER VI

1. See: Lane, An Arabic-English Lexicon, Book IV (London: Williams Norgate, 1863-93), pp.1714-1715.

2. The Qur'ān: III, 114. Rāghib Iṣfahānī, Al-Mufradāt fi Gharīb al-Qur'ān, (Karachi: Tijārat Kutub, 1961), p.286, also confirms that in the Qur'ān Ṣalāḥ is often opposed to fasād and sayyi'a.

3. R. Paret, "Istiḥsān and Istiṣlāḥ" Shorter Encyclopedia of Islam (Leiden: Brill, 1961), p.185.

4. As quoted by Muṣṭafā al-Shalabī, Taʿlīl al-Aḥkam...(Cairo: Azhar, 1949), p.292 ff.

5. Vide Ibid., pp.285 ff.

6. Abu'l Ḥusayn al-Baṣrī, Al-Muʿtamad fī Uṣūl al-Fiqh, Vol. II (Dimashq: al-Maʿhad al'Ilmī al-Firansi, 1964), p.888.

7. Ibid.

8. Ibid., p.805.

9. Ghazālī, Al-Mustaṣfā min ʿIlm al-Uṣūl, Vol. I (Baghdād: Muthannā, 1970), p.286-87.

10. Ibid., p.284.

11. Ibid., p.290.

12. Ibid., p.294-295.

13. Ibid., Vol.II, p.306.

14. Ibid., Vol.I, pp.274, 284, following Shāfiʿī, Ghazālī says:
"من استصلح فقد شرع . كما ان من استحسن فقد شرع" p.315.

15. Ibid., Vol.I, pp.284-315.

16. Ibid., pp.56-57.

17. Ibid., p.60.

18. Ibid., p.87.

19. Ibid., Vol. II, p.230.

20. Ibid., Vol.II, p.295ff.

21. Ibid., p.297.

22. Ibid., Vol.II,p.306.

23. Ibid., Vol.I,pp.5-7. Ghazālī complains that Transoxian jurists, such as Abū Zayd have tried to bring too much fiqh into uṣūl al-fiqh.(p.10).

24. Ibn Khaldūn, Muqaddima (Cairo: Bulāq, 1320 A.H.), p.431.

25. Fakhr al-Dīn Rāzī, al-Maḥṣūl fī Uṣūl al-Fiqh, Ms. Yale University, Nemoy, A-1039 (L-643).

26. Ibid., part II, f.87a.

27. Ibid.

28. Ibid.

29. Ibid., part I, f.9a.

30. Ibid., f.13a.

31. Ibid., part II, f.90b.

32. Ibid., f.91b.

33. Ibid., f.92a.

34. Ibid., f.92b.

35. Ibid., ff.92-97.

36. Ibid., f.97b.

37. Ibid.

38. Ibid., f.88b.

39. Ibid., ff.87-90.

40. Most probably this is the ijbār to which Shāṭibī refers. See Ch. VIII, p. 368.

41. Qarāfī, Tanqīḥ al-Fuṣūl fī ʿIlm al-Uṣūl, in Al-Dhakhīra (Cairo: Maṭbaʿ kulliya al-Sharīʿa, 1961), pp.144-46.

42. Ṣadr al-Sharīʿa al-Maḥbūbī, Al-Tawḍīḥ wa'l-Tanqīḥ, Vol.II (Cairo: Maṭbaʿ Bosanawī, 1304 A.H.), pp.536-540.

43. See p. 299.

44. Jamāl al-Dīn al-Isnawī, Nihāyat al-Sūʾal, commentary on Bayḍāwī's Minhāj al-Wuṣūl, on the margin of Ibn Amīr al-Ḥājj, Al-Taqrīr wa l-Taḥbīr (Cairo: Bulāq, 1317 A.H.), Vol.III, pp.134-140.

45. Tāj al-Dīn al-Subkī, Jamʿ al-Jawāmiʿ, in ʿAbd al-Raḥmān al-Bannānī, Ḥāshiya... ʿAlā matn Jamʿ al-Jawāmiʿ, Vol.II (Cairo: Muṣṭafā Bābī, 1937), pp.270-285.

46. Saʿd al-Dīn al-Taftāzanī, Sharḥ al-Tawḍīḥ wa'l-Tanqīḥ (Cairo: Bosanawī, 1304 A.H.), Vol.II, pp.548-683.

47. Sayf al-Dīn al-Āmidī, Al-Iḥkām fī Uṣūl al-Aḥkām, Vol. IV (Cairo: Maṭbaʿ Maʿārif, 1914), p.215-217.

48. Ibn Ḥājib, Mukhtaṣar Muntahā al-Uṣūlī, Vol.II (Cairo: Būlāq, 1317 A.H.), p.289.

49. Ibn ʿAbd al-Salām was initiated into the Suhrawardiya Ṭarīqa. He is also claimed to have joined the Shādhiliya. His relationship with Ibn ʿArabī has, however, been a subject of dispute. For details see Riḍwān ʿAlī Nadwī, Al-ʿIzz b. ʿAbd al-Salām (Damascus: Dār al-fikr, 1960), pp.103-110.

50. Ibn ʿAbd al-Salām, Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām, Vol. I (Cairo: Istiqāma, n.d.), p.10.

51. Ibid., p.6.

52. Ibid., p.24

53. Ibid., p.129

54. R. A. Nicholson (Ed. Comm.), in Abu Naṣr al-Sarrāj, Kitāb al-Lumaʿ fī'l Taṣawwuf (London: Luzac, 1914), p.134.
For this opposition of terms cf.
Abū Bakr al-Kalābādhī, al-Taʿarruf li Madhhab Ahl al-Taṣawwuf (Cairo: ʿĪsā al-Bābī, 1960), p.23.
Najm al-Dīn Kubrā, Fawāʾiḥ al-Jamāl, ed. Fritz Meier, (Wiesbaden: Steiner, 1957), p.71 (Introduction), pp. 5-6 (Text).

55. Sarrāj, op.cit. p.47. (quoting Ṣūfi Ruwaym b. Aḥmad.)

56. Ibid., p.336.

57. Abū'l Qāsim al-Qushayrī, al-Risāla fī 1lm al-Taṣawwuf (Cairo: Muḥammad ʿAlī, 1948), p.181.

58. See above, n . 48.

59. ʿAbd al-Ḥalim Maḥmūd, Al-Madrasa al-Shādhiliyya wa Imāmuhā Abū'l Ḥasan al-Shādhilī, (Cairo: Dar al-Kutub al-Haditha, 1387 A.H.)

60. Ibid., p.137.

61. Ibn ʿAbbād al-Rundī, Sharḥ al-Ḥikam l'il-Imām Abī'l-Faḍl Aḥmad b. Aṭā'Allāh al-Iskandarī (Cairo: Muṣṭafā Afandī, 1320 A.H.), p.99.

62. Ibid., p.106.

63. See p. 300.

64. Ibn Taymiyya, Qāʿida fī'l Muʿjizāt wa'l karāmāt wa Anwāʿ khawāriq al-ʿĀdāt in Majmūʿa al-Rasā'il wa'l Masā'il, Vol.V (Cairo: Matba Manar, 1349 A.H.), p.22.

65. Ibid.

66. Ibid., p.23.

67. Ibid.

68. Ibid., p.30

69. Ibn Qayyim, Iʿlām al-Muwaqqiʿīn, Vol.I (Cairo: Saʿāda, 1955), pp.29-32.

70. Ibid., pp.197 ff.

71. Ibid., Vol.III, p.14.

72. Najm al-Dīn al-Ṭawfī, Sharḥ al-Arabaʿīn, included as appendix to Muṣṭafā Zayd, al-Maṣlaḥa fī'l Tashrīʿal-Islāmī wa Najm al-Dīn al-Ṭawfī (Cairo: Dār al-fikr al-ʿArabī, 1954), p.18.

73. Ibid., pp.35-37.

74. Ibid., p.47.

75. G. F. Hourani, Islamic Rationalism, The Ethics of ʿAbd al-Jabbār (Oxford: Clarendon, 1971), p.57, 115, 118.

76. Shāṭibī, Al-Iʿtiṣām (Cairo, 1332 A.H.), Vol.II, pp.95-140.

77. Shāṭibī, here, refers to Mālik whose reliance on maṣāliḥ mursala is strongly criticised by other jurists. Shāṭibī defends Mālik in the following manner

> Mālik, adhering to the principle of not applying rational explanations in matters of ʿibādāt "revolves entirely around his /approach to/ stop at the limits prescribed by Sharīʿa, /and thus/ disregarding what munāsib requires... /This is/ in contradiction to ʿādāt which are governed according to suitable reason (al-maʿnā al-munāsib) which is evident to human reason (ʿuqūl). He employed laxity (istirsāl) with self-confidence and with deep insight in reasoning by maslaha.../He employed this laxity so frequently/ that the scholars often condemn him because of this laxity. They imagined that Mālik threw off the yoke /of Sharīʿa/ and opened the gate of law-making. How far is it /from truth/!"
> Al-Iʿtiṣām, p.113.

78. Ibid., p.115.

79. Ibid., p.96.

80. Ibid., p.98.

81. Ibid., pp.99-110.

82. Ibid., p.111.

83. Ibid., For instance, Shāṭibī explains, Shāriʿ's prescriptions about cleaniless from human excretions are not rationally uniform. In case of urine and stools one is obliged only to wash certain parts of one's body, (i.e. ablution), but in case of nocturnal discharge, washing of the whole body is obligatory. Ibid., p.111.

84. Ibid., pp.113-115.

CHAPTER VII

SHĀṬIBĪ'S DOCTRINE OF MAQĀṢID AL-SHARĪ'A

As we have said elsewhere, in order to appreciate Shāṭibī's concept of maṣlaḥa, one must study it within the structure and formulation he himself devised. This chapter, therefore, aims at presenting Shāṭibī's concept of maṣlaḥa as it emerges from his philosophy. The concept will be developed according to his own formulation. For this reason, the present chapter is almost entirely based on Volume Two of Shāṭibī's Al-Muwāfaqāt, which is wholly devoted to an exposition of Maqāṣid al-Sharī'a.

It must be made clear that the following is neither a translation nor a summary of the said volume. We have summarized only those discussions from Al-Muwāfaqāt which, in our opinion, are relevant to our problem. To keep Shāṭibī's structure of analysis intact, his method of dividing and subdividing the concept into its various components, has been faithfully followed.

The scheme of Shāṭibī's discussion of Maqāṣid has been given in the previous chapter. Accordingly the present chapter is divided into five sections which analyse the following concepts and terms: maṣlaḥa, dalāla, taklīf, ta'abbud and niyya.

As a preamble to the exposition of the maqāṣid, Shāṭibī states that the whole of the discussion is based on a generally accepted premise which is theological in

origin. The premise is that God instituted sharā'iᶜ (laws) for maṣāliḥ (benefits, good) of the people, both immediate and future. (6)[1]. There exists, however, a difference of opinion among scholars concerning the details of this premise. For details of the discussion Shāṭibī refers his reader to ᶜIlm al-Kalām. For the purpose of this dissertation, however, the point needs to be explained briefly.

The mutakallimūn (theologians) accept the general and apparent meaning of the premise of maṣāliḥ, yet they differ from one another if maṣāliḥ are understood in terms of ᶜIlal (pl. of ᶜilla) meaning "causes" or "motives". The Ashᶜarī theologians reject explicit as well as implicit causality in reference to God. For them, the premise implies that God is obliged by the consideration of maṣāliḥ to act in a certain way. Since such an obligation proposed limitation on God's omnipotence, the Ashᶜarīs reject the idea that maṣāliḥ are the ᶜilal of sharā'iᶜ. They, however, accept the premise by interpreting maṣāliḥ to be the 'grace' of God, rather than the 'cause' of his acts. On the other hand, the Muᶜtazila, even though they too maintained God's omnipotence, yet believed that God is obliged to do good. Consequently they accepted the above premise, regarding maṣāliḥ as ᶜilla of sharīᶜa.

The theological disagreement initially concerned God's acts, but it was extended to God's commands in the Qur'ān as they constitute His acts of speech. Thus the theological disagreement manifested itself in uṣūl al-fiqh as well. Theological arguments penetrated into uṣūl al-fiqh also because a number of writers on uṣūl were theologians.

Uṣūl al-fiqh, however, required a manner of thinking and a method of reasoning different from that of kalām. Legal thinking necessitated that the volition for voluntary human acts must be attributed to man himself if man is to be held legally responsible for his acts. Since obedience to Divine Commands thus depends on human volition, the Command must be shown to be motivated by the consideration of human interests. Consequently, the premise of maṣāliḥ must be accepted in uṣūl in terms of "cause", "motive" and "purpose".

The premise of maṣāliḥ came to be generally accepted in uṣūl. Some uṣūliyyīn, such as Ghazālī and others, in order to be consistent with their theological views, redefined the term ʿilla so as to rid it of the connotation of "causality" and "motivation" in which sense it was used and disputed in Kalām. Passing from Kalām to uṣūl, the term ʿilla thus underwent a semantic change. For the explanation of the meaning it acquired in uṣūl, we now turn to Shāṭibī.

Shāṭibī explains that Rāzī held that like His acts, God's commands also cannot be analyzed in terms of ʿIlal (causes) whereas the Muʿtazila believed that His Commands are caused (muʿallala) by the consideration of maṣāliḥ of the people. The majority of the fuqahā' accepted the latter view in fiqh. Since it was inevitable that ʿilal be established for al-aḥkām al-Sharʿiyya (the rules of Sharīʿa), the ʿilla as used in connection with the uṣūl came to be interpreted as "the signs that make a rule known specifically". (6)

Shāṭibī argues that the premise of maṣāiiḥ is established in Sharīʿa by the method of induction, both as a general theme and by the evidence of the description of

the ʿilal of various commands in detail. For instance, the Qur'ān explains the reasons for ablution, fasting and jihād as being cleanliness, piety and eradication of oppression, respectively. (7)

After explaining this premise, Shāṭibī proceeds to discuss the details of the maqāṣid, which are analyzed in five aspects; four in relation to the lawgiver, and one in relation to the mukallaf (subject of law).

SECTION ONE

MAṢLAḤA, THE FIRST MAQṢID OF SHARĪᶜA

The primary objective of the lawgiver is the maṣlaḥa of the people. The obligations in Sharīᶜa concern the protection of the maqāṣid of the Sharīᶜa which in its turn aims to protect the maṣāliḥ of the people. Thus maqāṣid and maṣlaḥa become interchangeable terms in reference to obligations.

Shāṭibī defines maṣlaḥa as follows: "I mean by maṣlaḥa that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require of him in an absolute sense". (25)

This is the definition of maṣlaḥa in its absolute sense. Shāṭibī, however, takes into account various other senses in which maṣlaḥa can be studied. The maṣāliḥ belong either to this world or to the world hereafter. Further, these maṣāliḥ can be seen as a system; belonging to different grades and with a definable relationship with each other.

The second element in the meaning of maṣlaḥa is the sense of protection. Shāṭibī explains that the Sharīᶜa deals with the protection of maṣāliḥ either in a positive manner as when to preserve the existence of maṣāliḥ, Sharīᶜa adopts measures to support their bases. Or, in a negative manner, to prevent the extinction of maṣāliḥ it adopts measures to remove any elements which are actually or potentially disruptive of maṣāliḥ. (8)

Shāṭibī divides the maqāṣid into ḍarūrī (necessary), ḥājī (needed) and taḥsīnī (commendable). The ḍarūrī maqāṣid are called necessary because they are indispensable in sustaining the maṣāliḥ of Dīn (religion and the hereafter) and Dunyā, in the sense that if they are disrupted the stability of the maṣāliḥ of the world is disrupted. Their disruption results in the termination of life in the world, and in the hereafter. It results in losing salvation and blessings. (8)

The ḍarūrī category consists of the following five: Dīn (religion), Nafs (self), Nasl (family), Māl (property) and ʿAql (intellect). (10)

Scholars, says Shāṭibī, have observed that these five principles are universally accepted. Analyzing the aims of the Sharīʿa obligations, we find that Sharīʿa also considers them as necessary. The Sharīʿa obligations can be divided from the viewpoint of positive and negative manners of protection into two groups. Falling into the positive-group manner are ʿibādāt (rituals, worship), ʿādāt (habits, customs) and muʿāmalāt (transactions), and falling into the negative group are jināyāt (penalties).

ʿIbādāt aim at the protection of Dīn (religion). Examples of ʿibādāt are belief and the declaration of faith (the Unity of God, the Prophethood of Muḥammad), ṣalāt, zakāt, ṣiyām and ḥajj. ʿĀdāt aim at the protection of nafs (self) and ʿaql (intellect). Seeking food, drink, clothing and shelter are examples of ʿādāt. Muʿāmalāt also protect nafs and ʿaql but through ʿādāt. Shāṭibī defines jināyāt as that which concerns the above five maṣāliḥ in a preventive manner; it prescribes the removal of what prevents the realization of these interests.

To illustrate jināyāt, he gives examples of qiṣāṣ (retaliation) and diyāt (blood money) for nafs, and ḥadd (punishment for drinking intoxicants) for the protection of ʿaql. (8-10)

The ḥājiyāt are so called because they are needed in order to expand (tawassuʿ) the purpose of the maqāṣid and to remove the strictness of literal sense, the application of which leads to impediments and hardships and eventually to the disruption on the maqāṣid(objectives). Thus if the ḥājiyāt are not taken into consideration along with the ḍarūrī maqāṣid, the people on the whole will face hardship. The disruption of ḥājiyāt is, however, not disruptive of the whole of maṣāliḥ, as is the case with the ḍarūriyāt. Examples of ḥājiyāt are as follows: in ʿibādāt, concessions because of sickness and because of travel which otherwise may cause hardship in prayers, fasting, etc.; in ʿādāt, the lawfulness of hunting; in muʿāmalāt, permission for qirāḍ (money lending), musāqāt (agrarian association) and in jināyāt, allowances for weak and insufficient evidence in decisions affecting public interest. (10-11)

Taḥsīnāt means to adopt what conforms to the best of practices (ʿādāt) and to avoid those manners which are disliked by wiser people. This type of maṣlaḥa covers noble habits (ethics, morality). Examples of this type are as follows: in ʿibādāt, cleanliness (ṭahāra) or decency in covering the parts of the body (satr) in prayer; in ʿadāt, etiquette, table manners, etc.; in muʿāmalāt, prohibition of the sale of unclean (najis) articles or the sale of surplus food and water, and depriving a slave of the position of witness and leadership, etc.; for jināyāt, prohibition of killing a free man in place of a slave, etc. (11-12)

Shāṭibī regards the above division of maṣāliḥ as a structure consisting of three grades, connected to one another. His detailed analysis reveals two aspects of their relationships with one another. First, every grade separately requires annexion of certain elements which supplement and complement this grade. Second, every grade is related to the others. (12)

Every one of the three grades requires certain elements to achieve the fuller realization of its objectives. For instance, qiṣāṣ (retaliation) cannot be realized without a condition of tamāthul (parallel evaluation). This position, however, calls for two clarifications: first, a lack of these complementary elements does not amount to a negation of the essential objectives; second, the consideration and realization of the complementaries must not bring about a negation of the original objectives - that is to say, if the consideration of a complementary results in the annulment of the original objective, its consideration will not be valid. The reasons for this stipulation are, first, because the complementary element is like a quality (ṣifa). If the consideration of a quality results in the negation of the qualified object (mawṣūf), the qualification is negated as well. Second, even if it is supposed that the consideration of the complementary results in the realization of its interests at the cost of the original objective, it is stressed that the realization of the original be preferred. (14)

The above situation is illustrated by the following example. The eating of carrion is allowed in Sharīʿa to save life. The reason is that the preservation of life is of the utmost importance, and preservation of murūʾa (manliness, honour) is only complementary (takmīlī) to the protection of life. Impure things are prohibited

in order to preserve honour and to encourage morality. But if the preservation of the complementary, i.e. to preserve honour by avoiding eating impure things, leads to the negation of the original interest, i.e. the preservation of life, the consideration of the complementary is forsaken.

Another example may be seen in the act of sale which is a ḍarūrī maṣlaḥa while the prohibition of risk and ignorance in sale transactions is complementary. If the complete negation of risk is stipulated, the result will be complete negation of the act of sale.

The relationship of the above three grades of maṣāliḥ with one another is the same as that of the complementary maṣāliḥ to the original objective of the law. The taḥsīniyat are thus complementary to the ḥājiyāt which are complementary to the ḍarūriyāt. The ḍarūriyāt are the fundamentals of maṣāliḥ. In view of the above explanation, Shāṭibī deduces the following five rules in this relationship:

1. The ḍarūrī is the basis of all maṣāliḥ.
2. The ikhtilāl (disruption) of ḍarūrī necessitates the ikhtilāl of other maṣāliḥ absolutely.
3. The ikhtilāl of other maṣāliḥ, however, does not necessitate an ikhtilāl of, and within, the ḍarūrī itself.
4. In a certain sense, however, the ikhtilāl of taḥsīnī or ḥājī absolutely necessitates the ikhtilāl of ḍarūrī.
5. The preservation (muḥāfaẓa) of ḥājī and taḥsīnī is necessary for the sake of ḍarūrī. (16-17)

These rules may be illustrated by the rule of qiṣāṣ (lex talionis). Qiṣāṣ is ḍarūrī, and tamāthul (consideration of equality) in qiṣāṣ is taḥsīnī and takmīlī.

To illustrate the first rule, tamāthul (taḥsīnī) is complementary and exists only because of qiṣāṣ (ḍarūrī). Thus a ḍarūrī maṣlaḥa (qiṣāṣ) is the basis of a taḥsīnī maṣlaḥa (tamāthul).

To illustrate the second rule, if there is no qiṣāṣ, there is no consideration of tamāthul. In other words, the ikhtilāl of the ḍarūrī means the same for the other grades of maṣāliḥ necessarily.

To illustrate the third rule, the ikhtilāl of tamāthul does not require ikhtilāl of qiṣāṣ.

The fourth and fifth rules can be appreciated if one grasps the sense in which ḍarūrī is affected by the ikhtilāl of other maṣāliḥ. Shāṭibī explains the effect of other maṣāliḥ on ḍarūrī maṣāliḥ with the following four similes:

1. The relationship of other maṣāliḥ to ḍarūrī maṣāliḥ is like that of protective zones (ḥimā). The interruption (ikhlāl) of one protective zone amounts to the interruption of the next zone and eventually to the disruption of the ḍarūrī maṣāliḥ which are at the centre of these zones.
2. This relation may also be understood as that of the part and the whole; other maṣāliḥ together with the ḍarūrī maṣāliḥ make one whole. The disruption of the parts obviously means the same as the disruption of the whole.

3. The ḥājiyāt and taḥsīniyāt can be understood as individuals in relation to the universal, i.e. ḍarūriyāt.

4. The ḥājiyāt and taḥsīniyāt serve the ḍarūrī maṣāliḥ as a prerequisite (muqqaddima), or as associates (muqārin). (16–24)

As mentioned above, the maṣāliḥ are also divided into those belonging to this world and those which concern the Hereafter.

First are the maṣāliḥ of this world. There are two angles from which the maṣāliḥ of this world can be observed. The first angle is to observe them as they actually exist, and the second is to observe them on the basis of sharʿī proclamation.

Examining maṣāliḥ as they exist in this world, we see that they are not found as pure maṣāliḥ. Rather, they are mixed with discomfort and hardship, however big or small, and which may precede, accompany or follow the maṣāliḥ. Similar are the mafāṣid (opposite of maṣāliḥ) which also are not pure but are found to be mixed with a certain amount of comfort and enjoyment. The whole phenomena in this world point to the fact that this world is created from a combination of opposites and that it is impossible to abstract (istikhlāṣ) only one side. The proof of the matter is the completely universal experience of this fact. It is for this reason that the maṣāliḥ and mafāsid in this world are known only on the basis of the pre-dominant side; if the side of maṣlaḥa dominates, the matter at issue is considered, customarily a maṣlaḥa; otherwise a mafsada. In these matters, thus, the determining factor is the prevalent practice (ʿāda). (26)

It must be noticed here that this principle is applicable only to acts relating to ʿāda, and only to the determination of maṣlaḥa or mafsada in this world through knowing them as they exist. Acts which are not ʿādāt are not affected by this principle. (26)

The second approach to considering the maṣāliḥ of this world is to observe them in reference to their connection with Sharʿī proclamation (Khiṭāb). The basic rule in this approach is that the maṣāliḥ or mafāsid as taken into consideration by the Shāriʿ are pure. If they are supposed to be mixed (mashūba), they are not so in the reality of sharʿ. (27) As explained above, maṣlaḥa or mafsada, in this world, is determined by the predominant side (al-jiha al-ghāliba) of a matter. It is the predominant part which is the object of Sharʿī proclamation. The dominated (al-maghlūba) part, whether maṣlaḥa or mafsada is not the objective of the Shāriʿ. Why is it then that the dominated elements, even though they may be maṣlaḥa, are not the objectives of sharīʿa?. On the other hand, how can they, when they are not the objectives of sharīʿa, still be maṣlaḥa? Shāṭibī solves this apparent contradiction with the following explanation.

He argues that maṣlaḥa maghlūba is that which is considered as such according to the acquired habitude (al-ʿtiyād al-kasbī) alone, i.e. without adding the Sharʿī requirements of maṣlaḥa. Customarily such a maṣlaḥa is not considered worth seeking. This is the part of maṣlaḥa which is also not the objective of the law-giver insofar as the sharʿiyya (legality) of rules (aḥkām) as a whole is concerned.

Further, if the dominated part were also taken into account by the Shāriᶜ, no act could have been the subject of command alone or of prohibition alone. Obviously such is not the case. If it is supposed that the dominated part in a mixed maṣlaḥa is the object of prohibition and the dominating part that of command, then one and the same act becomes an object of command and prohibition at one and the same time, which would have been a taklīf mā lā yuṭāq (impossible obligation) as well as an absurd situation. (28)

The above explanation, however, does not clarify the existence or occurrence of mafsada despite the Shāriᶜ's intention to the contrary. Shāṭibī elaborates the matter further by saying that the above position may appear to be that of the philosophers' and the Muᶜtazila on the existence and occurrence of evil. According to the philosophers, God created a world in which the good is mixed with evil. It is the good, however, which is the purpose of creation. He did not create the world for evil, even though evil may occur along with the good.

The Muᶜtazila believed that evils are not intended to occur; their occurence is against God's will (irāda).

Shāṭibī first refutes the apparent similarity between his and the above positions. He argues on the basis of a distinction between two intentions (qaṣd) of God. First there is the intention of creation (al-qaṣd al-khalqī al-takwīnī) and second the intention of legislation (al-qaṣd al-tashrīᶜī). The positions of the philosophers and the Muᶜtazila concern the former and Shāṭibī's the latter. As he argues, the

occurrence of mafsada, despite God's will and intention for maṣlaḥa, is justifiable in the case of al-qaṣd al-tashrīʿī, because a man is held free (mukhtār) so as to be legally responsible for his acts. This position is not justified in the case of al-irāda al-takwīniyya as this would imply imperfection in God's powers. (30).

The above discussion of maṣlaḥa has been concerned with the cases where the actual practice may be used as the basis of determining a maṣlaḥa. There are cases where the judgment of habitude is not so definitive. For instance, eating carrion in case of dire need and killing a murderer for the prevention of crimes, are considered maṣlaḥa despite the fact that the acts themselves are not so. In other words, unlike the cases in the above discussion where the acts, despite their consisting of certain aspects of mafsada, are regarded as maṣlaḥa in themselves on the whole, the acts in the above examples, though mafsada in themselves, become maṣlaḥa because of certain external considerations. The supposition in this case is that the external consideration can dominate the internal consideration. How this domination is decided needs elaboration.

In view of the above situation, logically, there are two positions; either both considerations are equal in such a manner that one cannot be preferred to the other, or one of them can be preferred. The former position probably does not exist in Sharīʿa, because it necessitates that Sharīʿa should intend prohibition and permission simultaneously.

Furthermore, if one side is preferrable, it is still possible that the Shāriʿ might have intended the other side. Both sides will always remain to be weighed by a

mujtahid. We are obliged only to do what, after weighing both sides, appears to us (yanqadiḥu) the intention of the Shāriᶜ, not what is intended by the Shāriᶜ in reality (in His mind). (31) In this way, after the decision of a mujtahid, the possibility of the other side being intended has to be disregarded insofar as fulfilling an obligation is concerned. The possibility is, however, not finally disregarded insofar as naẓar (examination, investigation) is concerned.

A group of Scholars who believed the above possibility to be applicable in the case of obligations as well, maintained the principle of murāᶜāt al-khilāf. As mentioned elsewhere, this principle, to Shāṭibī, meant an impossible and hence void obligation.[2]

Shāṭibī sums up the above discussion by saying that al-jiha al-marjūḥa (the dominated aspect) when it is found mixed with al-jiha al-rājiḥa (the dominating aspect) is not the objective of a legal obligation. This principle governs all problems which are subject to ijtihād (legal reasoning) irrespective of whether one believes a mujtahid to be always correct or not. Hence reasoning by analogy must go on (al-qiyās mustamirrun) and the demonstrative proof must remain free and unqualified (al-burhān muṭlaqun). (32)

So far the discussion has been concerned with maṣāliḥ of this world. Maṣāliḥ of the hereafter are also pure, such as the blessings of paradise, as well as mixed (mumtazija), such as the punishment of hell meted out to believers in the Unity of God.

The basic rule in such maṣāliḥ and mafāsid is that they are all determined according to Sharīʿa, because the reason has no place in matters relating to the hereafter.

Sometimes a confusion may arise because of considering the pure maṣāliḥ or mafāsid as mixed. For instance the blessings bestowed upon the prophets in paradise differ from those given to others. Those in lower ranks may be regarded as being punished by the absence of the blessings given to those in higher ranks. According to Shāṭibī, this confusion arises because a distinction is not maintained between a species and its individual exemplifications. The individuals may differ in special characteristics, etc., but they do not differ in relation to their species; they are all equal as members of the species. This membership is the thing that determines their waṣf (quality). (36).

From the above discussions, Shāṭibī deduces the following rules as characteristics of maṣlaḥa:

1. The purpose of legislation (tashrīʿ) is to establish (iqāma) maṣāliḥ in this world and in the hereafter, but in a way that they do not disrupt (yakhtall) the system of Sharʿ.
2. The Shāriʿ intends maṣāliḥ to be absolute.
3. The reason for the above two considerations is that Sharīʿa has been instituted to be abadī (eternal, continuous), kullī (universal) and ʿāmm (general) in relation to all kinds of obligations (takālīf), mukallafīn (subjects of law) and aḥwāl (conditions, states). (37)

The above three characteristics thus require maṣlaḥa to be both muṭlaq (absolute)

and kullī (universal). The absoluteness means that maṣāliḥ should not be relative and subjective. Relativity is usually based on equating a maṣlaḥa with one of the following: 'ahwā' al-nufūs (personal likings), manāfiᶜ (personal advantages), nayl al-shahawāt (fulfilment of passionate desires) and aghrāḍ (individual interests). According to Shāṭibī all of the above considerations render the concept of maṣlaḥa relative and subjective, which is not the consideration of Shāriᶜ in maṣlaḥa, though it may be so in ᶜāda.

He argues on the following grounds: First, the objective of Sharīᶜa is to bring the mukallafīn out of the dictates of their desires so as to make them servants of God. This objective negates the consideration of personal liking as an element in the consideration of Shāriᶜ.

Second, maṣāliḥ cannot be considered as mere manāfiᶜ because in ᶜāda as well as in Sharᶜ they are mixed with disadvantages. The point of emphasis here is that nafᶜ is not essential in the consideration of maṣlaḥa - neither in ᶜāda nor in sharᶜ.

In ᶜāda some higher goal like the subsistence of life forms the basic consideration in determining maṣlaḥa. In sharᶜ the consideration must still be higher, and that is the consideration of the hereafter.

Third, the consideration of the fulfilment of personal desires also renders the concept of maṣlaḥa highly relative. The consideration of personal desire varies from state to state, person to person, and time to time. It is so relative that it cannot be an essential consideration for determining maṣlaḥa.

Fourth, consideration of individual interests leads not only to a divergence but, more significantly, also to a conflict with others and to the deprivation of others' interests.

Consequently, relativity and subjectivity are excluded from the shar^{c}ī consideration of maṣlaḥa; it must, therefore, be absolute. In shar^{c} this absoluteness is provided by the stipulation that maṣlaḥa must aim at the subsistence of life in this world commensurately with life in the next world.

The second characteristic of maṣlaḥa is its universality (kullī). This universality is not affected by the takhalluf (falling short) of its particulars. For instance, the penalties are imposed on the basis of the universal rule that they generally restrain people from committing crimes. Yet, there are people who, despite being punished, do not abstain from committing a crime. Nevertheless, such exceptions do not affect the validity of the general rule about the penalty. (52) In sharī^{c}a it is al-ghālib al-aktharī (the major dominant) which is the general-definitive element (al-^{c}āmm al-qaṭ^{c}ī) in the consideration of a maṣlaḥa. This is the characteristic (sha'n) of inductive universals (al-Kulliyāt al-istiqrā'iyya). An illustration of this universality may be found in the universal rules of a language. The universals of a language are closer to those of sharī^{c}a, because both are waḍ^{c}ī (instituted, conventional) not ^{c}aqlī (speculative). The inductive universals (in Arabic grammar, for instance) remain valid even if some of their particulars do not conform to the majority of particulars. (52-53).

In reference to the characteristics of maṣlaḥa, Shāṭibī takes into consideration

the criticisms of this concept by other jurists. Among them he specifically refers to Fakhr al-Dīn Rāzī, Shihāb al-Dīn Qarāfī and Ibn ʿAbd al-Salām. He has answered their criticism. As these criticisms and answers are quite relevant to the discussion of maṣlaḥa, a brief summary of this debate is given below.

Analysing the position of those who favour maṣlaḥa, Rāzī refers to their argument that the basic rule in manāfiʿ (useful things) is ʾidhn (permission, lawfulness) and in maḍārr (harmful things) is manʿ (abstention). (40). Shāṭibī rejects this analysis as an unfaithful representation of the maṣlaḥa-view. It is possible to speak about manāfiʿ and maḍārr only in absolute terms as they do not exist as absolute in reality; actually they are largely relative. Second, since maṣāliḥ refer to sharʿī proclamations which take into consideration the differences among persons, times and states, it is inadequate to talk in absolute terms. Third, since no manāfiʿ are to be found that are not mixed with maḍārr, if we accept Rāzī's principle, we will have also to accept that ʾidhn and nahy (prohibition) can apply to one and the same thing - which is absurd.

Shihāb al-Din al-Qarāfī, the commentator on Rāzī's al-Maḥṣūl, had some doubts about the principle that maṣlaḥa constituted the basis of legal obligations. He argued that maṣlaḥa cannot be the basis of ibāḥa. This is true, first, because maṣlaḥa cannot be realized and hence defined in simple and absolute terms, because no maṣlaḥa can be gained without ʾalam (pain) and mafāsid (evils). Thus to maintain that every mubāḥ must be based on maṣlaḥa amounts to a com-

plete negation of mubāḥ. Second, in order to argue that maṣlaḥa is the basis of obligation, maṣlaḥa must be defined in absolute terms and not in reference to certain specific factors, because this process of the preference of one specific consideration to another is never ending and because it does not provide a universally accepted basis of definition. Furthermore, this position cannot be argued on the grounds that maṣlaḥa is that whose violater is punished by God. This definition is not acceptable because it is based either on the assumption that God punishes only evil and this manner of argument is dawr (arguing in circle) or on the assumption that every obligation from God is a maṣlaḥa, simply because it is an obligation.

Qarāfī adds that the maṣlaḥa view is difficult to maintain for our people (aṣḥābunā [ashʿarīs?]), as well. They cannot say that God takes maṣlaḥa into consideration over against mafsada, because there are many mubāḥāt in which this consideration is lacking. The only proof they have is an argument on the basis of the induction of the obligations, and this also is based on a claim to know the asrār (secrets, rational explanation) of fiqh. They are necessarily thus led to the position thatGod's actions, commands and considerations are entirely dependent on His will and nothing else. The Muʿtazila are also led to the same conclusion. (42)

To answer Qarāfī, Shāṭibī refers to his own discussion of the relativity of maṣlaḥa. Second, he answers that a survey of the rules of Sharīʿa by the method of induction is claimed to have proved that sharīʿa has taken into considerati on what is

regarded as maṣlaḥa in customary practice as well. He argues that such a survey on the basis of the method of induction provides the ḍawābiṭ (determining factors) of maṣlaḥa. The examination of the events by way of induction where the takālīf al-sharīʿa (legal obligations) have been realized in practice shows that these takālif and mubāḥāt did not harm human interests (or maṣāliḥ) but have conformed to them and established them.

Ibn ʿAbd al-Salām distinguished between maṣāliḥ al-dār al-ākhira and al-maṣāliḥ al-dunyawiyya on the basis that the former can be known only by sharʿ while the latter are known by needs, experience, custom and by considerations of probability. He even says that when one wants to know a maṣlaḥa, he may simply consider it rationally, supposing that the shāriʿ has given no indication. Judgment is reached rationally in this manner except in the case of taʿabbudāt where maṣāliḥ or mafāsid are not given.

Shāṭibī, quoting Ibn ʿAbd al-Salām here, probably to indicate his disagreement, refers to him not by name but by terms such as baʿḍ al-nās (some person) and hādhā al-qā'il (this speaker). To Shāṭibī maṣāliḥ in the hereafter are not independent of maṣāliḥ of this world. Hence not only al-maṣāliḥ al-ukhrawiyya but also the dunyawiyya, as long as they are obligations, are known by sharʿ alone. If the distinction between the two maṣāliḥ were absolute, the sharʿ would have been concerned only with al-maṣāliḥ al-ukhrawiyya. In fact, to realize the ukhrawiyya, the establishment of the dunyawiyya is inevitable. Shāṭibī refutes the implication in Ibn ʿAbd al-Salām's statement that the dunyawiyya are rational and hence the consideration of sharʿ only supplementary. (48)

SECTION TWO

AN ANALYSIS OF THE TERMS DALĀLA AND MAʿNĀ

The preceding section discussed the first aspect of maqāṣid which focussed on maṣlaḥa as being the primary objective of law. In the present section Shāṭibī goes further to argue that the second maqṣid of Sharīʿa is its intelligibility; Sharīʿa was revealed in such a manner that it was to be intelligible for every mukallaf. Although Shāṭibī does not say so explicity, his analysis of dalāla develops an argument against the Ẓāhirīs and the Ḥadīth-group who discouraged any interpretation of Sharīʿa on the basis of maṣlaḥa. Ẓāhirīs attach more significance to the letter of the law (lafẓ: words) than to the spirit of the law (maʿnā: meaning). Shāṭibī, on the contrary contends that it is the meaning which is important, and not the word. Thus, he indirectly leads to the conclusion that interpretation of Sharīʿa by maṣlaḥa serves to fulfil the objectives of Sharīʿa.

The idea of Sharīʿa being universally intelligible has been accepted generally. There have been, however, some points which had posed some difficulty for the scholars. One such point was the question of foreign words in the Qur'ān. Generally, the jurists found it necessary to reject the foreign origin of these words in order to maintain that the Qur'ān was revealed in pure Arabic. Before proceeding to discuss his theory of dalāla (indication of words to meaning), Shāṭibī first discusses the problem of foreign words in the Qur'ān.

Shāṭibī opens his discussion by analysing this very fact of revelation in Arabic.

He explains that in the claim 'that ... sharīʿa is all Arabic and there is nothing aʿjamī (foreign) in it', the point of emphasis is not whether there are foreign words in the Qur'ān or not. Unfortunately, many a jurist has understood the problem in this sense. In fact, the point to be stressed is that Qur'ān was revealed in the language of the Arabs as a whole, and it is in this general sense that ... Sharīʿa aims to be understood. It was revealed in such a manner that the particular words and styles of expressing the meanings are the same as used and understood by the Arabs. For instance the Arabic language uses ʿāmm (general) sometimes to mean ẓāhir (apparent), sometimes to mean ʿāmm in one sense and khāṣṣ in another sense, and sometimes to mean khāṣṣ only. The Qur'ān follows the same styles of expression. In other words every language has particular styles of expression, and styles of one language cannot help in understanding another language. The language of the Arabs cannot be understood on the basis of the language of non-Arabs. Similarly, the language of Arabs cannot help in understanding non-Arab languages. Shāfiʿī noticed this aspect of sharīʿa and stressed its significance for uṣūl al-fiqh, but the later jurists have generally disregarded this aspect. (66) Shāṭibī retakes from Shāfiʿī and develops the theme of the universality of the understanding of sharīʿa by an analysis of the meaning-indication process in the Arab language.

Shāṭibī's discussion of the universality of the intelligibility of Sharīʿa does not seem to solve directly the contradiction which emerges in case of those who know no Arabic. We may, however, infer from the general trend of his argument two levels of the universality of intelligibility which may serve as an indirect answer to the question. On the first level the universality of intelligibility is confined

to Arabs. Shāṭibī maintains that Sharī'a is cast in a language which is understood by all Arabs and it is in this sense that it is Arabic. On the second level Sharī'a is universally intelligible, even by the non-Arabs. Here, intelligibility refers to a more special sense of 'meaning'; it does not refer to the indication by words, syntax or grammar. This is the special sense of 'meaning' in which the meaning is separated from words, syntax, grammar, etc., and thus, actually disconnected from any language. In this state of abstraction they are ready to be understood by speakers of all languages. These meanings are ready to be translated into other languages. This 'meaning' nevertheless, initially comes from the first level of intelligibility which is achieved from the context of a speech in a particular language.

Shāṭibī calls the process, which indicates this special 'meaning', al-dalāla al-aṣliyya which may explain how Shāṭibī proposes that Sharī'a can be understood even by those who do not know Arabic. Al-Dalāla al-aṣliyya is explained in detail as follows:

The Arabic language, insofar as it consists of words to express meanings, has two aspects:

First, the absolute aspect of its words and expressions which denote absolute meanings. This denotation is al-dalāla al-aṣliyya (essential denotation).

Second, the limited aspect in which the words and expressions denote subsidiary meanings. This denotation is al-dalāla al-tābi'a (subordinate denotation).

The first aspect is common to all languages and is the ultimate aim of a speaker. For instance, if A performs a certain action, let us say standing, all languages

can state this fact. Although with different words; yet all languages will state the same fact. It is in this aspect that statements in one language can be translated into another. This is the sense in which one speaks of universal understanding of a language. (66)

The second aspect concerns particular languages, in this case Arabic. The statement in the above example, "Qāma Zaydun", will vary depending on the emphasis on subject, predicate, condition, context and on the variations of styles. As examples may be given the following: Zaydun qāma; Inna Zaydan qāma; Wallāhi inna Zaydan qāma; Qad qāma Zaydun; Zaydun qad qāma; Innamā qāma Zaydun, etc. (67).

These kinds of variations, though they change the meanings and emphasis in a statement, are, nevertheless, not the original objective (al-maqṣūd al-aṣlī) of the speaker, but rather they are supplementary and ameliorative to the essential meaning. This, however, does not mean that they are to be disregarded. Rather they are to be taken together with the first aspect of indication as attributes (awṣāf) of the essential meaning. These attributes depend on the essential meaning and will be disregarded if the essential meanings exist no more or are disrupted. (68)

To satisfy the requirements of universality and absoluteness in the comprehensibility of Sharīʿa, it is necessary not only to confine the comprehensibility to the essential meaning as evident from the context, but also to the fact that the meanings so found must accord to Arab usage. For this, the following two aspects may be considered as determinative factors: first the Arab usage in word-meaning relationship and second, the Arab intellectual background. The consideration

of Arab usage is so essential that "if the Arabs have an incessant custom in their language, it cannot be validly disregarded in the comprehensibility of Sharīʿa, and if there is no such custom even then it is not valid to adopt for its comprehension something which is not well known to them (Arabs)". (82)

The Arab usage in this regard is that the words are not followed slavishly in their indication of meaning. The Arabs do not confine themselves to one and the same word, and the replacement of words does not seem to affect their statements. The above fact can be illustrated by the following examples.

The Arabs often disregard the general rules of language. For instance, they frequently employ the styles of poetry in prose, even though such a style is not required and despite the fact that it is contrary to prose styles. What is significant to note, however, is that customarily such a deviation does not seem to affect the speech. (83)

Second, one of the characteristics of Arab usage is that they frequently replace original words with their synonyms, and this practice is not considered to imply contradiction or confusion in speech as long as the intended idea (al-maʿnā al-maqṣūd) subsists. The seven readings of the Qurʾān are examples to this effect.

Further, a number of evidences are found in the transmission of verses. For instance, Ibn al-Aʿrābī (d.848), the famous linguist, once recited:

Wa mawḍiᶜin zīrin lā ʾurīdu mabītahū
ka'annī bihī min shidda (t) al-rawᶜi ānisū

(I do not want to spend night in a place of zīr (like a conical jar), as if, because of intensive fright, I am familiar with it).

One of his listeners corrected, reminding him that on another occasion he had recited 'wa mawḍiᶜin ḍīqin' (a narrow place) instead of 'wa mawḍiᶜin zīrin'. Ibn al-Aᶜrābī replied regretting that the enquirer had been with him for such a long time and yet did not know that 'zīr' and 'ḍīq' are one and the same. (84)

Arabic Poetry has been transmitted according to varying reports and with a diversity of words. On the whole, one learns that the Arabs do not strictly adhere to particular word specifically so as to regard synonymous words as weaker and defective. The few exceptions from this usage belong to peculiar cases where only one meaning is possible. (84).

The Arabs often disregard part of the grammatical rules of a word, although never as a whole. An example of such disregard is the subtle rules (al-aḥkām al-laṭīfa) which the words demand according to theoretical analogy (al-qiyās al-naẓarī) but which are, nevertheless disregarded. To illustrate, Shāṭibī says that the words "ᶜamūd" and "yaᶜūd", and "saᶜīd", strictly speaking, do not rhyme, yet they are often used to rhyme in Arabic poetry. The reason is that the Arabs' aim for the refinement of their language does not lead to a pedantic concern (taᶜammuq) for these rules. (84).

The best appreciated piece of literature, according to the Arabs, is that which avoids unnecessary artificiality. When a poet is found indulging in refinement of his diction he is no more regarded as worthy to be followed. (84)

To sum up, Arab usage pays more attention to meaning than to words, because "the word is only a means to reach the desired meaning, whereas the meaning is the goal". (87)

It must, however, be noted that not all the meanings of a word are intended at one time. Shāṭibī makes a distinction between al-maʿnā al-ifrādī (single meaning), and al-maʿnā al-tarkībī (contextual meaning). The ifrādī is disregarded whenever it does not agree with the latter. (87)

The purport of the above discussion of meaning is Shāṭibī's contention that neither the words, nor even their abstract meanings are the goals of language in a speech. It is rather the meaning obtained within a context, written or oral, which is the goal. It is this sense of meaning, i.e. al-dalāla al-aṣliyya, which according to Shāṭibi assures the universal intelligibility of speech within the circle of the speakers of a certain language.

The second consideration for universal intelligibility is the consideration of the intellectual level of the addressees of a speech. Obligation depends on comprehension in the sense that one cannot be held responsible for more than he can understand. Comprehension, however, does not depend simply on the familiarity of words and meaning, but also on many other things.

The degree of comprehensibility may differ from person to person in specific matters because men are not equal in their individual mental make-ups. They, however, come to agree with one another in general matters, and this is the condition according to which maṣāliḥ function in this world. (85)

Since Sharīʿa concerned the maṣāliḥ of the Arabs who were ʾummiyyīn (unlettered), the Sharīʿa had also to be ummiyya. Shāṭibī explains that ʾummiyya means that the Arabs did not possess the sciences of the Ancients (Greeks). Literally, ʾummī comes from ʾumm (mother) to connote one who remains as he was originally at the time of his birth, that is to say, in the state of not yet having learned anything. (69)

To call the Arabs ʾummiyyīn, however, does not mean that they were completely ignorant and uncultured. On the contrary they did possess certain branches of knowledge such as astronomy, knowledge of weather, history and medicine etc. They also possessed their own code of ethics. (71-79)

This consideration implies that in understanding Sharīʿa, (particularly as in the case of exegesis of the Qurʾān, many scholars introduced matters which were not intelligible for the common people), one should not demand more than what ʾummīs can generally understand. This consideration would also require that the obligation whether pertaining to beliefs (iʿtiqādiyāt) or to actions (ʿamaliyāt) must be within the intellectual capacity of an ʾummī. Otherwise, obligations would concern only the élite and not people in general. If an obligation surpassing the intellectual capacity of all were made to apply to

people in general, it would constitute an impossible obligation. Both of these consequences are absurd. This conclusion is strongly supported by the attitude of the companions of the Prophet who did not indulge in speculative discussions. Also in practical matters . e Sharīʿa uses commonly observable facts rather than complicated speculations as criteria, as for instance, the rising or setting of the sun rather than an astrologically (or astronomically?) defined schedule of times of prayers. (90)

It must, however, be made clear that by insisting on the comprehensibility of Sharīʿa to ʾummiyyīn, Shāṭibī neither claims that everything in the Qurʾān or Sharīʿa is and must be understood by an ʾummī, nor does he discourage any thinking or action beyond the comprehensibility of an ʾummī. Rather what he stresses is the minimal essential requirement in matters of obligation without which the sense of obligation is not complete. Additional considerations may supplement or ameliorate an obligation but the absence of such considerations does not make it any the less obligatory so long as the minimal essential requirement is present. The question of comprehension is restricted furthermore, to those matters which are relevent to the fundamentals of Sharīʿa (qawāʿid al-Sharīʿa) and has no meaning for theological matters (ʾumūr ʾilāhiyya). The latter are additional matters which are not primarily obligatory. (91)

SECTION THREE

AN ANALYSIS OF THE TERM TAKLĪF: LEGAL OBLIGATION AND PHYSICAL CAPABILITY OF THE MUKALLAF

In this section, Shāṭibī discusses the concept of taklīf which is the term used for 'obligation' in Uṣūl. Etymologically the term has the connotation of 'toil', 'pain' and 'hardship'. On the other hand the principle of taklīf mā lā yuṭāq (no obligation which is impossible to fulfil), which is theological in origin, does not encourage the literal meaning of taklīf to be extended to its extreme. The discussion of the term taklīf, thus, naturally takes into account both of the above extreme aspects of obligation.

For a definition of taklīf, Shāṭibī, therefore, indulges in an analysis of the terms qudra and mashaqqa. According to Shāṭibī qudra is an essential element in the concept of legal obligation. He says that the premise of his discussion of taklīf which is again theological in origin, is that the sharṭ (condition) or sabab (cause) of taklīf is the qudra of doing that for which one is obliged. Hence, any obligation which is not within the qudra of the mukallaf, is not valid according to sharʿ, though it may be so ʿaqlan (rationally). (107)

To define qudra, Shāṭibī chooses to analyse what is considered ghayr maqdūr (that which is not within the power of a man to do) in Uṣūl. Shāṭibī's term ghayr maqdūr is synonymous to mā lā yuṭāq.

Shāṭibī observes that ghayr maqdūr may be used in four senses. First, it may

refer to those obligations which are impossible to fulfil (mā lā yuṭāq), either because they are beyond human capability, as for instance the demand to give up eating or drinking or to command someone not to die, etc., or because the obligations demand something which a man has or does not have because of his individual nature, as for instance the demand for bravery in a man who is a born coward. (108-109) Shāṭibī also uses the term mā lam yakun dākhilan taḥta kasbihī (that which is absolutely not acquireable by man) to refer to this sense of ghayr maqdūr.

The second sense of ghayr maqdūr refers to obligations which cannot be fulfilled because of the following grounds:

(a) Where the obligation concerns acts which depend on other acts in such a manner that the latter acts are means to realize the former. In such cases obligation itself becomes ghayr maqdūr without the performance of the latter acts. (109)

(b) Where an act occurs as an inevitable consequence of a certain other act. This case may seem similar to (a), but, in fact, it is different, because in (a) one has to do a certain act before being able to fulfil the act which is obligatory, while in (b) one does not perform the obligatory act itself and only by performing the precedent act does the obligatory act come to occur inevitably. Shāṭibī illustrates his meaning by the example of the obligation to know. Apart from a priori knowledge, other kinds of knowing occur inevitably following naẓar (observation, reasoning, syllogism). (111)

The other two senses with which the term ghayr maqdūr is associated are mashaqqa (hardship) and ḥaraj (impediment). Shāṭibī maintains that, strictly speaking,

mashaqqa and ḥaraj are not ghayr maqdūr. He explains it by arguing that legal obligations in Sharīʿa are related with mashaqqa and ḥaraj, but not with the above-mentioned first and second senses of ghayr maqdūr, and since Sharīʿa is not mā lā yuṭāq, the mashaqqa and ḥaraj are not ghayr maqdūr.

Shāṭibī does not deny the fact that in Sharīʿa there are occasions where a command is apparently directed to a certain ghayr maqdūr act, yet he maintains that the close examination reveals that the obligation is not actually related to the ghayr maqdūr act. He elaborates it in the following arguments.

Shāṭibī observes that, as a principle, the realm of ghayr maqdūr is not object of taklīf -- whether in respect to demand or prohibition. If the apparent sense of a sharʿī command is to make ghayr maqdūr obligatory, the command must be understood to refer to a maqdūr act which (or the mention of which) either precedes (sābiq) this ghayr maqdūr as a means or cause, or occurs simultaneously (qarīn) with it or succeeds (lāḥiq) it. To illustrate, the Qur'ānic command: "Do not die but as Muslims (lit. Do not die except if you are Muslims)" (2:122), literally demands not to die, which is ghayr maqdūr to fulfil. Naturally the obligation must be connected with the phrase that follows the actual command, i.e. to be Muslims. (108) This example shows that command may be related with ghayr maqdūr but that ghayr maqdūr is not obligatory.

There are further instances in Sharīʿa where a command is directly related with a ghayr maqdūr and even aims at it, yet it does not constitute the actual obligation. In such instances ghayr maqdūr is capable of being the object of either

the desire (ḥubb) or the detestation (bughḍ) of the Shāriʿ. Even though the acts which are ghayr maqdūr are neither within the capability of the mukallaf nor within his intention, yet they may be desired by the law-giver. To illustrate, Shāṭibī refers to the above-mentioned example of the obligation to know. If the object of knowing is something ḍarūrī (a priori), then there is no action involved to fulfil the obligation. In other cases, the knowing is a result of some other act, and even then it necessarily and immediately follows the act of arranging the premises. In short, the act of knowing itself is ghayr maqdūr and yet desired by the Shāriʿ. (111)

In the latter category of ghayr maqdūr, Shāṭibī refers, in fact, to acts which are involuntary, being fiṭrī and iḍṭirārī and musabbab. (110, 112)

Shāṭibī's argument is that such ghayr maqdūr acts as mentioned above, are not object of obligation, though they are desired by the law-giver. The fact that they are desired is proven either in literal expression by the law-giver to such effect or by his making it subject to Jazā' (reward and punishment). (112)
On this point Shāṭibī's position rather appears puzzling. How an act despite being the object of Shāriʿ's desire and subject to Jazā', be not the object of obligation?

Shāṭibī explains his position in the following manner.
The jurists have taken three positions in answer to the above question. One group has held that the reward and punishment do not concern ghayr maqdūr. Another group believes that reward and punishment both attach to ghayr maqdūr at the same time. In contrast to these groups, Shāṭibī maintains that either reward or punishment attaches to ghayr maqdūr to the exclusion of the other. (119)

The first group argues that since ghayr maqdūr acts are subject to obligation, they are not subject to reward or punishment. If there is no obligation, there can be no reward or punishment. (115)

Shāṭibī refutes this argument by rejecting the assumption of the necessary relationship of reward and punishment to obligation. He illustrates his view with examples showing that there are obligations which entail no reward or punishment. (117-118).

Another argument advanced in favour of the first position proceeds by showing contradiction in the second position. This argument is as follows. Reward and punishment, if their connection with ghayr maqdūr acts be accepted, will either concern the acts in question in their essence or in terms of related acts. If reward and punishment concern their essences, then no distinction is possible between one act and another and between reward and punishment. Consequently, both reward and punishment may concern one and the same act at the same time, which is impossible. If reward and punishment concern related acts, instead of essences, then the point is proven that in neither case does reward and punishment concern ghayr maqdūr themselves. (115)

Shāṭibī refutes this argument by showing that by not maintaining a distinction between reward and punishment in respect of one and the same act, the above argument implies that one and the same act can be the object of both desire and detestation of Shāriʿ at the same time, which is absurd.

He argues further that reward and punishment cannot be supposed to be concerned

with related acts, in this case to the exclusion of the act in question. If a connection between ghayr maqdūr act and related act is necessary for reward and punishment, the meaning is that ghayr maqdūr act is certainly effective in determining reward and punishment. (118)

Shāṭibī, therefore, concluded that an act even though not object of obligation may still be subject to reward. Also, that being a subject to reward does not make an act to be the object of obligation Thus a ghayr maqdūr may be desired or rewarded, yet it does not mean that it is obligatory. To be obligatory, an act must be maqdūr.

From here, Shāṭibī proceeds to an analysis of mashaqqa and ḥaraj which, he maintains, are not to be equated with ghayr maqdūr in the senses which have been discussed so far. Mashaqqa and ḥaraj make an act hard and difficult, but they are capable of being object of obligation. Shāṭibī, however, lays stress that acts consisting of mashaqqa and ḥaraj may be object of obligation, yet mashaqqa and ḥaraj are not objectives of obligation for their own sake. Shāṭibī develops his views in a detailed analysis of the term mashaqqa.

Mashaqqa

Mashaqqa is often confused with ghayr maqdūr. The discussion below contends that a distinction among taklīf mā lā yuṭāq, (ghayr maqdūr) and mashaqqa must be observed. Sharīʿa aims at none of them per se, but it does impose the latter though not the former. (119) This discussion calls for an investigation into the meaning of mashaqqa.

Literally, sh-q-q as in shaqqa ʿalayya al-shay'(the matter became difficult for me), denotes something "tiresome" and "hard". The Qur'ān says, "You could not reach it save with great trouble to yourselves (bi shiqq al-anfus) (17:7). This meaning when taken in the absolute sense -- without reference to its conventional (waḍʿī) meaning in Arab usage -- acquires five particular technical (iṣṭilāḥiyya) senses. These five senses, in fact, stem from three considerations: (1) from the general literal sense of the word mashaqqa, (2) from the viewpoint of ʿāda i.e. whether a certain act is considered mashaqqa by ʿāda or not, and (3) from the concept of taklīf itself i.e. a mashaqqa is so neither in its literal sense nor in its customary sense but is rather derived from the concept of obligation itself. These three viewpoints provide the following five senses of mashaqqa.

1. First, in a very general sense, mashaqqa, applies to all meanings of "toil" or "trouble" disregarding their being maqdūr or not, or being real or metaphorical. It is in this sense that taklīf mā lā yuṭāq is also called mashaqqa, because in order to fulfil a command which is supposedly mā lā yuṭāq man puts himself into vain trouble. For instance if a man tries to fly in the air his attempt will be in vain. But here a distinction must, however, be recognized; "flying in the air" is called mā lā yuṭāq not mashaqqa; mashaqqa is rather the effort made to achieve the end (i.e. flying...). Thus it becomes obvious that even linquistic usage associates mashaqqa with maqdūr only.

2. In the second sense mashaqqa is applied to acts which are extraneous to the muʿtād (customary). That is to say to perform these acts

means to incur hardship upon oneself. For instance, to observe fasting during sickness or a journey is not according to ʿāda, and thus it incurs mashaqqa. It is here that the Sharīʿa makes certain allowances which are called rukhṣa by the fuqahā'.

3. The third sense of mashaqqa is an extension of the second one. While the second concerns particular acts, the third concerns the totality of actions.

It is persistence in uninterrupted performance of acts, although initially easy to fulfil, that creates mashaqqa and makes them difficult to carry out. In such cases the Sharīʿa recognizes the principle of rifq (leniency, moderation) by commending the choice of acts which are not tiresome.

4. In the fourth sense of mashaqqa, the hardship of an act does not result from its being against ʿāda but rather because it is additional to ʿāda. In other words customarily it is not mashaqqa but it becomes so because one is obliged to do it. It becomes mashaqqa also because it creates responsibility in addition to the acts required by this worldly life.

5. The fifth sense of mashaqqa also flows from obligation, but in a manner different from the fourth. Whereas in the fourth an act is mashaqqa merely because it is an obligation, there being no additional hardship other than this fact alone; in the fifth, there is an additional hardship. The additional element comes about because taklīf requires one to reduce (mukhālafa) his own desires which incurs toil and hardship, since hardship is quite evidently seen in prevailing customary practices (ʿādāt jāriya). (119-121)

These five senses of mashaqqa constitute the framework for investigating whether mashaqqa is included under the requirement of obligation or not. Shāṭibī conducts this investigation by analysing the intention of the law-giver, the understanding of the term in ʿāda, and the intention of the mukallaf.

The first question is whether the Shāriʿ intends mashaqqa or not. There are two kinds of answers to this question. One is given through the Shāriʿs declaration of his own intentions, known through the Qur'ān or tradition. The second may be known through an analysis of the notion of mashaqqa in Sharʿ as distinguished from that in ʿāda. Both kinds of answers agree on the point that the Shāriʿ does not intend mashaqqa per se. The first kind of answer is manifested in the following:

a) various statements in the Qur'ān and Ḥadīth categorically deny any intention by the Shāriʿ to impose hardship. (121-122)

b) the existence of well-known allowances (rukhaṣ) in Sharʿ prove the existence of concessions to remove hardship. (122)

c) the consensus on the absence of any intention by the Shāriʿ to make shāqq acts obligatory. If it were supposed that the Sharīʿa did such a thing, it would be guilty of self-contradiction and hence self-negation; the sharīʿa cannot and does not aim at both comfort and hardship. (122-123)

The second kind of answer is sought by investigating the notion of mashaqqa in relation to ʿāda.

Not every bit of toil and hardship is called mashaqqa in ʿāda. For instance,

seeking one's livelihood through following a craft and trading, although it involves toil (kulfa), is not called mashaqqa. Rather a person is reproached if he avoids such efforts. All states of the human being in this world are toilsome (kulfa), yet they are not called mashaqqa. (123)

A certain act is not called mashaqqa in ʿāda when "it is possible (mumkin) habitually (muʿtād) and the hardship (kulfa) entailed by the act does not interrupt the act in general practice (fī al-ghālib al-muʿtād)" (123) In this sense mashaqqa in relation to muʿtād can be of two kinds: Mashaqqa muʿtād, or the hardship entailed by an act which is possible to bear and within the capacity of man, although it is, in fact, hard for him; Mashaqqa khārija ʿan al-muʿtād, or "when the perpetuation of a certain act leads to its discontinuation, wholly or partly, or results in a defect (khalal) in the doer of the act (ṣāḥibuhū) in his person, property or in his states". (123) Such acts are called mashaqqa and are extraneous to muʿtād because they are not possible to perform habitually.

Having established this distinction, Shāṭibī points out that mashaqqa khārija ʿan al-muʿtād is obviously not maqṣūd by Sharʿ. Even mashaqqa muʿtāda is not maqṣūd by itself in an obligation. It is required rather because the obligation serves the maṣlaḥa of the mukallaf. (124)

There are three possible objections to this position which are discussed in the following lines.

First is the fact that the very term, taklīf, which is used as an appellation for

these acts entails the meanings of kulfa and mashaqqa. An act is demanded only insofar as it entails mashaqqa, and this is why it is called taklīf. Hence mashaqqa is the maqṣūd of the Shāriʿ. (124)

Shāṭibī answers this objection by explaining that taklīf can be directed to the mukallaf in two aspects:

(1) First because taklīf is mashaqqa and (2) Second because there is an immediate or forthcoming maṣlaḥa and good to be achieved for the mukallaf. Shāṭibī obviously favours the second aspect as the only maqṣūd of the Shāriʿ. The first cannot be maqṣūd because both of these two aspects cannot exist together. The fact of maṣlaḥa being the maqṣūd has been established in the first section. Hence mashaqqa per se cannot be maqṣūd. Why, then, is an obligation called taklīf? Shāṭibī answers that, in the usage of Arabs, a thing derives its name from its inseparable attribute, although, in usage, this inseparable attribute is not intended. It is on the basis of this rule of ʿilm al-ishtiqāq (etymology) that an act is called taklīf because it entails kulfa and mashaqqa, not because taklīf in the sense of Kulfa is the aim or purpose of this act. The consideration of Kulfa is possible only when the term taklīf is applied in a majāzī (metaphorical) sense to a certain act rather than using the term in its ḥaqīqat al-waḍʿ al-lughawī (the essential posited meaning of a word in a language). (125-126)

(2) The second objection is that the Shāriʿ knows what a taklīf is and what it incurs, and since it is known that every taklīf incurs mashaqqa it follows

that the shāriᶜ knows that a taklīf incurs mashaqqa. It is, therefore, evident that by imposing a taklīf, the Shāriᶜ purposes also to impose mashaqqa. (124-125)

Shāṭibī answers this objection by refuting the equation of the knowledge of sabab and musabbab with qaṣd (intention). He argues that even if in this particular case knowledge of sabab and musabbab is considered as intention (qaṣd) it would be considered only as leading to the whole; the intention for mashaqqa is only secondary. But even within this supposition the position comes to a contradiction because, even though secondary, the intention for mafsada (mashaqqa) is posited together with intention for manfaᶜa (maṣlaḥa). Hence the Shāriᶜ does not intend mafsada i.e. mashaqqa. (126-127)

Secondly, it is evident from the Qur'ān and etc. that the Shāriᶜ intends to remove hardship. How can it be then maintained that the Shāriᶜ intends to impose and remove mashaqqa at one and the same time?

> To sum up the discussion, Shāṭibī maintains that:
>
> "The obligation of muᶜtadāt and the like does not entail mashaqqa as explained. Hence what necessarily follows from taklīf is not called mashaqqa; irrespective of whether the knowledge of its occurrence necessarily requires it or necessitates the intention for it." (127)

There is, however, another dimension of the problem. Granted that the Shāriᶜ does not intend mashaqqa in his imposition of taklīf, should a mukallaf intend

mashaqqa while fulfilling his obligations or not?

Shāṭibī's general answer is in the negative. The mukallaf should not intend mashaqqa because the shāriᶜ does not do so and because the mukallaf's intention must correspond to that of the Shāriᶜ. Consequently the mukallaf's intention should be concentrated on act rather than on mashaqqa. (128)

In details, however, the problem is more complicated when acts and mashaqqa are looked upon from different points of view.

First, the acts themselves, in this case, can be considered in two categories, those which are permissible and those which are not so. (133) In the latter case, the intention to perform such acts is obviously forbidden. The problematic matter is those acts which are nothing but mashaqqa in themselves but which the Shāriᶜ imposed as such, as for instance punishment (ᶜuqūbāt). Shāṭibī maintains that even here the intention of the Shāriᶜ is not to impose mashaqqa as such, but to acquire maṣlaḥa or to remove mafsada by this mashaqqa. Accordingly, the mukallaf's intention must also be maṣlaḥa and not mashaqqa as such. This is the reason why if a mashaqqa (such as a ḥalf (ḥalf) to give all his property for charitable purposes) contravenes some ḍarūrī or ḥājī principle in dīn (i.e. the limitation of such a voluntary distribution to only one third of one's property), it will be deemed as void. (149)

Next is the category of acts which are permissible. These are to be considered in relation to mashaqqa whether this mashaqqa is ikhtiyārī (by man's own choice)

or iḍṭirārī (imposed on man not by his choice). Another point to be considered regarding mashaqqa is whether it is so called in ʿāda or not or whether it is extraneous to all such considerations. (133) To simplify, we can divide Shāṭibī's discussion of mashaqqa into the following 3 categories:

1) Ikhtiyārī, where the mukallaf intends mashaqqa by his own choice.
2) Iḍṭirārī, where mashaqqa is an inevitable consequence of a certain action.
3) Khāriji, where mashaqqa is neither of the above but rather falls upon the mukallaf without having any connection with them.

We will deal with these three categories one by one.

Mashaqqa Ikhtiyāriyya

As already mentioned, Shāṭibī maintains that since Shāriʿ does not intend mashaqqa per se, one must not seek for mashaqqa. Mashaqqa ikhtiyārīyya therefore, is condemnable according to him. There is, however, one point where one may argue that a mukallaf may intend mashaqqa to augment his reward on the assumption that reward is enhanced in commensuration with the hardship suffered. (125)

Shāṭibī rejects this kind of reasoning. First, because, to him, the whole concern of taklīf is with action (ʿamal) and this is also that at which the Shāriʿ aims. It is, therefore, action and not mashaqqa which increases reward. (127)

Secondly acts depend on intentions. The intention must, therefore, correspond to the intention of the Shāriʿ so as to produce acts which are intended by the Shāriʿ.

To seek mashaqqa, in this case, would be to violate the intentions of Shāriᶜ. This violation cannot earn reward. (129)

In opposition to Shāṭibī's view a considerable number of traditions are quoted to the effect that a reward is connected with the hardship of the act, and the more the hardship the greater the reward. (129-130) Second evidence to oppose Shāṭibī is the situation of arbāb al-aḥwāl (ṣūfīs) who try their utmost to increase ᶜazīma and hardship in rejection of rukhṣa. (130)

Shāṭibī refutes these evidences on the following grounds:

1. All such reports are akhbār aḥād and relate only one matter. They do not constitute istiqrā' qaṭᶜī. Our concern is Qaṭᶜiyya not ẓanniyya. Hence these ẓanniyyāt cannot invalidate our position. (130)

2. In the final analysis these traditions do not favour the intention of mashaqqa; rather they stress the acts themselves. The intention to bring about mashaqqa is a secondary (tābiᶜa) not the primary (matbūᶜa), concern. (130)

3. Rather there are traditions in which the Prophet reproached those who opted for hardship. His proscription (nahy) of hardship (tashdīd) is so well known in Sharīᶜa that it has become a definite principle (aṣl qaṭᶜī). (132-133)

4. As for arbāb al-aḥwāl, even in their case it is not correct to say that they intend to bring about mashaqqa only. Their purpose is to disregard their own ḥuẓūẓ (self-considerations) so as to fulfil their duties toward God. Shāṭibī explains this point more fully in the case of ḥaraj. Ḥaraj is an act which causes an impediment in fulfilling the ḥuẓūẓ. The arbāb al-aḥwāl prefer to forego their ḥuẓūẓ in favour of their duty towards God, because of fear or love of God. (132, 147-148)

Mashaqqa Iḍṭirāriyya

In general terms, hardship can be seen in three ways. First, there is the hardship which has become part of daily life and is no more called mashaqqa but is rather expressed by terms such as kulfa, taʿb etc. This is called by Shāṭibī mashaqqa muʿtād. Second, there is the type of hardship which is not habitual. It may not be impossible to bear, but it might be so painful as to be too difficult to endure. This is called by Shāṭibī mashaqqa ghayr muʿtād. The third category lies on the fringes of the second one. In itself it may neither be impossible nor painful to bear, but it becomes an impediment to the performance of other acts. This is called ḥaraj. (133)

According to Shāṭibī the first type of mashaqqa is not in question at all because it is, in fact, not considered mashaqqa. The discussion here does concern the second type when the mukallaf chooses it for its own sake. This type has been dealt under the category ikhtiyārī. If it becomes so difficult as to be impossible to carry out, this type is discussed under the category ghayr maqdūr.

What concerns the category of iḍṭirārī is, in fact, the third type of mashaqqa. This kind of mashaqqa is usually either an inevitable result of a certain act, in that case called ḥaraj, or it comes about from without; neither from the mukallaf's own choice nor as a result of his action. This kind is discussed further below under the heading khārijī. The category iḍṭirārī thus deals with ḥaraj actions. On ḥaraj actions, Shāṭibī's basic position is that they are revoked where they

become impediments in fulfilling essential obligations.

According to Shāṭibī ḥaraj is revoked in the following two cases:

1) First where one fears being cut off from the Path (al-khawf min al-inqiṭāʿ ʿan al-ṭarīq, That is, when inconvenience in performing a certain act amounts to abhorrence of it or creates a dislike for one's obligation, that inconvenience is called ḥaraj and is revokable. The revoked acts include all that may cause any harm to occur to one's body, intellect, property or condition. (136)

2. Second, where the fear of falling short of fulfilling all of one's duties occurs, or, at least, where one's indulgence in one act comes into conflict with his other duties or results in neglecting other duties. In some cases this indulgence prevents one from fulfilling his duty to others. Thus he stands condemned because he is required to carry out all his duties without neglecting any one of them. (136)

Shāṭibī's argument in favour of the above observations are based on evidences from the Qurʾān and Ḥadīth to the effect that "God made this blessed upright Sharīʿa generous and convenient and by making it so He won people's hearts and evoked in them love for Sharīʿa. If they had to act in a way against convenience, they could not honestly fulfil their obligations." (136)

There are, however, instances from the Prophet's own actions (and from others) when people opted for the harder acts. Nevertheless the Prophet is quoted frequently prohibiting or promoting the deliberate creation and seeking of hardship. This poses an apparent contradiction to Shāṭibī's position.

Shāṭibī resolves this problem, still maintaining his original position, by concluding on the basis of an analysis of verses of the Qurʾān and of certain aḥādīth that, "The maqṣūd of the Shāriʿ is that the prohibition be based on some intelligible ʿilla. (138)

Shāṭibī maintains that the ʿilla of the prohibition in this case is the fatigue or impediment which results from an action and which makes it difficult or tiring to carry the action on further. In the case of the second situation, the ʿilla lies in the fact that the action impedes carrying out other duties or others'. duties. The contrary is also true; if an action does not constitute an impediment in the above sense, it will not be prohibited even though it may be hard.

Shāṭibī thus concludes:

> "In fine, prohibition based on some intelligible ʿilla is the maqṣūd of the Shāriʿ. Since this is true, the prohibition depends on there being an ʿilla both for its affirmation and its negation." (138)

There is, however, one situation of hardship worth considering. That is a situation where an obligation involves a risk of losing one's life and yet a person opts for it. Is his option valid? Shāṭibī examines this situation by asking the following question: Did the Shāriʿ remove mashaqqa because it is His right (ḥaqq) or because it is the right of the ʿabd? (142) In his answer, Shāṭibī takes into consideration his previous arguments about God's not intending mashaqqa and observes that "when someone chooses to see the act as a right of (rather duty towards) God, the act is absolutely forbidden, (because God has removed hardship from religion). But if one regards it as a right of the ʿabd, it is not absolutely forbidden, but rather be left to one's choice." (143)

In this context Shāṭibī reconsiders the case of arbāb al-aḥwāl and their like, the people who choose extraordinary hardship in preference to Sharʿī allowances

or who indulge in certain duties in order to disregard others. Shāṭibī considers the attitude of arbāb al-aḥwāl towards Sharʿī obligations as extraordinary.

Shāṭibī explains his view by making a distinction between two kinds of people:

1. Arbāb al-ḥuẓūẓ: those for whom carrying out a particular act causes extraordinary hardship, or for whom not availing of Sharʿī allowance means inviting harm. Such people must not carry out an act of this kind and should avail themselves of Sharʿī rukhṣa.

   Shāṭibī, however, warns against the other extreme of following one's ḥuẓūẓ absolutely so that one departs from the bondage of ʿubūdiyya. (146-147)

   "The true position according to Sharīʿa is a combination of both aspects with a view of balance (ʿadl); to pursue one's ḥuẓūẓ as long as the pursuit does not interfere with an obligatory duty, and to abstain from ḥuẓuẓ as long as the abstinence does not lead to prohibition." (146)

2. Ahl isqāṭ al-ḥuẓūẓ: those for whom such acts do not bring about fatigue and hardship because of their acts being governed by fear, hope or love. The fear makes the hardship feel lesser; the hope relaxes the hardness of the act, while the love renders the act rather enjoyable. This group is so engrossed in fulfilling their duty to God on the basis of fear, hope and love that they even forget their own ḥuẓūẓ. They give up personal considerations. (147-148)

Mashaqqa Khārija

There is a third category of mashaqqa which falls upon mukallaf from without; it is neither intended by the mukallaf nor is it a result of any of his actions. In the above discussed categories, mashaqqa was a necessary part, or a consequence, of mukallaf's intention or action. In the present category, mashaqqa is khārijī (external) to his intention as well as to his action.

Shāṭibī maintains that the Shāriʿ does not intend the continuation of a mashaqqa

as he did not first originally intend to impose it. The only explanation for the imposition of mashaqqa khārija when it is known to be intended by God, is that He intends it in order to test and examine the faith of the mukallafīn. It is, neveretheless, understood from the totality of Sharī'a that it is permissible to remove mashaqqa absolutely to eliminate the related mashaqqa and to protect the permissible ḥuẓūẓ from being affected by mashaqqa.

Sharī'a even allows preventing mashaqqa before it occurs. (150) This permission is known a priori (ḍarūratan) in dīn. (151)

Shāṭibī illustrates mashaqqa khārija with the following: hunger, thirst, cold, heat, sickness, bodily harm, etc. Removing all of these mashaqqas is allowed. (150-151)

Shāṭibī, however, observes an important detail. The obligatory nature of the demand to do away with the mashaqqa differs in two kinds of mashaqqa khārija. The first is that where the obligatory nature of the removal of mashaqqa is proven, such as in case of an attack upon Muslims to destroy Islam. In such cases, the mashaqqa consists of an attack or a possible domination of non-Muslims. The obligation to do away with this mashaqqa is undoubtedly proven.

In the second kind of mashaqqa khārija, for example, an incurable sickness, its elimination is not irrefutably demanded. In such a case the imposition of hardship and the endurance of trial must be borne. One must submit to such a mashaqqa as a qaḍā' (decree of destiny).

Shāṭibī sums up the discussion on taklīf in reference to mashaqqa with the

following three conclusions:

1. Whether mashaqqa falls upon the mukallaf particularly and singularly (in such a case, called al-mashaqqa al-khāṣṣa), or falls upon others together with him or falls upon others because of him, (called al-mashaqqa al-ʿāmma), in every case, a mashaqqa is not required by Shāriʿ neither in its essence nor in the act that leads to it. If there be a conflict between two obligations to eliminate two mashaqqas, the elimination of a mashaqqa which is ʿāmma (general) will prevail over the elimination of a mashaqqa al-khāṣṣa (particular). (154-155)

2. Mashaqqa may be muʿtād or khārij ʿan al-muʿtād. In case of its being muʿtād, its removal is not intended by the Shāriʿ just as its imposition was also not intended. The removal of this kind of mashaqqa means the discontinuation of taklīf.

   In case of a mashaqqa which is khārij ʿan al-muʿtād, since it is conducive to disruption in either dīn or dunyā, its total removal is the maqṣūd of the Shāriʿ.

   There is, however, one consideration. The hardship involved in acts is not the same in all cases; it varies from time to time, place to place and state to state. This is the reason why the same mashaqqa may appear to be khārij ʿan al-muʿtād in certain cases while, in fact, it is muʿtād.

   Shāṭibī explains this difficulty by saying that a mashaqqa following from a single act has two ends and a middle. The higher end of the mashaqqa is such that when something is added to it the mashaqqa ceases to be muʿtād. This does not, however, exclude mashaqqa from being essentially muʿtād. The lower end is such that were something subtracted, there would remain no more mashaqqa attributable to that act.

3. Sharīʿa, according to its requirements, follows precisely the middle way in its obligations, taking both sides equally. Obedience to law comes within the capacity of man without necessitating any mashaqqa

or any leniency.

Now if Sharī'a legislates in view of the mukallaf's deviation from the middle point to one of the above-mentioned ends, the legislation will aim at returning the mukallaf to the just middle. But in this process it will lean on the other side so as to restore a balance.

Following this line of argument, it is to be concluded that every al-kulliyya al-shar'iyya (universal legal principle) essentially takes the middle position. But if it leans toward one of the extremes, it will do so because of actual or possible inclination towards the other end. The tendency to tashdīd (severity) is brought forward to balance the laxity in a mukallaf's regard for Dīn. The tendency to takhfīf (laxity) is brought forward to balance hardship and severity.

The departures from the middle position, as reported in traditions, must be understood in the light of the above explanation. This departure is meant to balance the severity or laxity, whichever the case may be, inherent in the act, the object of obligation. Similarly the stress on piety (wara') and asceticism and the like, when they appear to be departures from the middle position, should also be taken as an attempt to balance the laxity in obligation.

SECTION FOUR

AN ANALYSIS OF THE TERM TA'ABBUD: DISTINCTION BETWEEN LEGAL AND MORAL AND RELIGIOUS OBLIGATIONS

This section deals with the purpose of the lawgiver in making the mukallaf subject to the rules of Sharī'a. In other words it seeks an answer to the question of the nature of legal obligation.

The preceding section discussed the aspect of legal obligations which concerns the legal command and the mukallaf's physical capability to perform it. This section deals with that aspect of obligation which has to do with the mukallaf himself - his intention and motive. The argument here is, again, that legal obligation is essentially motivated by the maṣlaḥa of the mukallaf. To explain this, Shāṭibī clarifies and analyses the notions of maṣlaḥa and ta'abbud which are often considered to be opposed to each other, in reference to obligation. As elaborated earlier, the notions of zuhd and ikhlāṣ, as expounded by the Ṣūfīs, laid special stress on tark ḥuẓūẓ al-nafs as a necessary qualification of 'ubūdiyya or the Ṣūfī understanding of obligation.[3] Shāṭibī maintains that although legal obligation also aims at ta'abbud, yet ḥuẓūẓ are not denied by ta'abbud. It is in fact the conformity of action with the objectives of the lawgiver which is the real meaning of ta'abbud. The sense of hardship contained in the meaning of taklīf (obligation) is not the denial of the necessities of life; it is rather perseverence in fulfilling the obligation and its universality that makes it hard.

The Ṣūfī sense of taʿabbud is further refuted by the limitation of the scope of taʿabbud in the sense of mere obedience. For Shāṭibī, this sense applies only to the ʿibādāt, while ʿādāt are governed by maṣlaḥa. Since according to him, in the final analysis, the taʿabbud in ʿibādāt is only one aspect of maṣlaḥa, and maṣlaḥa in ʿādāt is not opposed to taʿabbud, Shāṭibī concludes that legal obligation is motivated by the maṣlaḥa of the mukallaf.

The discussion in this section is arranged in twenty problems. The three main topics discussed are as follows: 1) taʿabbud and the problem of ḥuẓūẓ; 2) ʿawā'id; 3) the division of obligations into ʿibādāt and ʿādāt in accordance with the considerations of taʿabbud and maṣlaḥa.

Taʿabbud and the Ḥuẓūẓ

Shāṭibī opens the discussion by saying that "the legal objective in instituting the law is to relieve the mukallaf from the stimulus of his passions (hawā) so that he be a servant of God voluntarily (ikhtiyāran) as he is so naturally (iḍṭirāran, by compulsion)". (168)

To prove this point he argues from the Qur'ān and sayings of the Prophet where following one's passions (hawā) is condemned. (169) He further contends that human experience in society (al-tajārib wa'l-ʿādāt) also tellus that maṣāliḥ, be they those concerning religious matters or be they mundane, cannot be achieved by following passions and selfish motives. (170)

The above position may appear to agree with the anti-maṣlaḥa viewpoint in denying the interests and desires of the people, and may imply a demand for absolute obligation. It is at this point, however, where Shāṭibī makes a significant distinction. He denies the identification of maṣāliḥ with shahawāt (desires), hawā (passion) and aghrāḍ (personal interests). He stresses that Sharī'a aims at the maṣāliḥ, not at realizing hawā. He does not accept the idea that 'akhdh ḥuẓūẓ can be equated with hawā. (172) In order to distinguish between hawā and ḥuẓūẓ, Shāṭibī argues in detail that following the passions is condemned even in cases where the act concerned is in itself praiseworthy, but this is not so insofar as ḥuẓūẓ are concerned. (174) The reason is that an action performed in obedience to the stimulus of passion, obviously, pays no attention to the Command or Prohibition of the law, whereas seeking fulfilment of ḥuẓūẓ and aghrāḍ is not opposed to the objectives of Sharī'a in the above sense. (174, 172). One can seek ḥuẓūẓ by making them subservient to maṣāliḥ which are the pupose of law. Referring to the Ṣūfīs' states and experiences, Shāṭibī argues that by denying ḥuẓūẓ al-nafs these people aim at something praiseworthy; but by suspending the observance of the legal obligations or by aiming at things which may bring happiness to them, they are merely obeying the demands of passions. (175)

On the contrary, Shāṭibī argues that one cannot avoid ḥuẓūẓ in fulfilling legal obligation. He says furthermore that ikhlāṣ or more specifically takhlīṣ al-ḥaẓẓ (purification of ḥaẓẓ) does not mean denial of ḥuẓūẓ. The main points of of Shāṭibī's arguments are as follows:

1. From the standpoint of ḥazz, maqāṣid may be divided into two types: al-maqāṣid al-aṣliyya (essential objectives) in which the mukallaf has no ḥazz and maqāṣid tābiʿa in which the ḥazz is provided. Al-Maqāṣid al-aṣliyya means universal necessary obligations consisting of the Five Maṣāliḥ. (176) Examples of tābiʿa are obligations in which the natural desires (shahawāt) and pleasures are also aimed to be satiated. (178) Shāṭibī argues that in al-maqāṣid al-tābiʿa, the shahawāt are, in fact, a means to achieve the al-maqāṣid al-aṣliyya and, thus, no longer remain ittibāʿ al-hawā. In fact, God knows that dīn and dunyā are maintained and well preserved by these stimulii in man which excite him to acquire what he and his fellow beings need. The desires to eat and drink are created so that when he is hungry and thirsty, they motivate him to seek means to fulfil this need. But there are certain desires which one individual cannot fulfil alone; hence he needs the co-operation of others. Thus, although each one fulfils his own desires, in fact, at the same time, he is also, working for the benefit of others. Hence his seeking of ḥuẓūẓ is, in a sense not entirely a hawā. On the basis of this consideration seeking of ḥuẓūẓ is made permissible, not prohibited. (178-179)

2. Through a detailed analysis of al-maqāṣid al-aṣliyya and tābiʿa, Shāṭibī demonstrates that in obligations where ḥazz of the mukallaf is not the primary goal (bi'l qaṣd al-awwal) it is realized indirectly (bi'l qaṣd al-thānī).[4] He shows also that where ḥazz is the primary goal, the act is naturally relieved of ḥazz, because to seek ḥazz in this case becomes part of the obligation. (183-186)

3. Takhlīṣ (purification) or tajrīd (abstraction) from ḥazz is thus achieved in those cases where ḥazz is permitted or demanded even when one is actually seeking ḥuẓūẓ. This occurs for the reason that if the seeking of ḥazz is qualified by legal provisions and other such conditions, there is,

in fact, no more a ḥaẓẓ for mukallaf insofar as ḥaẓẓ is a requirement. (186)

4. The legal penalties in which there apparently figures no ḥaẓẓ for the mukallaf, are, in fact, a means to protect or realize ḥaẓẓ of the mukallaf. The penalties are meant to prevent persons from harming others' maṣlaḥa so that maṣāliḥ in general are maintained in a better way. (190-191)

Shāṭibī maintains that in fulfilling an obligation an act would thus accord either with al-maqāṣid al-aṣliyya or with al-maqāṣid al-tābiʿa. If it conforms with al-maqāṣid al-aṣliyya, its validity cannot be questioned, no matter whether it be free from ḥaẓẓ or provide for ḥaẓẓ. In other words the criterion is the seeking of maqāṣid not tark ḥuẓūẓ. (196) This conclusion sheds a new light on the notion of ikhlāṣ (sincerity, purification). Contrary to the usual definition of ikhlāṣ, which insisted on negation of ḥuẓūẓ to be ikhlāṣ, Shāṭibī concluded that it is conformity with al-maqāṣid al-aṣliyya which draws an act closer to ikhlāṣ al-ʿamal, and the act then becomes an act of ʿibāda, whether it was originally ʿāda or ʿibāda. (202)

In cases where the act accords with al-maqāṣid al-tābiʿa, the case is somewhat different. Here the criterion cannot be tābiʿa, hence it must be seen whether the act is connected with al-maqāṣid al-aṣliyya. If it is so connected, even though it seeks ḥaẓẓ al-nafs, the act is undoubtedly one of obedience. (207) This connection is either actual such as a declaration of intention by the mukallaf, or potential such as acts which are means to the permitted act. If this connection with al-aṣliyya is absent, then the act is simply one of ḥaẓẓ and hawā. (207)

Shāṭibī explains the matter further by saying that if the seeking of ḥuẓūẓ were the absolute opposite to obedience, it would not have been permissible for anyone to perform any act of ʿāda unless there were no intention and effort to achieve the ḥaẓẓ al-nafs. In fact there is no such command in Sharīʿa, nor is the goal of ḥuẓūẓ in al-ʿamal al-ʿādiyya prohibited, even though the lawgiver always lays stress on ikhlāṣ. (208)

If the intention to achieve ḥaẓẓ is denied in al-aʿmāl al-ʿādiyya, any hope for paradise or fear of hell in reference to acts of ʿibādāt would render them invalid (ʿamal bighayr al-ḥaqq). Such a conclusion is obviously absurd in view of the numerous verses in the Qur'ān and of the sayings of the Prophet which promise reward and punishment for such acts. To act in hope of reward or with a fear of punishment is certainly an act of seeking ḥuẓūẓ. (210)

To defend his conclusion, Shāṭibī, in addition to rational and traditional criticism, particularly mentions Ghazālī's views on ḥuẓūẓ and clarifies his own position by criticizing Ghazālī (214-215), Shāṭibī explains that obligations are divided into two categories. First, there are the ʿIbādāt, by which one seeks closeness to God. They consist of Belief (ʾĪmān) and its subsidiaries as fundamentals of Islam and all ʿibādāt. The second category is ʿādat. Satisfaction of ʿādāt obligations means spreading maṣāliḥ absolutely, and opposition to meeting these obligations means spreading mafāsid. The second kind of obligation belongs to this world and aims at maṣāliḥ of the people. The first has to do with the rights of God in this world. It does not aim to yield maṣāliḥ in

this world but rather in the hereafter. (215)

Now in the first category the ḥaẓẓ in the hereafter is established and lawful. The seeking of ḥaẓẓ in this sense cannot be called shirk (polytheism), nor is it a denial of ikhlāṣ. Furthermore, even according to Ghazālī, the highest aim of ʿubūdiyya is naẓar ilā al-maḥbūb (the vision of the beloved) in ākhira, which is also a ḥaẓẓ. (216) In fact Ghazālī calls it ḥaẓẓ ʿaẓīm (great joy). Also to demand complete negation of ḥuẓūẓ is an impossible obligation. (216) Seeking the ḥaẓẓ in this world in ʿibādāt such as to perform ʿibādāt in order to earn the praise of the people, or for some strictly personal considerations like fasting in order to save money, etc., are matters which affect the ikhlāṣ of ʿibādāt. (218-219)

As to the second category of obligations, i.e. ʿādāt such as nikāḥ (marriage), bayʿ (sale), etc., it is well known that the lawgiver intends through these things the maintenance of the immediate maṣāliḥ of the people. Since such is the case, seeking ḥaẓẓ in performing this category of obligations cannot be contradictory to the intention of the lawgiver. Further, if it were wrong to seek these ḥuẓūẓ, the Qur'ān and Sunna would not have mentioned them as being part of God's Grace and favour. (222)

The distinction in ʿādāt and ʿibādāt may be observed from the point of view of niyāba (proxy) as well. Niyāba is not allowed in ʿibādāt, while it is lawful in ʿādāt with the few exceptions where the obligation is specific and individual.

The criterion in this regard is the consideration whether the ḥaẓẓ which one aims at can be realized by someone else for him or not. If this obligation can be realized by another, then niyāba is valid; otherwise, not. For instance, in matters of sale etc. niyāba is valid, but it is not in matters such as eating, drinking, marrying, etc. (227)

Since ḥaẓẓ is distinguished from hawā, Shāṭibī enumerated three characteristics of the obligation which provide assurance that the effort to achieve ḥaẓẓ in obedience to the lawgiver will not reduce one's act to hawā. These characteristics are dawām (perseverance) (242) universality (kulliya) and the generality (ʿumūm) of the obligation.

It is a test of one's obedience when one has to meet an obligation constantly. (243) The characteristic of kullī (universal) requires that all obligations, and each obligation in its entirety, must be met without there being any possibility of getting exemption from some or part of an obligation. All particulars and parts of an obligation are obligatory without preference of one above others. (244) Being ʿāmm , the obligations are obligatory upon each mukallaf without distinction. The only exception to this ʿumūm is the Prophet, in respect to his regular obligations as well as to his special distinctive privileges (mazāyā) This case is unique, partly because khawāriq al-ʿādāt (deviation from regular habits) are often equal to ʿādāt in the case of the prophets. Since as a general rule the acts of the Prophet are obligatory, as models to be followed, and the cases of khawāriq al-ʿādāt are impossible to be followed, the latter must be considered

as special to the Prophets. They are not obligatory to be followed unless the Sharīʿa explicitly demands so and then only if they do not disagree with Sharīʿa. (249-266) The main argument that underlies this discussion is that the extraordinary acts of the Prophet where he appears to be abandoning ḥuẓūẓ are in fact khawāriq al-ʿādāt in the case of common men. (269) Since Sharīʿa is universal, it cannot oblige all men with things which are khawāriq. (275) Invalidity of the khawāriq, however, does not mean that law does not or cannot be changed. What Shāṭibī is stressing is the fact that the khawāriq do not convey the sense of legal change; they are rather exceptions to laws of nature. In addition to Prophetic revelation, Shāṭibī includes Kashf (mystic revelation) and ruʾya (dreams) of the awliyāʾ in khawāriq. (266-269) In order that it may be understood fully, this discussions requires a rather detailed analysis of the notions of ʿādāt and khawāriq, and their relationship to the rules of Sharīʿa. The analysis of ʿāda is presented in the following chapter, as it is more suited to the discussion there.[5] Briefly, Shāṭibī uses ʿādāt both in the sense of habits, customs and human behaviour and as an opposite term to ʿibādāt. Essentially, ʿāda belongs to the physical world. ʿĀdāt are constant; and when some event happens contrary to ʿāda it is called kharq al-ʿāda. Not all of the ʿādāt are constant, however; it is, in fact, only the universals of being which are constant; Shāṭibī calls them al-ʿawāʾid al-mustamirra. Some of these ʿawāʾid are either introduced or sanctioned by Sharīʿa, hence called al-ʿawāʾid al-sharʿiyya. Others are current in the practice of the people, hence called al-ʿawāʾid al-jāriy a. Sharīʿa does not oppose al-ʿawāʾid al-jāriy a; in fact, it shows a constant regard for them. There are,

however, variations in the practice of these ʿādāt. Also they change with time and place.

A detailed analysis of al-ʿawā'id al-sharʿiyya by Shāṭibī reveals that maṣlaḥa is the basic consideration both in the change and the continuity of these ʿawā'id. In the light of this view it may be seen that taʿabbud toward al-ʿawā'id al-sharʿiyya is not devoid of ḥuẓūẓ and maṣlaḥa.

Taʿabbud and Maṣlaḥa

From the above analysis Shāṭibī concludes that the essential consideration in ʿibādāt, insofar as the mukallaf is concerned is taʿabbud without regard for maʿānī (inner meanings). In ʿādāt, on the other hand, the essential consideration is that of maʿānī. (300) This conclusion is further demonstrated by the following points of argument. First, from a survey of Sharīʿa it may be inductively known that provisions such as ṭahāra (ritual cleanliness) and tayammum (ablution with dust) in the realm of ʿibādāt are difficult to explain, except in terms of taʿabbud. (301) In the realm of ʿādāt, it is obvious that such provisions are based on maṣlaḥa of the people. It is thus inductively discoverable that the lawgiver relies on a regard for maṣlaḥa in ʿādāt. (305)

Secondly, in ʿibādāt the extension of the scope of taʿabbud is not intended. (301) In other words, the obligation is limited to the specific commands comprised in ʿibādāt. This is why no explicit reason is given for promulgating such commands. In the case of ʿādāt, on the contrary, the extension of the rules is the purpose. Hence the lawgiver generously explains the rules of law relating to ʿādāt in respect to their ʿilal (reasons) and ḥikam (wisdom). (306)

Taʿabbud and maʿnā/maṣlaḥa, however, are not opposite terms for Shāṭibī. He characterizes taʿabbud by various statements: "al-rujūʿ ilā mujarrad mā ḥaddahu al Shāriʿ" (recourse only to what the lawgiver has determined); (304) Al-inqiyād li ʾawāmir Allāh" (being bound by the commands of God). (301) "Mā huwa ḥaqqun lillāh khāṣṣatan" (that which is the exclusive right of God). (315) "Rājiʿun ilā ʿadami maʿquliyat al-maʿnā (that which refers to the non-intelligibility of its meaning). (318) Shāṭibī defines maʿnā in this context as follows: that is "ḍabṭu wujūh al-maṣāliḥ" (to define the aspects of maṣāliḥ). (308)

The distinction between taʿabbud and maʿnā or maṣlaḥa occurs initially in reference to the question whether the reason for a command is intelligible or not. If the reason is intelligible, the command is based on maʿnā; otherwise, it is taʿabbud. (314) This explanation is as yet insufficient, however, because the "intelligibility" needs further to be qualified. Shāṭibī explains that "intelligibility" applies where the maʿnā or maṣlaḥa can be extended as an ʿilla to other similar cases. If the maʿnā is extendable, it will still be taken as taʿabbud. (309) To illustate,

> "The requirement of dowry in marriage is one of those matters in which the human reason cannot understand (determine) the specific masalih in these commands, so that they could be made analogous to other cases. We know that the required conditions in marriage such as that of the guardian and the dowry, etc., are laid down to distinguish marriage from fornication (sifāḥ)...But (if they are considered as being the ʿilla of marriage) they are but general principles just as humility and submission to the Sublime are the reasons for the obligation of ʿibādāt. This amount (of ʿilla is not sufficient to establish an analogy, to extend the above rule to further cases; so that one might say that were a distinction between

marriage and fornication to be established by some other factors, the above conditions would no more be required." (308)

This explanation implies at least two things: one, that taʿabbudāt according to Shāṭibī, are absolute obligations in the sense that they must be fulfilled without asking for the reason, and second, that taʿabbudāt cannot be made the basis of analogy. Shāṭibī seems to be stressing the second implication, rather than the first. In other words, he isimplicitly arguing that the absoluteness of obligation in matters of taʿabbudāt is maintained only in the sense that they are not to be extended. There is no denial of ʿilla; in fact it is only after the search for an ʿilla in the command that one can decide whether the ʿilla given or implied is general or specific. What is denied is the extension by taʿlīl and qiyās. The denial of taʿlīl amounts to placing a limitation on the scope of application of these commands. It is in the sense of specifically limited command that taʿabbud is spoken about in this context. As Shāṭibī himself says, "In all those matters where a consideration of taʿabbud is established, there can be no tafrīʿ (deduction, extension by analogy) from them." (310)

Shāṭibī, however, also accepts other senses of taʿabbud in addition to the one mentioned above. He explains that even matters, where the consideration of meaning without taʿabbud (in the sense mentioned above) is established, are not free from taʿabbud (in the general sense of the term). (315) This general sense of taʿabbud is demonstrated by the following considerations. First a mukallaf is bound to obey a command because of the sense of demand (iqtiḍā') and option

(takhyīr) imposed by the command, not because he finds in it a certain maṣlaḥa. (311) Second, even if a decision about an ʿilla is taken, this process does not assure us that the ʿilla decided upon is the only illa of that command or that it is the only maṣlaḥa to be realized. This state of indecisiveness (wāqifīn) is removed by recourse to taʿabbud. (312) Shāṭibī further explains that qiyās means a search for an ʿilla only insofar as it is ordinarily possible. Qiyās does not exhaust all the ʿilal; it is rather based on the most probable (ghalbat al-ẓann) ʿilla. On this basis 'qaḍā'bi'l taʿaddī' (judicial decision by extension of the original ruling) is not contradictory to taʿabbud which, here, means ' not based on reason'. (312)

Third, the obligations are known to us in two ways: either through well-known methods such as ijmāʿ, naṣṣ, ishāra, munāsaba etc., or through instances where none of these methods can be applied. The obligations of the latter kind are known only by waḥy (revelation). In this category of obligation the absence of ʿilla and taʿaddī within command demands taʿabbud only. This taʿabbud means to stop at the point where the shāriʿ has defined the limit; if the ʿilla is not given, taʿabbud demands that the command must not be extended by qiyās. (313) "A maṣlaḥa is so from God in such a manner that it is verifiable (yaṣdiqu) by human reason (ʿaql) and reassuring (taṭma'inn) to the soul (nafs)". (315)

The takālīf can also be viewed as rights of God. In this sense they become taʿabbudī. Shāṭibī, however, regards taʿabbud as a general sense of the rights of God. He divides these rights into three categories. First are those rights which belong exclusively to God, such as the ʿibādāt. Second, are those rights

of God which involve the rights of men as well, but the consideration of the former dominates. The third category consists of those rights of God in which consideration for the rights of men dominates. It is to the last category that maṣlaḥa or maʿnā belong directly, and hence this category is not essentially taʿabbudī. (318-320).

Shāṭibī clarifies the distinction between taʿabbud and maṣlaḥa, and ʿibādāt and ʿādāt from the point of view of ḥuqūq (rights). He says that the right of God means a situation "where it is understood from Sharʿ (law) that the mukallaf has no option (khiyara), whether the maʿnā is intelligible or not." (318) The right of man is defined as "what refers to his (man's) maṣāliḥ in this world". (318) The maṣāliḥ in the hereafter are generally rights of God. Thus taʿabbud means something, "the meaning of which cannot be specifically understood". (318) In view of these definitions Shāṭibī concludes that ʿibādāt essentially refer to the rights of God and ʿādāt to the rights of men. (318)

SECTION FIVE

THE MUKALLAF'S MAQṢID IN LEGAL OBLIGATION:

Analysis of the term niyya

So far the discussion has been concerned with the objectives of the lawgiver. This present part discusses the objectives of the mukallaf. On the whole these objectives have to do with the intention of the mukallaf and its effect on the validity or utility of the act. The discussion is arranged in twelve problems. At the end is an epilogue on the problem of knowing the objectives of the lawgiver.

The main points for discussion are the following terms: niyya (intention) and maqāṣid, takālif and jalb al-maṣālih (to seek maṣlaḥa); maṣlaḥa and taḥayyul (seeking legal devices to escape the severity of the law).

Niyya

Shāṭibī opens the discussion by saying that "acts are (judged) by niyyāt (intentions)." (323) Thus an interrelation between 'act' and 'intention' is established. But this raises a question about the details of this relationship. Does it mean that intention without act and act without intention will not be considered? Further, what is intention? By intention of the mukallaf does one mean the correspondence with the intention of the lawgiver in that particular act or something else? It may be noted here that Shāṭibī uses the terms niyya, qaṣd, maqṣid,

ibtighā interchangeably, all of which have the sense of English "intention".

The relationship of niyya and act: Shāṭibī says that the maqasid make a distinction between ᶜāda and ᶜibāda. The same act, such as the act of prostration, is ᶜibāda according to one intention, but it is not ᶜibāda according to others. (324) Thus acts are judged by the intention of their authors. Shāṭibī, however, maintains a distinction at this point between al-aḥkām al-waḍᶜiyya and al-aḥkām al-taklīfiyya. Al-Taklīfiyya are those rules of law which come into effect by the declaration of the lawgiver. They are declared to be ʾamr (command), or nahy (prohibition), etc. The five well-known values of obligatory, recommended, etc., belong to this category of rules. Since al-aḥkām al-taklīfiyya produce direct obligations, a necessary condition for their being fulfilled is the intention of the mukallaf to do so. Waḍᶜiyya are those rules which are not the effect of a direct command but which become effective because they are auxiliary to direct commands.

With the above distinction in mind, Shāṭibī says that if an act is connected with a qaṣd, al-aḥkām al-taklīfiyya become effective in connection with this act. If the act is performed without a definite intention, al-aḥkām al-taklīfiyya will not be effective.

One possible objection to this position may be drawn from the cases of acts done under ikrāh (duress) and hazl (joke) where the intention of the mukallaf is not connected with the acts in question, yet, juridically the acts are considered to be valid. (325) Shāṭibī's answer to this objection entails very significant

points of philosophical interest. In brief, he seems to be maintaining a distinction between two standpoints of deciding the validity of an act; from the standpoint of religion and morality the act is subject to al-aḥkām al-taklīfiyya and here the intention must correspond explicitly with the act, otherwise, the act is not valid. From the juridical standpoint, in cases other than ʿibādāt, expression of intention and its correspondence with the said act is not a necessary requirements; an act is valid and subject to juridical consequences even in the absence of a corresponding niyya.

The source of confusion has been the question of consideration of niyya in the above cases of duress and joke. The niyya, here, is not lacking in an absolute sense. Shāṭibī, therefore, begins his answer by explaining various senses of the considerations of niyya. In its general sense, niyya (in the sense of volition) is a necessity ("ḍarūra") for the validity of an action. This is so because the doer of an action insofar as he is mukhtār (one who has a choice, freedom of will), has intention implicity necessarily in his action, whether his intention is to be obedient to the command of the lawgiver or not. From this standpoint intention is absent only in such cases as, for instance, when a certain action is performed by a nā'im (a person in sleep) or by a majnūn (an insane person). Having no ikhtiyār, individuals in these states, are not mukallafin. Those acts which are done with ikhtiyār, however, cannot be considered as lacking niyya. Hence acts performed under duress or as jokes will be judged, juridically, by such intentions. This sense of the consideration of niyya is from the standpoint of al-aḥkām al-waḍʿiyya. As has been explained earlier, from the standpoint of

waḍᶜiyya, an act becomes valid and its juridical consequences are effective, if the necessary conditions of the said acts are fulfilled, even though a corresponding niyya be absent in that act. For instance, if a person returns the deposit to its owner, even though unwillingly, juridically his act of returning the deposit is valid. (327)

Unlike the above-mentioned general sense of the consideration of niyya, the consideration in the special sense demands the intention to obey law. In this specific sense the consideration of niyya becomes a necessary condition for the validity of an act in cases of ᶜibādāt. It is also necessary when one wants to transform all his acts, ᶜibādāt or ᶜādāt, into taᶜabbudāt. Free actions (al-aᶜmāl al-dākhila taḥt al-ikhtiyār) can be changed into taᶜabbudī, if the intention of obedience accompanies them. This sense of consideration of niyya is from the standpoint of al-aḥkām al-taklīfiyya. As discussed earlier, from the standpoint of taklīfiyya an act becomes valid and the jazā' becomes effective only if the act is accompanied by the intention to obey the Shāriᶜ.

The niyya of obedience is understood as meaning that the intention of the mukallaf in performing an act will be in conformity with the intention of the lawgiver in instituting the law, i.e. with the maṣlaḥa of the people. (331) From this standpoint any act by which one intends what is unlawful, becomes void (bāṭil). The reason for this judgment is that things are allowed in order to achieve maṣlaḥa and remove mafsada. A contrary intention with respect to these lawful things would be equivalent to seeking mafsada and preventing maṣlaḥa which is contrary to human interest as well as to Sharīᶜa. (333)

In the light of above discussions, acts may be of the following four types. First there are those acts in which the act and the intention both conform with the objectives of the lawgiver. Second, there are those acts in which both do not conform. Third there are those in which the act conforms, but the intention does not. Fourth there are those in which the intention conforms, but the act does not. (337)

The legal value of the act in the first and second type is obvious. In the third type the doer will be considered disobedient only for his intention but not for his act. In other words, he has violated the right of God, not the right of men. (338) If a man knows, however, that his act conforms to the objectives of the lawgiver, although his intentions do not, then he is to be the more blamed because he is taking advantage of his act for some other objectives. (339)

In the fourth type, if the doer of the act knows that his act is contrary to the objectives of the lawgiver then his conduct is similar to ibtidāᶜ (bidᶜa, innovation in religious matter). Bidᶜa as such is madhmūm according to Shāṭibī. He does not accept the judgment of bidᶜa made by some scholars. What is called bidᶜa muḥarrama or bidᶜa madhmūma is understood by Shāṭibī in reference to the second type of acts above where intention and act both are contrary to the objectives of the lawgiver. (340) In bidᶜa per se the intention conforms but the act does not. Shāṭibī, however, excludes those cases where the doer does not know that his act does not conform. In such a case he will not be regarded as disobedient, but his act will still not be considered as compliance (imtithāl). (342)

Jalb al-Maṣlaḥa

It has been mentioned above that jalb al-maṣlaḥa within the limits of shaʿīʿa becomes a necessary requirement of niyya.[6] The act of seeking maṣlaḥa occurs, however, not always in isolation; often it is connected with other acts as well. Hence the questions that need be considered in regard to jalb al-maṣlaḥa have to do with the following situations: striving for maṣlaḥa when the result will be harmful to others, and secondly, striving for maṣlaḥa for someone else. (348)

Shāṭibī devides the situations where one's own maṣlaḥa may be harmful to others into eight types of cases, according to the types of harm done. Harm may be general to the whole community, or may be specific to someone; it may be inevitable; it may be avoidable, etc. (349-362) The main principle upheld in these discussions is that if there is an alternative to harm, the bad result must be avoided. Disregarding an alternative would mean that harm becomes the only purpose of one's action. (349) Furthermore, striving for maṣlaḥa even though it may be harmful to others will be allowed if there is maṣlaḥa for more people than are harmed. The right of striving for maṣlaḥa will be given preference to the consideration of avoiding harm if it is well known that a prohibition to strive for maṣlaḥa will cause harm to the seeker. In cases where the seeker himself does not meet any harm but engages in efforts to achieve maṣlaḥa that customarily lead to harm, it must be seen whether this potential harm is qaṭʿī (definite) nādir (rare) or ẓannī (probable). A man will be prevented from striving for maṣlaḥa only if the harm done to others is qaṭʿi. (348)

The second question that needs to be considered in regard to jalb al-maṣlaḥa is that of seeking the maṣlaḥa of others. As a general rule Shāṭibī states that if some one is obliged to seek his maṣāliḥ, it is not obligatory for others also to seek his maṣāliḥ. (364) This rule is similar to the rule of niyāba discussed earlier. The main points that Shāṭibī brings forth in this discussion serve to show that no man is under obligation to fulfil the specific obligations of others. We are not concerned here with the obligation of ʿibādāt, as was made clear earlier in reference to niyāba in that ʿibādāt cannot be fulfilled by proxy. The obligations under discussion are those that concern this world. Such obligations, however, become binding upon others when the original mukallaf is unable to fulfil them, although they are necessities for him. For instance, the following obligations which aim at striving for maṣāliḥ of others, can be justified in terms of the above explanation: Zakāt, lending money, burying the dead body, looking after the affairs of minors and the insane, etc. Among these obligations are some which are general (or public) (kifā'iyya) and some which are specific (ʿalā al-taʿyīn) and individual obligations. The specific obligation cannot be fulfilled by proxy. In such cases an individual is required to seek maṣāliḥ for others, but only if his own maṣāliḥ are not affected. A situation meeting this condition is possible if either the individual is capable of fulfilling his own as well as others' obligations, or if other people are looking after his maṣāliḥ. If he cannot fulfil both his and others' obligations at the same time, his obligation to others will give way in instances of particular obligations to a particular person. His own maṣlaḥa is to be preferred to others. If the matter at issue is a general

obligation to others, then others must look after the individual's obligations while he fufills his duty. (364-368)

Shāṭibī's conclusions regarding the above two questions of striving for maṣlaḥa are very significant to his legal philosophy. He seems to admit that by doing good, or trying to do good, i.e. to strive for one's maṣlaḥa, one may also actually do evil, i.e. to harm others. This would make the sharī'a in some instances result in evil deeds. To rectify such a consequence, Shāṭibī stresses that obligations be undertaken after considering their ends and consequences, and not on their appearance of good or badness. Furthermore, the goodness of obligations, or the ultimate criterion of maṣlaḥa, is good of the larger number of people and harm to less of them. If the good of the few is harmful to many, it no longer remains good.

The above conclusion shows that in Shāṭibī's legal thinking there are certain elements which imply law's consideration for society rather than being an individual commitment towards the lawgiver. In fact, Shāṭibī even implies that by disregarding the social implications of the legal obligation, one's individual commitment to do good may result in evil.

Shāṭibī's view of legal obligation as also a social obligation is further explicated in his conclusions regarding the situation where one strives for the maṣlaḥa of others. If a person has devoted himself to look after the maṣāliḥ of society it becomes a kind of societal obligation for others to look after the maṣāliḥ of that individual. Shāṭibī states that this is why the obligation to pay zakāt is

prescribed; mutual lending of money is allowed; and looking after the maintenance of wife and children is required. In all above cases the individuals in question, e.g. the poor in case of zakāt, and wife and children, are unable to look after their own maṣāliḥ, either because they are occupied with serving the maṣāliḥ of others, as in case of wife, or they are simply incapable of doing so.

Taḥayyul

Shāṭibī defines ḥīla and taḥayyul as follows: "When a mukallaf uses certain means in order to escape an obligation or to make some forbidden thing permissible for him, this use of means which causes an obligatory thing to become apparently non-obligatory and a forbidden thing apparently to become permissible, is called ḥīla or taḥayyul". (379) These means are either apparently permitted in Sharʿ, or are not permitted. They work either by rendering a rule inapplicable or by transferring the consideration of the matter at issue. (378)

Taḥayyul, according to Shāṭibī, works on two premises: 1) it strives to transfer the value of one legal act to another legal act externally, i.e. merely on the basis of apparent similarity between the two acts. 2) It disregards the inner meaning (i.e. maṣlaḥa), of the acts on the basis of which the acts were originally intended by the Shāriʿ, and by doing so reduces the value of these acts to be means to certain other acts, whereas they were meant to be the end. Shāṭibī illustrates it with the following example: Someone wishes to sell ten dirhams in cash for twenty on credit. Because of the prohibition of usury, such a transaction is not allowed. This person evades this prohibition by the following ḥīla. He buys a piece of cloth for ten dirhams and sells it for twenty on credit. To refer to the above premises, he transferred the value of the act of selling the cloth

(which is permitted) to the selling of dirhams (which is prohibited) only on the basis of their external similarity (both are acts of selling). But he disregarded the maṣlaḥa in both acts; he rather used the maṣlaḥa of one act, i.e. to earn profit in selling cloth, as a means to achieve his own end.

In the light of the above expalanations Shāṭibī regards taḥayyul as unlawful on the whole. (380) He supports his argument from the Qur'ān and Ḥadīth. He contends that rules of law are made for the maṣāliḥ of the people; hence acts will be judged according to their relation to maṣāliḥ because that is the objective of the lawgiver. If an act is based externally and internally on lawful grounds, it is evidently a valid act. On the other hand, if it is externally lawful but the maṣlaḥa of that act is against a legal base, it is not lawful. (385)

Shāṭibī stresses that legal acts are not intended (maqṣūda) for their own sake, but for their maʿānī which are the maṣāliḥ. The maṣāliḥ gained in ʿibādāt are closeness to God, devotion to him alone with submission and humility and conformation of the heart and other parts of body in obedience to him. If these masalih are not sought, even the ʿibādāt become unlawful. There is a clear instance in the case of ṣalāt done for the sake of riʾā al-nās (to put up a show for the people). Such ṣalāt is not lawful. (385)

In view of the above explanation ḥiyal (p. ḥīla) are of three types. First come the ḥiyal of the hypocrites which are unanimously regarded as void and illegal. (387) Second are those ḥiyal which are unanimously held to be lawful such as uttering phrases of unbelief under duress. Shāṭibī, here, however, excepts from this rule

the case of one who uses the confession of Islam to save his life. In their motives both cases are similar, for both aim at a maṣlaḥa dunyawiyya. In the latter case, however, since the real intention is different from that of a ḥīla, i.e. one confesses but does not believe in Islam, he is seeking a mafsada in the hereafter, and hence the use of the confession is not lawful. (387)

The third type of ḥiyal are those the legal validity or invalidity of which cannot be decided as clearly as in the above types. Neither is it clear that such ḥiyal agree with the intentions of the lawgiver nor can it be said that they oppose it. Hence it has been controversial. Shāṭibī illustrates this type with two cases; nikāḥ al-muḥallil (marriage of a divorcee with a person other than her husband in order to make remarriage with the husband lawful) and buyū' al-ājāl (sales on credit). Shāṭibī finds it impossible to decide in favour of or against the practice of those two ḥiyal. He is of the opinion that those who regard this type as forbidden, believe that it is against the maṣlaḥa, or in other words, is an intentional violation of Sharī'a. He disagrees with this conclusion. (388) Shāṭibī only provides the arguments of those who are in favour of these two ḥiyal, but does not give his opinion in favour or against them. (391)

CONCLUDING REMARKS

Having investigated Shāṭibī's doctrine of maqāṣid according to his own formulation and the structure of his own presentation, we are now in a better position to infer the basic components of Shāṭibī's concept of maṣlaḥa and its significance in his legal philosophy. What follows is not a conclusion in the proper sense of

the word, but rather a reconstruction of Shāṭibī's concept of maṣlaḥa from his own statements presented above and their implications.

As must be evident from Shāṭibī's definition of maṣlaḥa and its various aspects, the essential element in his concept of maṣlaḥa is the consideration for and protection of the necessities of human life. The five aspects of the maqāṣid serve further to establish this point. The first aspect reveals the necessary relation between human needs and maṣlaḥa and sets out further details of these human needs in different areas. The second aspect discusses intelligibility as a qualification of legal commands, which implies that a major role is allowed to human reason, in the interpretation, justification and extension of the rulings of the sharīʿa. The third aspect discusses the doctrine that harmful things which impede the satisfaction of human needs are revokable. Contrary to the views of the ṣūfīs and some jurists the maṣlaḥa of man or the goal of law does not result in the negation of these needs. The fourth aspect reveals the meaning of obedience. In its narrow sense, obedience means to comply without asking for the reason lying behind the command. This meaning of obedience applies essentially to the ʿibādāt. The other areas of life, for which Shāṭibī uses the term ʿādāt, are based on maṣlaḥa. There is a second meaning of obedience, therefore in which obedience signifies to conform to the objectives of the lawgiver, or to obey the intent of the law. This sense applies both to ʿibādāt and ʿādāt, but implies that obedience in matters of ʿibādāt means taʿabbud and in matters of ʿadāt to follow maṣlaḥa, because these are the objectives of the lawgiver. This point is elaborated in detail in the fifth aspect of the maqāṣid. The basic components

of Shāṭibī's concept of maṣlaḥa are, therefore, the following: 1) the consideration for the needs of man, 2) the rationality of law and the responsibility of man, 3) protection from harm, and 4) conformity with the objectives of the lawgiver.

The jurists preceding Shāṭibī had divided maṣlaḥa into ḍarūrī, ḥājī, and taḥsīnī types only to reject the latter two as less satisfactory bases of legal reasoning. Shāṭibī, in contrast, sees the latter two categories of maslaha as layers or zones that are meant to protect the ḍarūrī type; they complete and supplement ḍarūrī maṣlaḥa. The rejection of the ḥājī and taḥsīnī categories may not immediately affect ḍarūrī maṣlaḥa but, eventually, such a rejection may disrupt the ḍarūrī type as well. This structural approach to maslaha makes Shāṭibī's conception more integral than that of others.

Shāṭibī, however, distinguishes between two conceptions of maṣlaḥa. Maṣlaḥa as conceived in ʿāda is essentially al-maṣlaḥa al-dunyawiyya, which does not look beyond this world.

Maṣlaḥa conceived in connection with sharīʿa takes into consideration al-maṣlaḥa al-ukhrawiyya in addition to al-maṣlaḥa al-dunyawiyya. Another factor that distinguishes the conception of maṣlaḥa in sharīʿa is its simple and abstract nature. Maṣlaḥa in ʿāda, although conceived as not-mixed, yet is found always to be mixed with mafsada and non-maṣlaḥa. In ʿāda, the maṣlaḥa in an act is determined by weighing the elements of maṣlaḥa and mafsada; whichever dominates gives its name to that act. Al-Maṣlaḥa al-sharʿiyya does not reject this process and the conclusion drawn from it, yet as al-maṣlaḥa al-sharʿiyya constitutes a legal obligation, it accepts only

the dominant aspect as a requirement of obligation and rejects the other part for this purpose.

The relativity of maṣlaḥa in ʿāda and definition of al-maṣlaḥa al-sharʿiyya in reference to dominating al-maṣlaḥa al-ʿādiyya is fundamentally important in Shāṭibī's legal thinking. Such a conception of maṣlaḥa gives him the means to free Islamic legal theory from the rigidity with which traditional view had invested it on both the conceptual and the methodological level.

On the conceptual level there were two main deterministic factors that discouraged any trend towards adaptability in Islamic legal theory. One of these factors was theological determinism springing from the concept of God as Omnipotent and Absolute Authority. The negation of causality in relation to God's actions and the denial of man's free will provided this determinism with further rigour. Shāṭibī's conception of legal obligation which takes ʿāda into consideration along with Sharīʿa, making maṣlaḥa the common element of the two, provides justification for man's responsibility for his legal acts, a responsibility that theological determinism would deny. The distinction between ʿāda and sharīʿa as two different aspects of Divine Will, is a further attempt to solve the dilemma which theological determinism creates for Islamic law. The theological understanding of God's Omnipotence, which demands, by necessity, no disjunction between God's willing something and the actual occurrence of that thing, forced most of the theologians to hold that legal commands are not necessarily backed by the Divine Will; otherwise, they would be actualized immediately.

Shāṭibī rejected this mode of thinking. He emphasized that there is Divine Will behind legal commands, but this Will is tashrīʿī and, thus, distinguished from the type of Divine Will which is takwīnī. Man is not involved as an agent in the actualization of God's takwīnī Will, but he is involved in God's tashrīʿī Will. Since man is a mukhtār, the actualization of legal commands depends upon his choice. This position upholds the responsibility of man in legal acts; yet it does not reject the connection of Divine Will with legal commands.

The second deterministic factor was moral and ethical and was introduced to Islamic thought by ṣūfīs. The ṣūfīs viewed the whole concept of obligation as devotion to God even to the extent of denying the necessities of human life. This attitude resulted in virtual neglect of the major part of ʿādāt as being ḥuẓūẓ pursued for the sake of zuhd. In relation to ʿibādāt their view of obligation demanded much more than formal fulfilment of the requirements in law for the sake of ikhlāṣ. Zuhd and ikhlāṣ thus constituted the basic elements of the ṣūfī concept of obligation which they termed waraʿ.

In his analysis of taʿabbud and ḥuẓūẓ Shāṭibī shows the irrelevance of ethical determinism for legal obligation. Taʿabbud means conformity with the objectives of law. Legal obligation does not demand more than what law has specified, and any additional requirement above and beyond the specifications of the law cannot constitute legal obligation.

Shāṭibī's concept of maṣlaḥa freed Islamic legal theory from its traditional rigidity on the methodological level as well. On the methodological level the question

of how to apply and extend law to new situations was hampered by theological, linguistic and logical factors. On the theological plane, major opposition to maṣlaḥa came from the denial of cause (ʿilla) in legal reasoning. Shāṭibī tried to solve this problem by distinguishing between the afʿāl and the awāmir of God. He argued that ʿilla can be attributed to God's aḥkām and His awāmir, if not to His afʿāl. Secondly he demonstrated that the Qur'ān even mentions ʿilla for specific commands. Thirdly, after making an analysis of Divine legal commands, Shāṭibī concluded that these commands not only have a purpose and motive but also that this purpose is maṣlaḥa.

On the plane of language legal formalism and literalism had been acceptable to jurists in general. Even the method of analogy and interpretation by implication, in the final analysis, inclined towards literalism. Shāṭibī rejected this method in two ways. First, by his theory of al-dalāla al-aṣliyya, he laid stress on the significance of meaning, more precisely on contextual meaning, rather than the letter of the law. Second, he emphasized that even in interpretations by implication the maqāṣid of the shāriʿa should be the basis of reasoning. Such an interpretation required induction rather than deduction in the process of legal reasoning.

On the plane of logic, the fear of arbitrariness had become a major source of rejection of maṣlaḥa. By giving substance to the concept of maṣlaḥa through conceiving it as a structure and confining it to five specific areas of human needs, Shāṭibī defended the concept against its becoming merely personal and relative. Moreover, by suggesting that maṣlaḥa is based on istiqrā' rather than the method of analogy from particular to particular, Shāṭibī argued that maṣlaḥa is based

on surer grounds. The proponents of analogy argued that a decision reached by analogy having been deduced from a specific ruling of a legal text logically constituted yaqīn. Reasoning in terms of maṣlaḥa provided only ẓann. Using the same terms, Shāṭibī argued that the method of analogy led, at the most, to ghalbat al-ẓann, and not to yaqīn. A decision in favour of one ʿilla does not remove the doubt that there may be another ʿilla which is more valid. Secondly there is no way to ascertain that the ʿilla for which one has decided is also the one in the mind of God. These decisions are based on one's best judgment which amounts to probability, not to certitude. If this be the case, a ruling based on induction is more valid than one based on deduction from one particular ruling.

In the light of the above analysis we can discern a trend towards a view of Islamic theory by Shāṭibī that permits adaptability. His understanding of maṣlaḥa as a principle of adaptability to human needs is based on certain distinctions that evolved out of his analysis of the concept. The most significant among these distinctions were those between ʿāda and sharīʿa and between ʿādāt and ʿibādāt. For a better understanding of Shāṭibī's view of legal theory these distinctions need to be further analysed.

NOTES: CHAPTER VII

1. The numbers in the parenthesis in the text of this chapter refer to the following:

   Shāṭibī, Al-Muwāfaqāt, Vol. II (Kitāb al-maqāṣid), ed. and comments. Darāz, (Cairo: Muṣṭafā Muḥammad, n.d.)

2. See above Chap. IV, p. 191ff.

3. See Chap. VI, p.265ff.

4. Kwame Gyekye, "The Terms 'Prima Intentio' and 'Secunda Intentio' in Arabic Logic", Speculum, XLVI,1 (1971),32-38, also suggests that the term ala al-qaṣd al-awwal should be translated as 'primarily', 'initially', or 'directly' instead of 'in the first intention'.

5. See p. 373ff.

6. See p. 349.

CHAPTER VIII

CONTINUITY AND CHANGE

In Chapter V we noticed that in his fatāwā, Shāṭibī accepted 14 cases of social change and rejected 23 others. Among the rejected cases 12 belonged to changes in ʿibādāt and 11 to changes in laws relating to family, property, and to contracts and obligations. He rejected changes in ʿibādāt because he considered them to be bidʿāt. He rejected changes in cases of laws relating to family and property where they amounted to either confusion or violation of the individual right of ownership and partnership. He rejected changes in cases of contracts and obligations where they hampered the freedom of trade and commerce.

The fact that Shāṭibī did not accept or reject social change in toto and further, that he distinguished among various cases of change, indicates that Shāṭibī had a clear notion of change and of the interaction between social and legal change. In fact, as we shall see, in Shāṭibī's legal thinking social change and legal change are so much interrelated that one cannot be understood without the other. Although this relationship makes Shāṭibī's views on change importantly relevant to the problem of our dissertation, yet this complexity renders the analysis of his concepts much more difficult. This chapter, nevertheless, attempts to outline Shāṭibī's concept of social and legal change in Al-Muwāfaqāt and Al-Iʿtiṣām.

In reference to Shāṭibī's terminology, this chapter will deal with the following concepts: Sharīʿa, ʿĀda, bidʿa, and ijtihād. An analysis of the term sharīʿa

reveals Shāṭibī's concept of law in reference to change. The concept of ʿāda explicates the notion of social change and its relation to law. Bidʿa presents a concept of legal change which is generally linked with social change. The concept of ijtihād explains the interaction of social and legal change.

Sharīʿa

Shāṭibī has defined most of the essential terms which he uses, but a definition of Sharīʿa does not seem to be attempted. An understanding of a term can, however, be obtained from other words used as its opposites or used in connection with it.[1] Accordingly, we find that Shāṭibī's concept of Sharīʿa is associated essentially with the notion of "revelation".

On the epistemological level the terms ʿaql (human reason) and hawā (desire)[2] are used as terms opposed to Sharīʿa. Ontologically Sharīʿa is contrasted with kawn (being)[3]. This semantic opposition has significant implications for the concept of Sharīʿa. Firstly, it indicates that law is not arbitrary and merely based on personal likings. Secondly, the values on which Sharīʿa is based are not determined by human reason. Thirdly, it implies that being opposed to kawn which is changing, Sharīʿa is eternal and abstract. Shāṭibī distinguishes between kawn and Sharīʿa also as two different aspects of Divine Will. Kawn is the expression of the creative aspect of Divine Will, and Sharīʿa is the expression of the legislative aspect. This distinction implies that in the first aspect there is a necessary connection between will and the occurrence of an event. This connection is not implied,

however, in the Legislative Will. The details on this point have been discussed earlier.

The term Sharīʿa is also used as synonymous with waḥy (revelation) [4]. Since waḥy is a process and sharīʿa is not, the synonymous use of the two makes sense only if we understand Sharīʿa as the substance of the process of waḥy. As for explanations of the term through synonyms or substitutes for it, the Qurʾān is equated with the Sharīʿa.[5] The application of the term is also extended to Ḥadīth of the Prophet, the Sunna of the Prophet and that of his companions; [6] but whereas the rulings in the Qurʾān are certain (qaṭʿi), in general and in details, the Sunna is certain only in general and is but probable (ẓannī) in detail. [7] The absolute and original Shāriʿ is Allāh only. The Prophet, muftis and mujtahids are also considered to be shāriʿs by Shāṭibī, but they function on God's behalf, [8] and not in their own right.

The characteristics of sharīʿa that Shāṭibī has enumerated are the following: blessed (mubāraka) [9], Arabic [10], general (ʾummiyya) [11], universal (ʿāmma; kulliya) [12], liberal (samḥa) [13], convenient (sahla) [14], protected (maʿṣūma) [15].

The other terms that are associated with the term "Islamic law" are fiqh and uṣūl al-fiqh.

The term fiqh is used by Shāṭibī more in its literal and essential meaning than in the technical sense. The phrase fiqh al-sharīʿa [16] as used by Shāṭibī may mean "under-

standing of the sharīʿa", "investigation of the sharīʿa" or "establishing the meaning of the sharīʿa".

Shāṭibī, however, uses the term "uṣūl al-fiqh" more often and in a certain technical sense. In al-Iʿtiṣām, he defines it as follows: "Uṣūl al-fiqh" means [to infer, by method of] induction, universal [principles] from the evidences [of Sharīʿa] until the mujtahid finds them conspicuous (naṣb ʿayn), and the searcher finds them easy to apply".[17]

The equations he uses to explain the term show that his concept of uṣūl al-fiqh is very closely connected with that of Sharīʿa. He argues that uṣūl al-fiqh have the same relationship to sharīʿa that the uṣūl al-dīn (the principles of religion; kalām) have.[18] He explains that to Qāḍī Ibn al-Ṭayyib uṣūl al-fiqh meant the principles of the science of sharīʿa (in the epistemological sense), whereas to Imām al-Juwaynī they were the proofs (adilla) of sharīʿa.[19] Shāṭibī did not consider them either as proofs or directives for sharīʿa, but as the principles derived inductively from the underlying universal laws in sharīʿa.[20]

A summary of Shāṭibī's view on the origins of sharīʿa also reflects his concept of sharīʿa as a "revelation". According to Shāṭibī, sharīʿa is the light of knowledge. In their pre-sharīʿa state, mankind sought their ends at random. Because of its inclination to passions and desires (hawā), the human reason was unable to discover the maṣāliḥ (good) of all mankind. Its efforts led only to confusion. It drew conclusions with defective analogies; it sought health from a sick body. Mankind was walking in reverse; yet it believed that it was on the right path. This state of self-

assurance led to sheer determinism (ijbār) in the very concepts of freedom, power, and choice (aqdār). Necessitarianist values (ḥukm al-iḍṭirār) were attached to acquired acts (al-afʿāl al-muktasaba). Men were in this plight, when God showed His Grace and sent prophets to every people with sharāʾiʿ (pl. of sharīʿa). The Prophet explained to the peoples in their own languages what was the true, right path. [21]

This account of the origin of sharīʿa is difficult to be interpreted in terms of time because Shāṭibī on other occasions argues that there never was a time without sharīʿa. This account then can be understood either in a mythological sense or in the sense that Shāṭibī was referring to what he calls the fatra, the period of interval in between periods of revelations of sharāʾiʿ.

The last in these series of revelations was sent to Muḥammad b. ʿAbdullāh. God revealed to him His Book, the Qurʾān. This book established the criterion of distinguishing certitude from doubts. [22]

The Qurʾān is the totality (kulliya) of sharīʿa, the fountain of widsom. It is the source of sharīʿa. [23] The Qurʾān was revealed first in Mecca and was continued in Medina. The universal principles were revealed in Mecca; they included among other things, belief in God, the Prophet and the Hereafter. These were followed by general rules such as those about prayer, alms, etc. Along with this were revealed general ethical rules about justice, virtue, patience, etc. These rules generally concerned religion and social practices in the pre-Islamic period. Very few specific

rulings were revealed in Mecca. When the Prophet came to Medina the territory of Islam had expanded. From then on, the general principles revealed in Mecca were complemented with additional particular rulings pertaining to contracts, prohibition of intoxicants, proscription of penal punishments, etc. [24]

The need for detailed rules might have been felt because of various reasons. Often there arose disputes among the people which required detailed judgments. There were controversies also because many people had accepted Islam while retaining their pre-Islamic mental attitudes and social habits. God revealed to them all that they needed, [25] sometimes in the Qur'ān and sometimes by the Sunna. Thus the whole of sharī'a came to be completed in Medina, and God declared, "Today I completed your religion..."

The fuqahā' attended to the task of applying these rules and prescriptions in further details. They searched the basis of these rules in order to apply them to particular cases. This process was the method of ijtihād (legal reasoning). [26]

The above account indicates that sharī'a insofar as it is a revelation of laws by God, was completed in the days of the Prophet. As to the question of change in the days of the Prophet, Shāṭibī maintains that the fundamental principles revealed in Mecca were permanent; they were never changed or repealed, because they were the necessary and essential matters. Abrogation (naskh) occurred only in particular details, not in universals. [27]

In other words, the finality and immutability of Islamic law in the days of the

Prophet meant the non-changeability of fundamentals of sharīʿa only. Legal change is, however, possible in individual cases. The question then is to ask which legal institution does Shāṭibī regard as responsible for the function of legal change?

As mentioned elsewhere, two legal institutions are involved in this matter, futyā and qaḍā'. Shāṭibī considers qaḍā' and futyā both as wilāyāt (administrative offices).[28] Like the establishing of a government, they are also kifā'iyya (societal obligations).[29] In Shāṭibi's structure of maqāṣid, kifā'iyya in contradistinction to ʿayniyya which are specifically individual obligations of each person, are an obligation for the society as a whole, somehow to be fulfilled though each individual may not be involved. Kifā'iyya, however, are still essential and necessary as they are among the maqasid of sharīʿa. They are indeed complementary to ʿayniyya because they make the fulfillment of the latter possible. Kifā'iyya aim at achieving the common good (maṣāliḥ ʿāmma) for all the people, because one individual by himself cannot take care of his interests or his family. How can he attend to the good of the whole society? One necessarily needs co-operation with others. Consequently one works for his own benefit but also toward the interests of others; thus is the benefit of all achieved by all. Such is the manner in which general (public) institutions such as khilāfa, wizāra, niqāba, qaḍā' and futyā came into being. They were recognized by sharīʿa in the public interest because were they to be abandoned, the social order would be destroyed.[30]

This clarification was necessary to show that futyā and qaḍā' being societal obligation are necessarily linked with society and hence with social change. Their being classified among ... Kifā'iya also implies that the muftī and the qāḍī both perform their functions on behalf of the whole of society. Consequently the interests of the society as a whole are required to be considered.

Shāṭibī does not spell out the distinction between the functions of qāḍī and muftī, but from his discussion of fatwā and iqtidā', which follows, it can be assumed that, properly speaking, the institution of futyā was regarded by Shāṭibī as responsible for the interpretation of law and the adoption of legal changes.

Shāṭibī believed the muftī to be the deputy and successor to the Prophet. Like the Prophet, a muftī relays the commands from God, interprets sharī'a for the people and executes them. More important, Shāṭibī regards the muftī to be a lawgiver in a certain sense. He explains this opinion in the following manner.

A muftī's knowledge of sharī'a is gained either through transmission of tradition or through deduction. In the former case he performs as a muballigh (communicator), in the latter he is a law maker (inshā' al-aḥkām) which is the function of a shāri'. This function qualifies the mufti as a true successor (Khalīfa) to the Prophet.[31]

In regard to the question of authority (iqtidā'),[32] Shatibi divides the wielders of authority into three categories. First are those in whose actions freedom from error ('iṣma) can be demonstrated. In this category are included the Prophet, and the consensus of those people of whom it is customarily believed either that they can-

not unanimously agree on error, or that such a consensus is sanctioned by sharīʿa.

Second are those who by certain specific acts claim the obedience of others. This category includes ḥukkām (rulers, officers) who pronounce this claim in the form of commands, and prohibitions or by signature. The third category of authority is one in which none of the above features exist. The first category is admitted in law without any doubt. The other two, however, need further consideration. The reason is that the objectives of authority in the case of these two types cannot be unanimously determined. Thus Shāṭibī does not admit their authority to command obedience in law.[33] He, nevertheless, accepts the authority of a judge (ḥākim) in the application and execution of law.[34]

Shāṭibī's concept of authority seems to be based on two notions: ʿiṣma and qaṭʿiyy. Though ʿiṣma implies freedom from error, yet it cannot be understood in the sense of infallibility in Shāṭibī's terminology. To him ʿiṣma is equivalent to ḥifẓ (safety, protection, assurance) from change or transformation; but not in a static sense. He explains that the ʿiṣma of the Qur'ān has been attained through its wider study, preservation and the development of sciences relating to the Qur'ān. The ʿiṣma of the sharīʿa in the hands of the generation succeeding Muḥammad came to be as they inferred the rules of sharīʿa by seeking its objectives from the Qur'ān and Sunna, sometimes literally, sometimes from its implications and sometimes by deducing the 'cause' (ʿilla) of the command. They applied these rules to cases that were unprecedented. In this way they made matters convenient for their successors. "This is the exact meaning of ḥifẓ..."[35] Shāṭibī's notion of qaṭʿiyy will be discussed later. What is important here is to note that the considera-

tion of certain conditions that would assure the continuity and permanence of the rules of law, is essential in Shāṭibī's concept of law.

The institution of futyā, however, does not function in a vacuum. Law can be applied, interpreted or changed in reference to society. The problem, therefore, can be formulated in the following question. Does Shāṭibī recognize the interaction of legal and social change? For the answer to this question we turn now to Shāṭibī's view on ʿāda.

ʿĀda

Shāṭibī's discussion of ʿāda turns around three problems; the constancy of ʿādāt, the possibility of their change and their relationship with sharīʿa. Even his definition of ʿāda shows these predilections. According to Shāṭibī "ʿĀda means nothing but that a given act, if it is supposed to happen without any impediment, happens only in a certain manner which is known by other similar acts."[36] Shāṭibī's definition partially resembles the theory of determinism. This deterministic element is the constancy which Shāṭibī calls istiqrār (persistence) and istimrār (continuity).[37]

The continuity of ʿādāt is a necessary condition without which the fulfilment of a legal obligation cannot be conceived. The other element is the certainty and predictability of the ʿāda, as Shāṭibī says "the occurrence of ʿāda in the world of existence is a known (maʿlūm) matter not a conjecture (maẓnūn)."[38] Both elements are such that their absence makes any law impossible. "If a divergence (ikhtilāf)

is presumed in ʿawā'id,[39] it would necessitate a divergence in law-making (tashrīʿ); in classification of law (tartīb) and in promulgation (khiṭāb), and the sharīʿa would not be the same as it is now."[40]

Shāṭibī uses the term ʿāda in various meanings; sometimes he means simply habits and human behaviour,[41] on other occasions it is equivalent to custom.[42] It is also contrasted with ʿibādāt so as to mean what the other jurists generally call muʿāmalāt.[43] In fact Shāṭibī's use of the term is inclusive of all these senses. This interpretation is admissible if we recall that Shāṭibī contrasts sharīʿa or ʾamr with kawn.[44] The ʿāda, then, would be related to kawn or the physical world, as the counterpart of aḥkām al-sharīʿa.

Shāṭibī's concept of the continuity of ʿāda, is questioned on two points, first on the ground that the continuity of a certain thing in this world is equivalent to the beginning of its existence, because for its continuity as for its existence it also requires an agent who, however, may possibly become non-existent. During the first period the continuity of the non-existence of that thing was possible, but when it was brought into existence, one of the two possibilities was achieved, i.e. its existence; the other possibility i.e. its non-existence still remains. When it is possible to conceive the possibility of its discontinuity, how can one talk with certainty about its continuity?

The second objection is that very often events occur contrary to ʿāda (Khawāriq al-ʿāda). This fact of actual occurrence supplements the above argument about the potential possibility of non-continuity of ʿādāt. How then can it be main-

tained that the occurrence of ʿādāt is known with certainty?

Shāṭibī replies that it is by tradition (samʿ) that we know the possibility of continuity. The possibility of discontinuity maintained in the objection does not contradict the position of tradition, because the notion of possibility is logical (al-jawāz al-ʿaqlī), while tradition is not concerned with possibility but with occurrence (wuqūʿ). Many a thing happens although logically it is possible for it not to happen. In fact the term "possibility" (jawāz) refers to the "possible" itself, while "necessary" (wujūb) and impossible (imtināʿ) refer to some external factor. Thus the latter cannot be contradictory to the former.

Second, the certainty and predictability in ʿādāt do not concern each and every ada. Essentially they concern the universals of being (kulliyyāt al-wujūd), not the indivduals. Hence if an individual deviates, this does not destroy the universal. The argument from khawāriq ʿāda refers to individuals. Furthermore, it is the occurence of khawāriq ʿāda that assures our knowledge about the universal ʿādāt and vice versa.[45]

From the above it can be seen that in a fashion similar to his views on sharīʿa, Shāṭibī believes in the continuity of only those ʿawā'id which are universal. The acceptance of their continuity is not only an actual fact, but it is also necessitated by the requirement of a stable base for law. The ʿawā'id which accept change are more in number than those which are immutable. Kharq ʿāda is not a proper example of changing ʿādāt; in fact kharqʿāda is a breach of a universal ʿāda, and hence it happens seldom. Shāṭibī, therefore dismisses kharq ʿāda as a

serious objection to the continuity of ʿādāt, as well as an example of change.

Shāṭibī classifies al-ʿawā'id al-mustamirra, in reference to shāriʿ into two kinds: sharīya, which are introduced or sanctioned by sharīʿa and ʿawā'id jāriya bayn al-khalq,[46] those which are current among people. These two categories are not exclusive of each other; the first category also belongs to the habits and customs of the people. Sharʿ necessarily gives consideration to ʿawā'id jāriya, because in fact Divine law (sunnat Allāh) corresponds with the ʿawā'id in general; hence the sharīʿa was instituted commensurate with the institution of ʿawā'id.[47]

Shāṭibī believes in the relationship of sharīʿa to ʿāda more than in the relation between sharīʿa and ʿaql. As mentioned earlier, it was in the periods of fatra that the philosophers (ʿuqalā') claimed to know good and evil by reason alone.[48] According to Shāṭibī, this was possible, in fact, only because the values of good and evil already existed as instituted in ʿādāt, although they were confused. This is why Shāṭibī finds that the sharā'iʿ have not rejected ʿādāt entirely. In the case of the sharīʿa of Muḥammad, indeed, the sharīʿa confirmed most of the ʿādāt practiced by the people in the pre-Islamic period. Examples of such laws are the following ʿādāt which were regarded as good in the pre-Islamic period and were adopted by Islam: diya (blood money), qasāma (compurgation), gathering on ʿarūba (the ancient Arabic name of Friday) for sermons, qirāḍ (loan), etc.[49]

Shāṭibī illustrates the relation of sharīʿa and ʿāda by the case of khamr (intoxicant). "It was habitually used in pre-Islamic days. Islam came, and left it intact in the period before Migration and a few years after. The sharʿ did not

pronounce any law regarding khamr until the verse 'they ask you about khamr and maysir...' ....Then he explains that "the fundamental rule of sharīʿa is that when an evil (mafsada) in a thing transgresses the good (maṣlaḥa), it will be evaluated as evil. The evils are prohibited, hence the reason for its prohibition is clear. In cases where the sharīʿa has not pronounced the prohibition, even though this aspect of its evaluation is apparent, the people will act upon the supposition that the original law established by the continuity of practice (ʿāda) remains in tact."[50]

Shāṭibī's discussion of the relationship of sharīʿa and ʿāda implies the aspect of change as well. The sharīʿa can change ʿāda in certain cases, and vice versa, but more important is the fact that when a change takes place within an ʿāda, it also effects a change in the sharīʿa rule. A thing which was relatively good becomes evil or vice versa; the sharīʿa has to adjust itself accordingly. This takes us to Shāṭibī's view of legal change. First we will discuss the aspect of change in ʿāda; then the problem of legal change will be dealt with.

It should be noted here that in the usage of the term "change" Shāṭibī includes both 'horizontal' and 'vertical' senses of change. The former is the change which manifests itself in the differences in ʿādāt among various societies, cities, countries, etc. The latter is the replacement of old ʿādāt by new ones, or the development of these ʿādāt by additions or modifications. For the 'horizontal' his term is ikhtilāf and for the 'vertical' he uses the terms "taghyīr" and "tabdīl".

Beside al-ʿawā'id al-shar'iyya which do not change, Shaṭibī divides al-ʿawā'id al-jāriya into two: first, al-ʿawā'id al-ʿāmma, which do not change with time, place or

state and second, those which change. In the first category, Shāṭibī mentions the ʿawā'id of eating, drinking, joy, sorrow, acquiring nice things, etc. The evaluation in these categories has been established on the basis of the awa id of past generations; they have never changed. In fact they are based on the Divine law in Creation [law of nature].

In the second category are theʿawā'id such as the forms of dress, styles of dwellings, etc., which change with time, place, and states. In this category, therefore, it is not correct to evaluate ʿawā'id absolutely on the basis of past experience. Even if there is found some external evidence which proves the continuity of such an evaluation, it must be kept in mind that this decision of evaluation was made because of some external factor, not because of ʿāda itself. Similarly the decision of evaluation in the present cannot be carried on into the future, or to the past. The reason for this temporal limitation is the probability of change.[51]

Shāṭibī discusses five senses of this change.[52] The first is exemplified where the change is from good (ḥusn) to evil (qubḥ) and vice versa. For example, keeping the head uncovered is regarded as evil in eastern countries but not so in western countries. Second, there is the change that results from the different interpretations of objectives. This change usually takes place among various peoples (ʾumam), but it also occurs within one people, like the differences of the technical vocabularies among men of various trades and professions. Third, there is the difference of acts in muʿāmalāt (dealing with each other), like the ʿāda (custom) of receiving a dowry (ṣadāq) before the consummation of a marriage. Fourth, there is the change resulting from the difference of considerations which are external to the acts in question, for example, the difference in the criterion of maturity (bulūgh)

among various people, whether on the basis of puberty or on the basis of age. Fifth, there is the case of irregular ʿawā'id which have become regular ʿādāt for some people, for instance a person who is injured in such a place that he can no more urinate in the regular manner. The irregular manner of his urinating is an ʿāda for him.

The illustrations of changing ʿawā'id show that Shāṭibī admitted change in ʿāda in both 'horizontal' and 'vertical' senses. This would then imply that sharīʿa insofar as it is related to ʿāda must also admit change.

Shāṭibī's discussion of the problem of change in sharīʿa can be analysed in at least six aspects. The first aspect is that of the universal principles on which the Sharīʿa is based and which underlie the Meccan part of the Qur'ān. These principles are also called maqāṣid al-sharīʿa, and they never change. What are these universal principles? Examples drawn from the Meccan revelations have been mentioned earlier.

The second aspect is that of al-ʿawā'id al-sharʿiyya. As mentioned earlier, they are the ʿawā'id introduced or sanctioned by sharīʿa. In contrast to the universal principles, they are more specific and concrete rules of law. According to Shāṭibī they also do not change. "Because," Shāṭibī explains, "they are among the matters included in the rules of sharīʿa. Hence they do not change. Even if the opinions of the mukallafīn (subjects of law) differ about them, it is not correct to change good into evil... For instance it cannot be argued that since the acceptance of the witness of slave is not disdained by the ʿādāt, hence it is allowed...If

this were permitted it would constitute abrogation of the rules which are constant and continuous, whereas abrogation after the death of the Prophet is not valid (bāṭil)."[53]

The third aspect concerns those ʿawā'id which are either a means or a mediate cause (sabab) to the fulfilment of certain rules of sharīʿa, like the physical capabilities to perform an act, the ʿawā'id about maturity, etc. "Since they are mediate causes (sabab) for the 'caused act' (musabbab), they are also commended by the lawgiver. Hence there is no difficulty in giving them due consideration and accepting them as the basis of rules."[54] The problem then is to ask whether the rules of sharīʿa would change if this basis changed. Shāṭibī replied in the affirmative, saying "The rule of sharīʿa will always be in consonance with these ʿawā'id."[55]

The fourth aspect is that of al-ʿawā'id al-mutabaddila, the five senses of which have been mentioned above. Shāṭibī explicitly argues that the rules of sharīʿa must be in accordance with the changes in this category of ʿawā'id.

The fifth aspect concerns the legal changes which imply that certain matters are not covered by Sharīʿa so that additional rules are required. Shāṭibī regards this aspect as requiring further investigation. A certain ḥadīth lays down the rule that 'the matters on which the lawgiver is silent, are forgiven (ʿafw)'. This ḥadīth admits that Sharīʿa does not cover everything. The ḥadīth, however, renders the position of those jursists questionalbe who maintain that there is nothing maskūt ʿanhu (where lawgiver is silent), because they claim that every case is either covered by the text (manṣūṣ) or is coverable by analogy with the text. To avoid

the conflict with the above ḥadīth, they explain that the Shāriʿ's silence can be removed in a number of ways; for instance, by way of istiṣḥāb, or by referring to the Shāriʿ's explicit proclamations in laws revealed before Muḥammad, or by confining the interpretation of the text to the generality of a specific ruling by disregarding its modifications if they are not mentioned immediately after the ruling.[56]

Shāṭibī goes into a detailed analysis of the nature of this silence. He divides this silence into two types. First is the type of silence where there was no immediate cause for issuing a command and hence the lawgiver did not say anything. Second is the type where such a cause existed but the lawgiver still kept silent. Quite naturally, the second type is a form of prohibition. To interpret this silence as absence of ruling would thus lead to introducing a bidʿa.

The first type is what can be properly called "silence". Because of its obvious significance, Shāṭibī's explanation on this point needs to be quoted in his own words.

> One of them [the aspects of silence] is, that he keeps silent because there is no motive (dāʿiya) that necessitates it [the ruling]...For instance the events that occurred after the (death of the) Prophet. They certainly did not occur in his lifetime so that one can say that the lawgiver said nothing about them, even though they occurred. They took place later and hence the people of Sharīʿa were obliged to examine those events and to execute them according to what had been established as universal principles.
>
> The new things that the righteous ancestors introduced in Islamic law belong to this type. The examples of this type are the maṣāliḥ mursala such as the collection of the Qur'ān etc....These are some of those things that were not discussed in Prophet's days, nor were they enquired about. Nor did they find place in social practice so that a cause for such an enquiry might arise.[57]

As a second instance, we may cite the category of ʿafw which according to Shāṭibī falls between the ḥalāl (lawful) and the ḥarām (forbidden). This category also proves that he not only admitted the possibility of matters not covered by sharīʿa, but also that they fall under the category of ʿafw (silence or indifference of the lawgiver).[58]

The sixth aspect of change is what Shāṭibī calls iḥdāth fī al-sharīʿa (innovation). Shāṭibī does not believe in the legitimacy of iḥdāth. He argues that iḥdāth occurs in sharīʿa in three ways. It happens first because of ignorance of the objectives of law. This is either ignorance of the tools that lead to an understanding of the objectives, such as ignorance of the Arabic language and its grammar, or it is ignorance of the objectives themselves.

A second reason for iḥdāth is taḥsīn al-ẓann bi'l ʿaql, to decide the value of a thing on the basis of rational speculation. A third cause is following one's own desires in seeking the truth. In such a case the desire dominates and even conceals the true evidences and leads to false ones.[59]

Bidʿa is one aspect of this ihdath. Iḥdāth can occur in all subject matters of sharīʿa, while bidʿa, according to Shāṭibī, is limited to certain aspects. This distinction requires a rather detailed analysis of Shāṭibī's concept of bidʿa.

Bidʿa

Shāṭibī's book al-Iʿtiṣām is specifically designed to discuss the problem of bidʿa. We need not go into the details of his arguments; what concerns us here is to discuss

bidʿa as a legal change and the problem of its legitimacy.

Shāṭibī vehemently condemns bidʿa on at least nine grounds.[60] His reasons for condemnation can be summed up by saying that since sharīʿa is complete and final, anyone who innovates, commits among other sins two grave errors. One is the implication of equality or rather superiority to God, the original lawgiver, because the promulgation of bidʿa implies that the innovator knows more than God about sharīʿa. Second, he relies more on human reason and desires than on the intentions of the lawgiver.[61]

Shāṭibī's condemnation of bidʿa must not, however, be taken as condemnation of any and all legal changes. Not only would such a conclusion not conform with his views discussed above, but it would also give a wrong idea about Shāṭibī's understanding of the concepts of bidʿa and ijtihād.

Shāṭibī explains that etymologically bidʿa comes from badaʿa which means to invent something new, the like of which has not existed. In a technical sense, however, this "new-ness" and "invention" is meant in reference to sharīʿa.[62] In reference to sharīʿa human acts can be of three kinds: required, prohibited, or voluntary. The category of prohibited actions is governed by two considerations. First, simply that it is prohibited by law, second, that it literally opposes the rules of sharīʿa. It is the latter consideration to which the technical sense of bidʿa pertains.[63]

Shāṭibī gives two definitions of bidʿa. The first is a definition that does not include ʿādāt; the second includes both ʿibādāt and ʿādāt. The first definition is as

follows: "A way (ṭarīqa) of innovation in religion (dīn) that resembles the way of sharīʿa (tuḍāhī al-ṭarīqat al-sharʿiyya) and which is intended to be followed in order to strive in the utmost toward obedience (taʿabbud) to Allāh."[64] The second definition replaces the phrase 'in order to strive...' with the following "with the same intentions that Shāriʿ aims for."[65]

Shāṭibī even goes further to clarify the qualifications included in the definition. It is relevant to note some of these qualifications. The qualification of 'religion' (dīn) is significant because according to Shāṭibī "if this way of innovation belongs to dunyā (mundane matters) exclusively, it would not be a bidʿa. Examples cited are innovations in crafts, in plans of cities, etc."[66] The qualification of 'innovation' excludes those matters which have their bases in sharʿ.

The qualification of 'intention of similarity with Sharīʿa' is also very important. Shāṭibī is admitting that the intentions of the innovators are not bad in themselves, but he implies that they misunderstood the purpose of Sharīʿa. Shāṭibī does not equate bidʿa with heresy only because it is a new thing. The key terms in this respect are 'intention' and the 'right understanding of the purpose of Sharīʿa .' How is this right understanding to be judged?

In one respect right understanding means correspondence of both intention and acts with the purpose of Sharīʿa. Shāṭibī elaborates the relationship of intention and act to the purpose of Sharīʿa, by describing four situations. First, if the intention of an act and the act itself conform with the purpose of Sharīʿa, the act certainly is valid. Second, the act is not valid if the act and the intention do not conform

with Sharīʿa. Third and fourth are the cases where one of them (the intention or the act) conforms and the other does not, Shāṭibī makes a distinction; if the intention conforms and the act does not, it is to be called bidʿa. If the act conforms but the intention does not, the act belongs to the category of riʾā and hyprocisy.[67]

al-Maṣāliḥ al-mursala illustrate the type of new things where the intention and the act both conform to the purpose of Sharīʿa.[68] An example of this type is the levying of new taxes in addition to those prescribed in the texts. The conformity of the act with the purpose of Sharīʿa and the intention in this case show right understanding of Sharīʿa, and, further, the intention does not conflict with the objectives of Sharīʿa.

In the case of ʿIbādāt this intention leads to an exaggeration in taʿabbud. For instance, in Shāṭibī's period the practice of chanting the names of God (al-dhikr) in congregation was considered obligatory.[69] This intention is absent in ʿādāt. Nevertheless wherever this intention (of similarity) is absent in a new thing, even though there be similarity in actuality, such a new thing will not be regarded as bidʿa.[70] Shāṭibī gives the following as the examples of the last type of new things: taxes levied on property in a specific proportion and amount that resemble zakāt; use of sieves; washing the hands with 'ushna (potash); erecting lofty buildings, etc.[71]

Lack of such distinctions as above, in various types of 'new things' in Islamic law, had made the concept of 'bidʿa' both confusing and controversial. The jurists who would accept nothing new in Islamic law rejected bidʿa in any sense. Some jurists

maintained a broad distinction between good and bad bidʿa. Scholars such as Ibn ʿAbd al-Salām and Qarāfī have even divided bidʿa into five categories corresponding to the five categories of legal valuation: obligatory, recommended, indifferent, reprehensible and forbidden.[72] Shāṭibī regards such a division as meaningless and irrelevant. With the exception of those bidʿa mentioned by these scholars in the categories of 'reprehensible' and 'forbidden' the others are not bidʿa at all.

Shāṭibī refined the meaning of the concept of bidʿa and made it more precise by clarifying his terminology and fitting it into a proper framework of legal philosophy. He showed that the bidʿa are of two kinds only, ḥaqīqiyya (absolute), 'iḍāfiyya (relative). Al-Bidʿa al-ḥaqīqiyya is that which is not proven by any sharʿī evidence like the Qur'ān, Sunna, ijmāʿ or a reliable basis of reasoning, neither in general nor in particular. Al-bidʿa al-iḍāfiya is that which mingles both aspects. In one aspect it is connected with sharʿī evidence; in the other it is not. It is only in the latter aspect that it is bidʿa.[73]

The common point in the two definitions of bidʿa given by Shāṭibī, is the intention of the innovator to equal the lawgiver, and this is possible in ʿadāt as well. Obviously this common point can be taken as the essence in Shāṭibī's concept of bidʿa. Real bidʿāt according to Shāṭibī, however, are only those which belong to ʿibādāt. Shāṭibī argues this point in two ways. First he refutes the thesis of his opponents who maintain that were innovation possible in ʿibādāt, it would also be possible in ʿādāt. Furthermore, there are a large number of aḥādīth which predict the occurrence

of new things in later periods.

Shāṭibī dispels this objection by saying that the controversy is not about the possibility but about the actual occurence of bidʿa in ʿādāt; hence the argument of 'possibility' is not valid. As for predictions of changes in aḥādith, the argument is misleading. These particular aḥādīth do not call all of these changes bidʿa, and moreover, these matters are not condemned there because they are innovations. Shāṭibī continues by saying that were every new thing in ʿādāt regarded as bidʿa, then every change in matters such as eating, clothing, speaking, etc., would stand condemned.[74] He sums up his argument in the following fashion:

> There are ʿawā'id which change with time, place and name. If every change is condemned then everyone who differs in this respect with those Arabs who were in contact with the companions of the Prophet... will be considered as not following them and hence deviating from the right path. This is quite difficult to accept.[75]

The implications of the above statement are fundamentally important for the question of legal change. Shāṭibī, here, is saying that there are large areas of life --- in fact everything except ʿibādāt --- where the concept of bidʿa does not apply. The implication is that Sharīʿa does not control these areas of life or at least does not control in the same sense that it controls the relations of man and God.

Shāṭibī's second manner of argument against including ʿādāt among bidʿāt is the consideration of taʿabbud. As mentioned earlier, from the viewpoint of sharʿ, acts of the mukallafīn are of two kinds; ʿādāt and ʿibādāt. It is generally agreed that ʿibādāt are taʿabbudī, but there is disagreement whether ʿādāt are also taʿabbudī.

Shāṭibī defines taʿabbudī as "that the meaning of which cannot be rationally understood from the act itself". Matters such as ritual cleanliness, prayers, fasting and pilgrimage are all taʿabbudī. Matters such as whose meanings can be rationally understood and whose goodness or badness can be known are ʿādī. Examples may be seen in the acts relating to sale, marriage, lease and punishment for crimes. It is in this sense that ʿādāt are not taʿabbudī, and hence the term bidʿa is not applicable.[76]

In the light of what has been said so far, it is possible to reconstruct Shāṭibī's theory of social and legal change as follows.

One finds a significantly elaborate conception of social as well as legal system in Shāṭibī's thought. The conceptions of these systems emerge from Shāṭibī's analyses of ʿawā'id and Sharīʿa. It must, however, be noted that Shāṭibī sees both of these systems originating from one source, God, yet as they represent two different levels of Divine Will, they do not function in the same way. ʿĀda represents the level of al-irāda takwīniyya, where man has no choice but to obey the rules. In Sharīʿa, obedience depends on man's choice. Human acts insofar as they belong to al-irāda takwīniyya, obey the laws of takwīn necessarily, but those acts which belong to al-irāda al-tashrīʿiyya necessarily need man's intention and volition for obedience. ʿAwā'id which cover habits in reference to individual and social practices in reference to individual and social practices in reference to the community and laws of nature (kulliyāt al-wujūd) in reference to kawn, provide the determinism that stabilizes the function of a social as well as a legal system. There are, of course, some deviations (khawāriq) from this continuity of ʿawā'id, but these deviations establish (rather

than destroy) the factor of stability. Such ʿawā'id which continue are called al-ʿawā'id al-mustamirra and the rules of sharīʿa have their basis in this type of ʿawā'id.

The connection of Sharīʿa with the recurring ʿawā'id makes possible for Sharīʿa to be eternal and continuing. The eternity of Sharīʿa does not originate from the continuity of ʿawā'id, in the sense that the concepts and rules of Sharīʿa become eternal because of these ʿawā'id. In fact Sharīʿa forms the ultimate basis which are abstract, universal and general and, thus, is believed to be unchanging. The continuity of ʿawā'id makes the actualization of these ultimate bases possible.

Shāṭibī clarifies that human reason alone could not discover these ultimate bases, hence this knowledge was revealed in two ways: on the one hand it was instituted in ʿawā'id, and on the other, it was revealed through Sharā'iʿ. Human reason was led either to total laxity or to sheer determinism in its attempt to discover these ultimate bases from ʿawā'id. Consequently revelation of Sharā'iʿ was necessary to save man from both extremes of legal attitudes. Leaving aside the discussion of how the revelation of Sharīʿa differed from the attempt of human reason in this respect or how far it is a denial of any role to human reason, what is notable here is Shāṭibī's attempt to explain that Sharīʿa aims at the good of mankind. This good is judged in relation to and on the basis of ʿawā'id.

With the exception of universal principles, the ʿawā'id are, however, subject to change. Sharīʿa is based on the unchanging principles of ʿawā'id, which are thus called al-ʿawā'id al-Sharʿiyya. Nevertheless the ʿawā'id which belong to human beings (al-ʿawā'id al-Jāriya bayn al-khalq) may change. Since Sharīʿa governs these ʿawā'id

as well, it must respond to these changes. The mechanism of this response gives birth to a legal system.

Shāṭibī illustrates some such changes. The legal system faces one type of change when an individual, coming from a different social system, becomes the subject of another legal system, or the legal system is introduced where a different social system is in function. Obviously this change does not affect the fundamentals as it is supposed that the ʿawāʾid on which Sharīʿa is based are universal. Nevertheless this change requires to be accommodated in order to maintain the stability of the legal system. The second type of change occurs when the old practice no longer satisfies human needs, or when some new elements either from without or from within are introduced. Yet another type of change is introduced when social practices or institutions come into conflict with each other or with the purpose of law; this conflict may arise from a clash of personal interests or because of certain new developments in society. Whatever the cause, the change in a social system takes place in such a manner that it requires a legal system to respond to these changes.

The need to respond to social changes is essentially the result of the aim of the legal system at its own as well as at the stability of the social system. Since the possibility of change is unending and the applicability of the rules of law to these changes is limited, it is out of this necessity that the legal system is organized on rational basis both in its principles and methods, so that it is manageable by human reason. According to Shāṭibī since human reason alone cannot achieve such organization, Sharīʿa has provided men with general guidelines. Among these guide-

lines some can be tested in social practice and some not. Those which cannot be tested are ʿibādāt and they are to be obeyed as such. Of those which can be tested and which are rationally intelligible - they are ʿādāt. The latter constitute the major area of human acts. Since it is possible to rationally organize the ʿādāt, Sharīʿa has left the details to be worked out by legal reasoning.

The Islamic legal system, insofar as the principles are concerned, is revealed in its entirety in the Qur'ān. Shāṭibī divides the injunctions of the Qur'ān into three categories: First the injunctions declaring lawfulness of things, second the declaration of prohibition and the third category is ʿafw which refers to those situations that are not covered by Sharīʿa. Such situations will be decided by leagal reasoning, the guidelines for which are provided in the other two categories.

The decision about the situations not covered by Sharīʿa may mean application of established rules or it may mean extension of these rules. Shāṭibī does not accept extension in the case of ʿibādāt, but only in ʿādāt. The reason is that in ʿibādāt it is only God who can decide what is good for men. Consequently, the Qur'ān being the last and complete revelation, contains all that man needs. Hence there is no need of extension of ʿibādāt beyond what the Qur'ān prescribes. Shāṭibī regards such an extension as bidʿa which is to be condemned.

While ʿibādāt are not rationally intelligible, the ʿadāt are. Moreover, often in the Qur'ān, an ʿilla is mentioned in case of ʿādāt which means that Sharīʿa not only considers them intelligible, but also extendible.

Since the human reason is considered incapable of discovering the maṣāliḥ, yet as

there will be no more revelation of Sharā'i' after the Qur'ān, the situation demands that some system must be evolved to respond to the changes and to extend and apply the rules of law. According to Shāṭibī this is achieved through the institution of futyā and qaḍā. A muftī is a successor of the Prophet both in communicating the previous rules of law and in making new laws. A qāḍī applies and executes these laws. Whenever a situation arises where a member of the community feels that existing laws do not cover or satisfy this situation, he takes this question to the muftī, who investigates the problem and provides an answer on behalf of the legal system. Most often these enquiries arise out of ignorance of the rules of law. Nevertheless a layman as well as a qāḍī may often feel the rules of law to be insufficient in a particular case. In such an event, they are supposed to refer to muftīs. Implicitly there is a rejection of social changes relating to law, without formally accommodating them in the legal system. A more significant implication is that law is to follow social changes, not to initiate or plan them. 'To follow' here means 'to adjust itself', not 'to obey'.

The process of legal reasoning through which a muftī responds to a social change in the framework of the legal system is called ijtihād. Ijtihād is not simply a process of adaptation of legal theory to social changes, but it also aims at a rational attempt to accommodate the change and still maintain the continuity of a legal system.

Ijtihād

For a better understanding of Shāṭibī's discussion of ijtihād we need to consider a few technical details first.

A new case may either be provided for in the body of the rules of law or not. Further, this provision may either be implicit or explicit. An implicit provision may either be in form of general rules or in the form of permission derived from the absence of any prohibition. The need and method of legal reasoning both depend on the nature of these provisions. In some cases ijtihād may be continuously needed, while in other cases it may not be necessary.[77]

The dependence of the method of legal reasoning on the legal provision means that to justify the validity or invalidity of the new case it needs to be examined in reference to these provisions. This justification is exercized by demonstrating the correspondence of the essential elements in the new case with the basis of the legal provision. These bases which are called manāṭ, may be explicity known, or can be known by further ijtihād.

Shāṭibī divides ijtihād in reference to these manāṭ, into four types: 1) Taḥqīq al-manāṭ al-ʿāmm: General verification of the basis of the rules of Sharīʿa. In this case, the rule (ḥukm) in its sharʿī precept (mudrak), as its basis, is already established. The function of the mujtahid is to verify the application of these general bases in the subjects of law, but still in a general and universal sense.[78]

In other words the basis of the legal provisions are examined so as to be applicable

to all the mukallafīn. The generality, here, is further explained by Shāṭibī to mean that this type concerns anwāʿ (species, types) of mukallafīn, and not the ashkhāṣ (persons, individuals).[79] It is called 'general' to distinguish it from the second type of ijtihād, which is specific. Shāṭibī illustrates this point with the Sharʿī ruling that requires a witness to be ʿadl (just). The general and broad meaning of ʿadl is known, but to determine the characteristics and qualifications on the basis of which a witness can be universally described as ʿadl is the function of a mujtahid. In order to verify this qualification in case of a particular witness ijtihād is required.[80] Taqlīd cannot solve this problem, because this process of verification can never end. Every new case is unique in itself in this respect.[81] Furthermore, Sharīʿa does not pronounce its rulings to cover all particular cases individually. The rulings of Sharīʿa are general and abstract so that they can cover any new cases which are infinite.[82]

This is because of the above reasons that Shāṭibī regards this type of ijtihād as ever-continuing. If one admits the discontinuity of this ijtihād, one makes the application and extension of the rules of sharīʿa impossible.[83] Human acts never happen in the abstract, they always happen concretely and as individual cases. If this type of ijtihād discontinues, the obligations of Sharīʿa will exist only in man's minds, and not in practice.[84]

2) Taḥqīq al-manāṭ al-khāṣṣ: This type is different from the first one, as it concerns ashkhāṣ (individuals). This is more detailed and specific. For this a mujtahid relies more on taqwā (piety, prudence) and ḥikma (wisdom, inner reason).[85]

3) Tanqīḥ al-manāṭ (the refinement of the basis of the rule). The proper quali-

fication (waṣf) is mentioned in the text of the ruling but in conjunction with another matter; the task of separating and refining this qualification is done by ijtihād.[86] Shāṭibī further explains that this type does not concern with the method of qiyās, but is rather a type of ta'wīl al-ẓawāhir (interpretation of the literal sense).[87] In a certain sense it also belongs to what Shāṭibī calls al-ijtihād bi-al-istinbāṭ (reasoning by inference).[88]

4) Takhrīj al-manāṭ (deduction of the basis of the rules). This type refers to a text of a ruling where manāṭ are not mentioned. The manāṭ are found through the process of deduction. The method is also called al-ijtihād al-qiyāsī or reasoning by analogy.[89]

Shāṭibī maintains that among these four types, the first is ever continuing,[90] but the continuity of the other three depends on their need. The reasons for the continuity of the first type have already been noted. Shāṭibī explains the need of continuing the other three as follows:

> The new events which were not known in the past, in proportion to those which have occurred in the past, are very few because of the expansion of the body of rules due to the investigation and ijtihad of the preceding jurists. It is therefore possible to accept their decisions (taqlīd) in the major part of Sharī'a."[91]

The need for ijtihad was often justified by the jurists by arguing on the basis of khilāf. In other words if the opinion of scholars differed on a certain point, the case was considered open for ijtihād. For Shāṭibī this implied khilāf in Sharī'a, which he vehemently rejected. He maintained that in its basis Sharī'a is a unity; khilāf is neither intended to exist nor to be perpetuated.[92] Hence khilāf in this technical sense is not sufficient to justify continuity of ijtihād.[93] What justifies ijtihād is the absence of rules to cover new cases.

In reference to legal material required for ijtihād, Shāṭibī finds in ijtihād three processes. One that depends on inference and deduction and hence is connected with written legal material. For this type a knowledge of Arabic language is inevitable. Shāṭibī clarifies that he does not mean the knowledge of grammar, syntax, etc., but rather a knowledge of Arab usage.[94] The second process of ijtihād is that where it is not directly concerned with the text, but with the law itself. For this process of reasoning, one requires a grasp on ʿilm maqāṣid al-Sharʿ (the knowledge of the purpose of law).[95] In reference to the above-mentioned four types of ijtihād, the present process is particularly relevant to taḥqīq al-manāṭ and takhrīj al-manāṭ.

The third relates to deductions which require neither of the above types of knowledge.[96] This process is, in fact, the application of the verified manāṭ to specific cases. Consequently in this type of reasoning, two premises are involved; first taḥaqquq al-manāṭ (certitude of the basis of ruling) and second taḥakkum (decision).[97] Shāṭibī explains further that the method of deduction of conclusion in ijtihād is quite different from what is followed by logicians. The premises here do not mean the formulation of propositions in accordance with the figures (ashkāl) of syllogism known in logic. Nor does ijtihād depend upon considerations of syllogism, such as tanāquḍ (contradiction) and ʿaks (conversion). If there is found any similarity, it must not be confused with the technical terms of logicians.

The closest logical figures of syllogism to the method of ijtihād are al-qiyās al-iqtirānī (syllogism by coupling or combining two propositions) or istithnāʾī (syllogism by exclusion).[98] Shāṭibī quotes the Mālikī jurist Abū'l Walīd al-Bājī (d. 1081

who rejected logician's claims that there cannot be a conclusion without two premises, and, referring to fiqh, argued that it is possible to conclude from one premise.[99]

It is in the light of this explanation that Shāṭibī rejects the requirement of a knowledge of the rules of logic for shar'ī purpose,[100] whereas knowledge of the Arabic language and that of objectives of law is considered sine qua non. As for other sciences such as the science of the readings of the Qur'ān, or that of ḥadīth, or kalām, they are not considered absolutely necessary. In fact, a mujtahid can justifiably accept the conclusions reached by these sciences as muqaddimāt (premises, foundations) in ijtihād.[101]

The above analysis of ijtihād shows that Shāṭibī saw it as a process of adapting the legal system to social changes. What distinguishes his treatment of ijtihād is his outlook as a jurist. He looks upon ijtihād as a necessary process but neither open to everyone nor at all times. It is exercised only when it is needed. Taqlīd for him is not a theological concept, but a practical necessity in a legal system.

NOTES: CHAPTER VIII

1. For the validity of this method, we refer to the following work, which has used this method in a highly successful manner: T. Izutsu, God and Man in the Koran (Tokyo, 1964).

2. Al-Muwāfaqāt, comm. ʿAbd Allāh Darāz (Cairo, n.d.), Vol.II, 169. Shāṭibī, here, argues that the Qurʾān uses waḥy (revelation), which is opposte to hawā. Ibid., Vol.I, 35, he contrasts the terms ʿaqliyya and sharʿiyya.

3. Ibid., Vol.III, 121.

4. See above n. 1.

5. Ibid., Vol.III, 369.

6. Ibid., Vol.I, 46-47. To illustrate what is Sharīʿa on a certain point, Shāṭibī quotes from the Qurʾān, ḥadīth and sayings of the Companions. This pattern is frequently repeated throughout the book. On p. 56, for instance, he says, "And this is how the Sharīʿa explains itself", and then he quotes sayings of the Prophet.

7. Ibid., Vol.IV, 7.

8. Ibid., 245.

9. Ibid., Vol.II, 64.

10. Ibid.

11. Ibid., 69.

12. Ibid., 274-275.

13. Ibid., 136.

14. Ibid.

15. Ibid., 58.

16. Ibid., 59.

17. Al-Iʿtiṣām, Vol.I, 19.

18. Al-Muwāfaqāt, 1,31.

19. Ibid.

20. Ibid.

21. Ibid., Vol.1, 19-20.

22. Ibid.

23. Ibid., Vol.III, 346.

24. Ibid., 103-104.

25. Shāṭibī's statement that "God revealed all that they needed", may be understood as that nothing outside the Qur'ān belongs to Sharī'a and secondly that there were things that God did not reveal because they were not needed. Apparently these statements reject any need of legal change. To be meaningful, these statements must be understood together with Shāṭibī's distinction between ʿādāt and ʿibādāt. Thus totality and completion in reference to ʿibādāt have been revealed and that nothing else by way of ʿibādāt is further needed. The totality, in reference to adat, means that the totality of basic principles or universals have been revealed, the particulars of which will always require ijtihād.

26. Ibid., Vol.IV,233-39.

27. Ibid.,236.

28. Ibid., Vol.II,247.

29. Ibid., 180.

30. Ibid., 177-79.

31. Ibid., Vol.IV,244-46.

32. Ibid.,272ff.

33. Ibid.,274,276.

34. Ibid.,281.

35. Ibid., Vol.II,58-61.

36. Ibid., Vol.II,281.

37. Ibid.,279ff.

38. Ibid.

39. Shāṭibī uses both ʿādāt and ʿawāʾid as plurals of ʿĀda. Etymologically, some

linguists claim that ʿawā'id is the plural of ʿā'id and ʿā'ida (something that re-occurs), and ʿadāt is plural of ʿāda. This distinction is, however, generally disregarded. In Shāṭibī's use of ʿawā'id there is some indication that he uses ʿādāt for those legal acts which are opposite to ʿibādāt, and ʿawā'id for habits, customs, etc. But this distinction is not consistently mainted by him.

40. Ibid., Vol.II, 280.

41. Ibid., Vol.II, 297. The examples of eating, drinking, etc., are given to illustrate ʿāda.

42. Ibid., Shāṭibī gives the examples of variety of ʿāda in different forms of dwellings; on p. 307, he gives the examples of customs in pre-Islamic period to illustrate ʿāda.

43. Ibid., pp.307-308.

44. Ibid., Vol.III, 121f.

45. Ibid., Vol.II, 281-82.

46. Ibid., Vol.II, 283ff.

47. Ibid., Vol.III, 265.

48. Ibid., Vol.II, 307.

49. Ibid.

50. Ibid., Vol.I, 174.

51. Ibid., Vol.II, 297-98.

52. Ibid., 284-85.

53. Ibid., 283-84.

54. Ibid., 284.

55. Ibid.

56. Ibid., Vol.I, 173.

57. Ibid., II, 409-410.

58. Ibid., Vol.I, 161.

59. Al-Iʿtiṣām, Vol.II, 293ff.

60. Ibid., Vol.I, 26-111.

61. Ibid., 82.

62. Ibid., 18f.

63. Ibid., 18.

64. Ibid., 19.

65. Ibid.

66. Ibid.

67. Al-Muwāfaqāt, II, 337ff.

68. Ibid., pp.341-42.

69. Al-Iʿtiṣām, Vol.II, 24.

70. Ibid., Vol.I, 22. "Fa kullu mā ʾukhturiʿa fī'l-dīni mimmā yuḍāhī al-mashrūʿ wa lam yuqṣad bihī al-taʿabbud, faqad kharaja ʿan hādhihī al-tasmiyya".

71. Ibid., pp.22-23.

72. Ibid., 147ff.

73. Ibid., 232ff.

74. Ibid., Vol.II, 63-67.

75. Ibid., 67.

76. Ibid., 68.

77. Al-Muwāfaqāt, Vol.IV, p.89.

78. Ibid., p.90.

79. Ibid., p.97.

80. Ibid., p.90.

81. Ibid., p.91.

82. Ibid., p.92.

83. Ibid., p.105.

84. Ibid., p.93.

85. Ibid., pp.97-98.

86. Ibid., p,95.

87. Ibid., p,96.

88. Ibid., p.162f.

89. Ibid., p.96.

90. Ibid., p.89.

91. Ibid., p.105.

92. Ibid., pp.118ff.

93. Ibid., p.128.

94. Ibid., pp. 162-165.

95. Ibid., pp.105-6, 162f.

96. Ibid., p.165f.

97. Ibid., p.334.

98. Ibid., p.337.

99. Ibid., p.339.

100. Ibid.

101. Ibid., pp.110-111.

CHAPTER IX

SUMMARY AND CONCLUSION

Granadian society in the fourteenth century underwent certain very significant changes. These changes were both multidimensional and fundamental for the Granadian legal system; they affected the political, religious, economic and legal structure of the society.

Sulṭān Muḥammad V al-Ghanī Billāh's reign (1354-59/1362-91) was replete with depositions, intrigues, and assassinations. He eventually brought political stability to the kingdom by making himself an absolutely independent ruler. The Sulṭān secured his independence by weakening the political power of the offices of Shaykh al-Ghuzāt, Wazīr and Qāḍī al-Jamā'a.

The weakening of the office of the Qāḍī al-Jamā'a affected the political power of the fuqahā' in general. The fuqahā' as a political and social group were very powerful. They held most of the administrative offices, and, further, they were the principal authority in religious matters and they controlled the institutions of learning. In addition, they were responsible for the administration of a considerably large amount of trust property.

The decline of the political power of the fuqahā' began with the Sulṭān's skillful manoeuvres to become independent of the fuqahā'. There were a number of factors which facilitated the Sulṭān's success. One of these was the introduction of the

state-controlled madrasa system of learning in the days of the Sulṭān's father. Despite the opposition of the fuqahā' the madrasa system had succeeded and had been gradually making the fuqahā' dependent on the Sulṭān.

The second factor was the penetration of taṣawwuf and of Ṣūfī ṭarīqas into Granadian society. The Sulṭān had bestowed his favours on the ṣūfī shaykhs because the Berber mercenaries who constituted the armies of the Sulṭān were followers of the ṣūfī shaykhs. To weaken the power of the shaykh al-ghuzāt and of the fuqahā' and to raise his prestige among these mercenaries the Sulṭān would eagerly patronize taṣawwuf. Furthermore, the ṣūfī life, being simple and pious, appealed to the people at large, who compared the ṣūfī life with that of the fuqahā' who lived in an aristocratic style. The rise of the ṭarīqas which undermined the religious and legal authority of the sharī'a was a real threat to the fuqahā'.

The above political and religious changes were further solidified by other factors which brought certain fundamental changes in the economy of Granadian society. Due to continuing loss of territories to Christians, agricultural land in Granada had become scarce. Furthermore, the Muslim emigrants from Christian Spain, and the Berber fortune-seekers from Africa were adding to the already over-grown population. Consequently every possible piece of land was being used for agricultural purposes. Thus, new forms of agrarian property, new types of agrarian partnership and the practice of hired seasonal labour had become popular.

To add to the complexity of the economy, the Granadian treasury owed to Christians and to the Berbers huge sums of money which were to be paid in cash. Hence

state revenues had to be collected in cash. In addition, a number of new taxes were introduced. Since this economic situation affected the gold and silver reserves in the treasury, a copper dīnār was introduced, probably as a devalued currency.

Local crafts and industries supplemented agricultural production, but by this time they had naturally become of prime importance. In the Kingdom of Granada, silk was the most profitable export industry. The rise of the Italian silk industry had, however, reduced the demand for finished Granadian products in the Mediterranean market. Now, raw silk was more in demand. Hence the Granadian economy was geared to such demands.

The Mediterranean trade had also developed rapidly. To meet the demands of Italian manufacturers, raw materials were imported from Africa and Spain. Granada, being connected with Malaga and Almeria, was situated on one of the very significant arteries of trade that linked North Africa with the European countries. The significance of trade was recognized by the rulers in these countries. Strong trade pacts among these principalities assured the safe transit of merchandise.

The affects of the above-mentioned developments were very far reaching for the legal system in Granada. New commodities and ideas were being exchanged. New forms of transactions had emerged. The legal theory had to accommodate all these changes into the system. The existing legal system was not adequate for the new circumstances. The incompetence of the legal system was recognized by Ibn al-Khaṭīb in his criticism of notaries and their outdated legal practice in regard to legal contracts. The internal contradictions of the system were exposed under the impact of these changes. An indication of these contradictions is seen in the

controversy over the demarcation of the functions of the muftī and the qāḍī.

Such was the milieu in which Shāṭibī (d. 1388) grew up in Granada. His training in fiqh brought him into touch with these problems quite early in his career. Later, he actively participated in discussions and disputations with other scholars on the problems arisng out of the social conditions mentioned above. Quite early on he realized the inadequacy of the legal system in Granada. The centre of his interests were the problems relating to Islamic legal theory and particularly the devices that the Mālikī fuqahā' had used to adapt Mālikī legal theory to accommodate social changes. One such device was that of murāʿāt al-khilāf. By accepting a diversity of laws as fact, the Mālikī fuqahā' came into possession of a legal device to accommodate new social practices. For Shāṭibī, accepting a diversity of laws meant negating the very basis of law. On various aspects of this and other problems, he wrote to Mālikī scholars in Andalus and in Africa. After a long search and investigation, he expounded his doctrine of maqāṣid al-sharīʿa. He examined the traditional legal theory in the light of this doctrine. The result was his book al-Muwāfaqāt in four volumes.

As Shāṭibī had expected, al-Muwāfaqāt was not welcomed. He was called a heretic. Alluding to a number of Shāṭibī's actions in his public life, his opponents condemned him as an innovator. He defended himself against these charges by writing his other book al-Iʿtiṣām in which he defined the concept of bidʿa.

In preparing his fatāwā, Shāṭibī had further actual experience of the inadequacy of the then legal theory to meet the challenge of social changes. We have seen above

that out of 40 queries that we have examined, 34 were related to social changes. Shāṭibī found that the methods of analogy and of borrowing from other schools of law in the name of murāʿāt al-khilāf was not sufficient.

The insufficiency of the provisions of Islamic law and the methods of Islamic legal theory to cope with rising needs were more conspicuous in the area of contracts and obligations. Growing economic activities, especially in trade and commerce, demanded freedom of contract. The Mālikī fuqahā' found it difficult to respond to such demands. The new forms of contract had become highly complicated. The older framework of contract in Mālikī legal theory, which still operated on the legal fiction of shirka fi'l-zarʿ derived from the early Medinese practice of agrarian partnership, did not provide sufficient analogies to new kinds of contract which were different both in form and in nature. The Mālikī fuqahā' tried to solve these problems by adhering to the method of analogy through various devices, but the search for particular precedents to particular cases proved unsuccessful. A number of fuqahā' were forced to fall back on the original Mālikī general legal principle of maṣlaḥa.

Shāṭibī also had the same experience in preparing his fatāwā. He too had to refer to principles such as tashīl, maṣlaḥa and ʿadam ḥaraj. He, however, realized that he could not apply these principles indiscriminately to all areas of social and legal change. Under the influence of taṣawwuf, a number of new rituals had come into social practice. He regarded these rituals as bidʿa and rejected them. The need for such distinctions impressed upon him the significance of investigating

the aim and purpose of law, the nature of legal obligation, and the method of legal reasoning.

Shāṭibī found the principle of maṣlaḥa to be the essential point at which all the enquiries about the nature and purpose of legal obligation, social and legal change, and the method of legal reasoning converge. At the same time this principle also provides the basis of the unity that underlies the diversity of rules in Islamic law.

The principle of maṣlaḥa, as a legal concept, however, has not been a simple concept in uṣūl al-fiqh. Various theological, moral, methodological and more recently ṣūfī conceptions of maṣlaḥa had posed serious difficulties for the use of maṣlaḥa as a principle of adaptability. The Ashʿarī denial of causality in God's actions made it impossible to analyze sharʿī commands on the basis of an ʿilla.

The ṣūfīs denied anything that implied any pleasure for the lower soul. Their emphasis on waraʿ, zuhd and ikhlāṣ rendered maslaha simply into an indulgence in personal desires.

Methodologically, according to traditional jurists, maṣlaḥa provided only a probable basis of reasoning if it was not supported by a specific legal Text. Traditionally, maṣlaḥa was classified from two perspectives. From one viewpoint it was divided into ḍarūrī, ḥajī and taḥsīnī with the last two being rejected. From the other angle maṣlaḥa was divided into muʿtabara, mulghā and mursala; as the first two were in fact covered by the legal Text, it was only maṣlaḥa mursala which remained to be discussed. Consequently the discussion of maṣlaḥa was reduced to

a consideration of maṣlaḥa mursala. It is evident that Shāṭibī's analysis of maṣlaḥa keeps the traditional criticism of maṣlaḥa in view. The first thing that emerges from his analysis of this concept is his stress on human needs rather than on its being simply a Divine prerogative in the absolute sense. From Shāṭibī's definition of maṣlaḥa and its characteristics and from his discussion of its five aspects, it becomes clear that the essential element in the concept of maṣlaḥa is consideration for and protection of the necessities of human life in this world and in the hereafter.

Shāṭibī accepts the traditional division of maṣlaḥa but rejects the limitations on their validity. He finds ḥājī and taḥsīnī types of maṣlaḥa to be complementary and to act as protective zones for the ḍarūrī type. The two are indispensible in this sense. He does not seem to accept the other division, however. The term maṣlaḥa mursala is seldom used in his discussion of maṣlaḥa, and when it is used, it does not differ in meaning from maṣlaḥa.

In his analysis of the concept of maṣlaḥa, Shāṭibī established certain distinctions to clarify the confusions that had gathered around this concept. He analyzed the implications of taʿabbud, ḥuẓūẓ, and mashaqqa in order to elucidate the concept of legal obligation. He refuted the ṣūfī conclusion that abandoning of the ḥuẓūẓ was an essential meaning of taʿabbud. He explained that taʿabbud has two senses; one to obey without searching for the reasons underlying obligations and the other to conform to the intent of the law-giver. Shāṭibī concluded that the first sense of taʿabbud is applicable only to the ʿibādāt which he distinguished from ʿādāt.

The other sense was applicable to the entire body of legal obligations. Obeying the intent of the law-giver meant to regard the maṣlaḥa or maʿānī in ʿādāt and taʿabbud in the second sense or to obey the explicit meaning, in ʿibādāt. He further explained that taʿabbud in the technical legal framework means that the area of ʿibādāt cannot be extended further than what has been revealed by the law-giver.

Shāṭibī answers the theological objections to maṣlaḥa by pointing to the confusion that had resulted from not distinguishing between two levels of the Divine Will. Divine Will at the legislative level does not operate in the same way as it does at the level of the Creation. The legislative will allows man's freedom to act and holds him responsible for his acts. Human freedom and responsibility logically require that the Divine Commands must be within man's capability to comply with them and, further, that they must be intelligible. Intelligibility refers to both the linguistic and the rational aspects of the commands. Thus the factors of responsibility, intelligibility and rationality taken together, necessitate that Divine Commands should be based on an explicit or implicit ʿilla, so that they can be understood, generalized and extended to like situations. Ashʿarī jurists, in order to defend God's Omnipotence, were forced not only to deny ʿilla in Divine Commands, but were also compelled to say that a Divine Command does not necessitate the Divine Will. Shāṭibī differentiated between two Wills; the Creative Will which is to desire someone to produce a certain act. Thus, contrary to Ashʿarīs, Shāṭibī was able to make it clear that a Divine Command with a legislative will does not necessitate its actualization, yet it stresses the support of the Command by the

Divine Will.

The basic components of Shāṭibī's concept of maṣlaḥa are, thus, the following: 1) consideration for the needs of man, 2) the rationality of legal commands and the responsibility of man, 3) protection from harm, and 4) conformity with the objectives of the law-giver.

Shāṭibī, however, distinguishes al-maṣlaḥa al-shar'iyya from the ordinary concept of maṣlaḥa; the former is abstract and simple. Ordinary maṣlaḥa does not exist in pure and simple form; it always contains certain elements of mafsada. Ordinary maṣlaḥa is known by weighing the aspects of good and evil in an action; whichever dominates characterizes the thing in question. Al-Maṣlaḥa al-shar'iyya as a legal obligation takes into account only the dominating aspect which is pure and simple, unmixed with mafsada.

In Shāṭibī's understanding, ʿāda and sharīʿa are very closely connected. Although both are willed by God, yet the former belongs to the Creative Will and the latter to the Legislative. Temporally ʿāda is unlimited but Sharīʿa is limited. Except for certain fundamental laws ʿāda may undergo changes, whereas sharīʿa insofar as it reflects the Divine Will cannot change. To find rules for new situations occurring because of changes in ʿāda one needs to know the exact rule or the intent of the law. This intent can be known through studying ʿāda in combination with the principles inductively derived from sharīʿa.

The above-described concept of maṣlaḥa was admirably suited to Shāṭibī's under-

standing of social change and to his views on legal change. According to Shāṭibī the ʿawā'id or the habits of individuals and social practice alike are stabilized by certain universal laws which do not change. The changes that occur in society happen because of the movements from one place to another of individuals, or because of the movements of social customs along with the migration of people. More fundamentally, changes are generally produced by human needs. It is when these social changes go beyond the provisions of the rules of law or when they become too complicated for the existing rules, that a muftī or mujtahid is summoned, through the agency of a fatwā, to examine the law and legal theory as they relate to the changes in question.

The process of legal change may be called ijtihād. Shāṭibi divides ijtihād into four types. Although the 'gate' of ijtihād is closed in none of the types, yet Shāṭibī was of the opinion that because of cumulative growth of fatāwā and judicial decisions, ijtihād may not be needed in many areas. For Shāṭibī ijtihād and taqlīd are legal necessities and not theological obligations. Thus Shāṭibī comes to a different conclusion about the principle of ijtihād. As has been pointed out, this rather legalistic and positive understanding of ijtihād is quite significant for Shāṭibī's legal philosophy.

Having summarized our findings, we may now draw conclusions in reference to the problem of the adaptability of Islamic legal theory to meet social changes.

We have seen that Shāṭibī admits that changes take place in society and that the legal changes in the area of ʿādāt accord with social needs. We have also found

Shāṭibī to believe that although its general and universal principles remain unchanged, yet Islamic law does accommodate itself to changes and that it favours the consideration of social needs in making its accommodations. According to Shāṭibī, ijtihād provides a method and process for legal change; maṣlaḥa gives a basis and direction to change; and the concepts of bidʿa and taʿabbud provide limits on social and legal changes.

Through his analysis of maṣlaḥa as the purpose of Islamic law, Shāṭibī has tried to free the operation of Islamic legal theory from a number of factors of determinism and rigidity arising out of theological and methodological considerations. In fact his concept of maṣlaḥa provides a correction for many traditional as well as modern misunderstandings of this concept. We need not repeat all the points relevant to these corrections; it will suffice to say that contrary to the general understanding, maṣlaḥa is neither u totally relative and arbitrary principle nor is it strictly tied to qiyās or to specific legal texts of sharīʿa. It is connected with social needs at one end, and on the other it is inductively supported by sharīʿa. It is, thus, not a special form of analogy, nor is it an extra legal method of expediency to provide an area of flexibility in legal reasoning along with more strict elements of the law. To Shāṭibī, maṣlaḥa is an integral principle that unifies sharīʿa, provides stability and gives direction to legal changes.

It can be seen that Shāṭibī had considerably improved upon the traditional philosophy of Islamic law by refining and clarifying certain basic legal-philosophic concepts, particularly the concept of maṣlaḥa. His views were quite fitting for

the needs of Islamic legal theory in fourteenth century Granada. As we have seen, quite similar developments in the philosophy of law took place in Christian Spain that came to bear fruit in the sixteenth century in Suarez's philosophy of law. The difference was, however, that in Christian Spain those activites which continued through the sixteenth century later helped in the development of modern philosophies of law. In Muslim Spain, despite the fact that Shāṭibī's philosophy of law was in some respects similar to that of Suarez, it did not gain acceptance, and the traditional view persisted. Why did Shāṭibī's philosophy fail?

To explain the failure of Shāṭibī's legal philosophy on the basis of material and historical reasons will not be sufficient. His legal philosophy was revived in the Salafiyya and Liberal movements in the nineteenth century, and as various studies, such as those by A. Hourani and M. H. Kerr, have shown, once again failed although the historical setting and circumstances were this time more favourable.

The reasons for this failure must also be sought within Shāṭibī's philosophy and in the understanding of it by his recent followers. Since the matter lies beyond the scope of this dissertation we will only suggest in respect of it that Shāṭibī's recent followers do not seem to have accepted his philosophy as a whole. For instance, they refer to maṣlaḥa as a principle of expediency to be used in cases where the provisions of legal texts and the method of analogy do not suffice. This is not Shāṭibī's understanding of maṣlaḥa but is rather a repetition of concepts long held in the community. Thus, in fact, these recent followers have not departed from the traditional concept of maṣlaḥa.

One would have expected that in view of modern developments in theories and systems of law, Shāṭibī's philosophy would have been further refined by his modern disciples. Instead, they have remained within the traditional framework of legal methodology and have even interpreted Shāṭibī's philosophy in the same framework. Consequently, it was possible for scholars such as Rashīd Riḍā to blunt the thrust of Shāṭibī's philosophy by giving Shāṭibī the image of a conservative, a crusader against innovation and of a reviver of tradition.

From the above observations it is possible to suggest that there is a significantly visible trend in Shāṭibī's legal thought towards a positive Islamic law. His emphasis on maṣlaḥa and his attempt to free legal theory from theological determinism indicate such inclinations. To illustrate, we may refer to his demarcation of two areas of legal change.

He stresses that no innovation can be accepted in ʿibādāt, whereas in ʿādāt changes are possible. The element of positivism lies in his theoretical justification of the above conclusion. He explains that ʿibādāt belong to that area of maṣāliḥ which is known only to God. Generally ʿibādāt cannot be rationally explained. Since they cannot be observed and tested by human reason, they cannot be extended by analogy to similar situations.

The area of ʿādāt is different, however. Not only are ʿādāt based on maṣāliḥ, but the commands in sharīʿa relating to ʿādāt usually provide the reason indicating that these maṣāliḥ can be grasped by human reason. Further, ʿādāt are observable and they can be tested. This is the reason they are extendible by analogy, and why they can be the subject of ijtihād.

Such arguments should have led Shāṭibī to positivism in his legal philosophy; yet there are no explicit statements by Shāṭibī showing such a tendency.

The implicit positivism in Shāṭibī's legal philosophy may be further noted in his attempt to separate law (fiqh) from theology and from ṣūfī morality as set out in his definitions of legal obligation. Although he believed the origin of Islamic law to lie in religion and morality, yet he was able to maintain that theological and moral elements and the conception of obligation based on them could not be admitted into the definition of legal obligation. He was, however, reluctant to reject entirely the theological and moral implications of legal obligation.

This reluctance, in fact, sometimes resulted in his allowing an element of confusion to creep into his definitions. For instance, we may cite his definition of taʿabbud. His illustrations of ʿibādāt refer to the well-known Islamic rituals and other such acts which, according to him, should be accepted without rational explanation in contrast to ʿādāt which have rational bases. There are a number of occasions, however, when he implies that even those legal commands in the Qur'ān, which do not concern ʿibādāt such as those governing family relations, should also be accepted without rational explanation. Does he mean that he extends the definition of taʿabbud in the sense of ʿibādāt to all the commands in the Qur'ān?

In the light of Shāṭibī's philosophy as a whole, it is difficult to explain such departures. Most probably these departures result from Shāṭibī's reluctance to accept the logical conclusions of his attempt to separate the two levels of conceiving the legal obligation i.e. the level of the origin of legal obligation and the level of its

definition and application. The first level may relate to religion and morality, but such a relationship is not necessary on the second level. One can appreciate Shāṭibī's reluctance if it is recalled that the legal system in his day, despite certain attempts, did not succeed in separating the jurisdiction of the muftī from that of the qāḍī. Furthermore, the muftī was also regarded as a deputy of the Prophet, and as such his jurisdiction included both religious and legal matters and the bases of his authority were somewhat metaphysical; the muftī derived his authority from the metaphysical principle of continuity of Divine guidance through prophets, and after Muḥammad through muftīs.

The qāḍī did not enjoy independence in the legal system; he had to rely on the muftī, who was attached to the court as a consultant, for the validity and legality of his decisions. Such limitations on the institution of the qadi inevitably influenced the concept of legal obligation.

Inspite of his attempts to define legal obligation, Shāṭibī did not uphold the independence of the qāḍī from the muftī. Hence his legal philosophy, despite certain elements of positivism, did not go far enough and, consequently, could not grow into a positive legal philosophy. This is probably the reason why this philosophy has also failed more recently when modernists have attempted to use it without supplying the necessary correctives.

It may, in fine, be concluded that, in the history of uṣūl al-fiqh, Shāṭibī's philosophy of law marks a tendency towards "legal positivism". A proper understanding of its limitations, which had resulted from the particular historical nature of

Islamic law in this period, and of the ambiguities resulting from these limitations, may help us to reconstruct Shāṭibī's arguments to adapt Islamic law to social change. Such a reconstruction might hold a key to a fruitful adaptation of Islamic law to modern circumstances.

APPENDIX A

A Summary-view of Al-Muwāfaqāt

Al-Muwāfaqāt is divided into five books:

FIRST BOOK: "muqaddimāt" (preliminaries). In this book thirteen preliminary rules are discussed. The main points made in these discussions are three:

(i) The uṣūl al-fiqh (principles of Islamic legal theory) are qaṭʿī (definite), not ẓannī (probable) as had been held by most of the mutakallimūn jurists, especially by Ghazāli and Rāzī.

(ii) These principles must relate to furūʿ (the details of applied law) and to aʿmāl (actions). This position was again taken in order to refute the mutakallimūn-jurists who had introduced problems of kalām into uṣūl al-fiqh.

(iii) The method of knowing the precepts of law must fulfil the following three requirements:

(a) the methods must be close to the level of common capability of understanding.

(b) it must aim at being a means to taʿabbud (bondage to God).

(c) it must lay stress on a necessary relationship between knowledge and action.

At this point Shāṭibī goes into a detailed discussion about al-ʿilm (the knowledge). This entails the following problems:

1. Definition of the proper (muʿtabar) sharʿī knowledge.
2. Division of knowledge: (i) ṣulb (solid), (ii) mulaḥ (salty, to add flavour), (iii) neither of these. Ṣulb is the goal, and uṣūl al-fiqh belong to this category.

3. The role of reason: human reason (ʿaql) follows, does not take precedence over the transmitted knowledge (naql).

4. Al-Adilla al-sharʿiyya (legal evidences) are the only basis for a proper sharʿī knowledge.

5. The method of learning: of the two methods of learning, i.e. al-Mushāfaha (direct from the teacher) and mutālaʿa kutub al-muṣannifin (indirect, by studying from books of authors), the former is better, yet the latter must supplement the former.

6. The signs (amārāt) of a true scholar with whom one should study are three: (i) correspondence of action with knowledge, (ii) direct relationship with his teachers in his education, (iii) imitation of his teachers.

SECOND BOOK: Aḥkām (legal values), deals with forty-two problems. The discussion is divided according to the two major categories of legal values, khiṭāb al-taklīf, concerning the values that result directly from a Divine command, and khiṭāb al-waḍʿ concerns the values that are the indirect result of that command.

Khiṭab al-taklīf creates five legal values: Nadb (recommendation), wujūb (obligation), Ibāḥa (freedom), karāha (reprehensibility) and manʿ (prohibition). Shāṭibī considered ibāḥa as a middle value in this structure, hence a major part of his discussion on this category of values is devoted to ibāḥa. The main points of discussion are the following:

1. The definition and essence of ibāḥa, the mode of expression of the value and its various aspects.
2. Relationship of ibāḥa to other values.
3. Relationship of ibāḥa to the maqāṣid (objectives of law).
4. Relationship of ibāḥa to the problem of Rights and Obligations (ḥuqūq).
5. Ibāḥa and ʿafw (foregiveness), a new category suggested by Shāṭibī as a middle value between the Qurʾānic values of ḥalāl (permissible) and ḥarām (forbidden).

Khiṭāb al-waḍʿ also creates five values which indirectly lead to the above-mentioned five. The above five are created as grades of obligation by direct command, but khiṭāb al-waḍʿ creates values by instituting the requirement through one of the following five values:

(1) Sabab (mediate cause).
(2) Sharṭ (qualification).
(3) Māniʿ (preventive cause).
(4) Ṣiḥḥa/buṭlān (soundness/unsoundness).
(5) ʿAzīma/rukhṣa (regularity or allowance in the requirement).

In these discussions Shāṭibī defines these sharʿī values and establishes distinctions among them. His main concern is to know whether they are intended by the law-giver as such or not. He also attempts to establish the two levels of this intention, the intention of instituting the requirement through these values, and the intention of requiring the performance of the action. For instance, a sabab act is required in performance but not the musabbab act although at instituting (waḍʿ) them the lawgiver's intention embraced both.

Shāṭibī's interest in the question of the intention of the lawgiver finds more space in the third book. After he has shown the relevance of this question to the discussion of legal values, he proceeds to deal with the question itself.

THIRD BOOK: "al-maqāṣid al-sharʿiyya fī al-sharīʿa" (the legal objectives of shari a), Shāṭibī discusses these objectives at two levels. On one level he treats the objectives of the lawgiver through the following four aspects:

(a) the primary objective of the lawgiver in the institution of shari a. Shāṭibī maintains that the primary objective is the maṣāliḥ of the people. He discusses the definition, types and structure of maṣāliḥ in order to show that the notion of maṣlaḥa constitutes the central theme in sharīʿa.

(b) the objectives of the lawgiver regarding the intelligibility of sharīʿa. Here Shāṭibī maintains that sharīʿa aims to reach all people; hence it must be intelligible to all of them. In this respect he discusses two notions: (i) ʿumūmiyya, generality in the use of terms and (ii) ʾummīyya, consideration for the majority of the people in their capability of understanding and their command of knowledge of the sciences.

(c) the objectives of the lawgiver in instituting the obligation. The main theme here is that sharīʿa does not impose obligation which is impossible; yet this does not mean that the obligation does not entail any exertion. The criterion in this regard is ʿāda, the common practice; if something is considered impossible in common practice, it cannot be regarded as a requirement by sharīʿa.

(d) the objectives of the lawgiver in admitting the mukallaf (one under obligation) as a subject of obligation. Shāṭibī here goes into detail in defining the objective of taklīf on two levels. On the first level he deals with two types of objectives of the lawgiver; primary and secondary. On the second level he discusses the participation (ḥaẓẓ) of the mukallaf and concludes that his participation is exclusively conditioned by the objectives of the lawgiver.

Shāṭibī, however, makes a distinction here in reference to this participation. Although the second level is conditioned by the first level, there are two aspects to be distinguished. As far as obedience is concerned, there is no distinction among various categories of action, but insofar as reasoning is concerned, the distinction must be made between ʿibādāt and ʿādāt.

Considerable space is devoted to the discussion of ʿāda, its characteristics, and its various types from the legal point of view. The question of Kharq ʿāda is also dealt with in detail.

The second level of discussion of the objectives has to do with the intentions of the mukallaf.

Here Shāṭibī deals with the questions of niyya (intent) and ʿayniyá (particularity). The main theme is that the intentions of the mukallaf must correspond with the intentions of the lawgiver. This is the reason why Shāṭibī condemns ḥiyal (devices to evade law) and bidʿa (innovations).

FOURTH BOOK: Al-'Adilla Al-Shar'iyya (Legal Evidences)

This book is divided into two parts:

1. The discussion of Legal Evidences in general.

   This part is divided into sections:

   A) General Principles: The following are the main subjects:

      1. Legal Reasoning (Nazar Shar'i) deals only with universals, not with particulars.

      2. The characteristics of Legal Evidences:

         Qaṭ'iyya (Definiteness), Ẓanniyya (probability), supplemented by other factors so as to make them definite.

      3. These evidences do not contradict Qaḍāyā 'Uqūl (rational propositions).

      4. Every evidence consists of two premises; since they are definite, so also is the conclusion.

      5. The evidences relating to 'ādāt are simple (muṭlaq) while those relating to 'ibādāt are muḍabiṭa (stipulative).

      6. The evidences are general in application.

      7. The evidences are either burhānī (offering a logical proof) or taklīfī (obligatory because of command).

      8. General rules for finding out the evidences, for undertaking what they demand and for their application.

B. Weaknesses of Legal Evidences:

In this discussion Shāṭibī deals with the following:

1. Tashābuh (equivocations)
2. Naskh (abrogation)
3. ʾAwāmir - Nawāhī (commands and prohibitions)
4. ʿUmūm - Khuṣūṣ (general and particular)
5. Bayān - ijmāl (explanation and conciseness)

II. The evidences in detail

Specific legal evidences are four: The Qurʾān, the Sunna, Ijmāʿ (consensus) and Qiyās (analogy). Shāṭibī dismisses the latter two, contending that only Qurʾān and Sunna are essential evidences.

A) Al-Kiṭāb:

The main points of this discussion are as follows:

1. Al-Kitāb is the whole (kulliyya) or the Sharīʿa.
2. Almost all the commands in the Qurʾān are "universal".
3. The Qurʾān contains an explanation for each of its concise commands.
4. The knowledge of the historical context of the Qurʾān is essential for the following reasons:
   a) To know the mediate causes of the revelation of a command.
   b) To establish the differences between the verses revealed in Mecca and Medina.
      The former are universals and hence regulative; the latter are particulars and subject to abrogation by the lawgiver.

5. Arbitrary opinion has no place in explaining a command in the Qur'ān.

B) Al-Sunna:

The main topics of discussion are the following:

1. Definition of the Sunna
2. The relationship of Sunna with al-Kitāb
3. The various kinds of Sunna
4. The Sunna of the Companions of the Prophet.

FIFTH BOOK: Ijtihād (Legal Reasoning)

This book is divided into five parts:

1. Ijtihād:

The main points of discussion are as follows:

1. Two types of Ijtihād, one whose results are immutable, the other which is continuously subject-to-change.
2. The qualifications for ijtihād
3. The unity of the principle of Sharī'a.
4. Ijtihād and Bid'a
5. The measures of Ijtihād:
   a) Sadd al-Dharā'i' (to block the ways possibly leading to an undesired action)
   b) Istiḥsān (juristic preference against strict analogy)
   c) The problem of Khilāf (disagreement)

II. Fatāwā (Responsa)

1. Muftī (the jurist who issues "responsa") is the deputy of the Prophet.
2. A fatwā consists of all the three categories of qawl (statement), fiʿl (action) and taqrīr (confirmation).
3. The qualifications of a muftī.
4. The problem of rukhṣa (allowance) and fatwā.

III. Iqtidā' (Imitation)

1. The meaning and nature of "imitation", the definition of muqallid (one who imitates)
2. muqallid and Istiftā' (the action of asking for responsa)
3. The problem of choosing whom to imitate.
4. The conditions for the pronouncing of a fatwa.
5. Imitation of actions.

IV. Taʿāruḍ (conflict) and Tarjīḥ (preponderance)

The problem of choosing between contradictory or conflicting evidences and its various aspects.

V. Suʾāl/ Jawāb (question and answer)

This part deals with the rules of debate and defence.

The following topics are discussed:

1. ʿIlm al-Jadal (The science of disputation)
2. The meaning of question, division - and reprehensibility of excessiveness of questions.

3. The difference between a mujtahid and a munāẓir (debator).

4. The method of argument: conclusion from two premises.

APPENDIX B

A Summary-view of Al-Iʿtiṣām

This book deals with the question of Bidʿa in ten chapters.

Chapter One: The definition of Bidʿa

Chapter Two: Condemnation of Bidʿa

Chapter Three: The condemnation of bidʿa is general, the condemnation applies to all kinds of bidʿa. In this chapter Shāṭibī criticizes scholars such as Ibn ʿAbd al-Salām and Qarāfī who divided bidʿa into five categories like the five legal values. According to them some categories of bidʿa are not only good and recommended but also come close to obligation.

Chapter Four: The details of the arguments of those who are in favour of bidʿa.

Chapter Five: Two levels of bidʿa; Bidʿa ḥaqīqiyya (real innovation) and Bidʿa iḍāfiyya (relative innovation)

Chapter Six: The legal value (ḥukm) of bidʿa

Chapter Seven: The question of bidʿa in reference to taʿabbudāt and ʿādāt. According to Shāṭibī, legally, the value of bidʿa applies only to the former.

Chapter Eight: Bidʿa and Maṣāliḥ Mursala (The juristic consideration of the public interest against strict analogy) and istiḥsān (juristic preference against analogy). Are they bidʿa?

Chapter Nine: Bidʿa as heresy: the heretical sects; Schism in the Community - The problem of the one Saved (nājiya) Sect.

Chapter Ten: Ṣirāṭ Mustaqīm (The Right Path) and Ibtidāʿ (Committing innovation)

1. Types of acts which introduce bidʿa
2. The causes of bidʿa
   a) Ignorance of the tools (adwāt) for knowing the objectives of Sharīʿa. This generally means inadequate knowledge of Arabic grammar and usage.
   b) Ignorance of the objectives themselves.
   c) Reliance on the judgment of human reason alone.
   d) Submission to personal desires (Ittibāʿ al-hawā).

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