SHĀTİBĪ'S PHILOSOPHY OF

ISLAMIC LAW
SHĀṬĪBI' S PHILOSOPHY OF ISLAMIC LAW

An Analytical Study of Shāṭībī's Concept of maṣlah̄a in Relation to
His Doctrine of maqāsīd al-sharī'ah with Particular Reference to
the Problem of the Adaptability of Islamic Legal Theory to
Social Change

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by
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ABSTRACT

Author  
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Title  
Shāṭibī's Philosophy of Islamic Law: An analytical study of Shāṭibī's concept of maṣlaha in relation to his doctrine of maqāsid al-Sharī'a with particular reference to the problem of the adaptability of Islamic legal theory to social change.

Department  
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Degree  
Ph. D.

This thesis studies Shāṭibī's (d. 790/1388) frequently quoted yet little explored and often misunderstood concept of maṣlaha. The thesis argues that Shāṭibī's doctrine, that the protection of the maṣlaha 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 maṣlaha as a principle of legal reasoning. After an analysis of such considerations, Shāṭibī proposed maṣlaha 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 ta'abbud 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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*AL* and *'I*.

Omitted in front of proper names. *-a* (*-at in construct state*)

#### VOWELS

- **Long**
  - ā ī ā'ū ā'ī

- **Short**
  - َ ُ ُّ َّ

- **Doubled**
  - ََّ ُُّ (final form ُُّ َّ ُّ)
  - ُُّّٰ (final form ُُّ َّ ُّ)

- **Diphthongs**
  - اُّ ًُّ ًُّ ًُّ ًُّ
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. Hurgonje 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 Šubhī Maḥṣūnī, contends that such legal principles as the consideration of maslaha (roughly translated, human good), the flexibility of Islamic law in practice and the emphasis on ījīthād (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 *maṣālih* (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 Ḩasan ʿAbd al-Raḥmān b. ʿAbd al-Ḥamīd b. ʿAmīr b. Ṭalhā (d. 790/1388) made one of the more significant contributions. In his *al-Muwāfaqāt*, Ṣaḥibī presented a doctrine of *maqāsid al-sharīʿa* (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. Ṣaḥibī is therefore a valid choice for a study of the requirements of which we have discussed above.

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

In fact, Ṣaḥibī is one of the jurists to whom modern writers on *usūl al-fiqh* (Islamic legal theory) owe their greatest debts. His books *al-Muwāfaqāt* and *al-līfiṣām* are so extensively used by modern authors on Islamic law that one cannot doubt the significance of Ṣaḥibī'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, is derived from Ṣaḥibī to a great extent.

In Egypt, Muḥammad ʿAbduh used to advise his students and scholars to study *al-Muwāfaqāt* in order to understand the real nature of "Islamic law making" (*al-tashrīʿ al-islāmī*). In Pakistan, Abuʾl Aʿlā 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 cur
legal experts may acquire a deep insight into and gain a correct understanding of the spirit of Islamic Fiqh.  

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

Evidence for the merit of Šaṭībī’s lengthy work may be drawn not merely from the number of editions it has undergone but, more importantly, from the rank which al-Muwafaqät 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 Šaṭībī as an authority; often they draw heavily upon his doctrines. The works of the following eminent authors adequately substantiate this point: Abū Zahra, Maḥfūz, Dawālībī, Muḥammad Iqbal, Muḥammad Khudrī, Yūsuf Mūsā, Muṣṭafā Zarqāʾ, Abū Sīma and Abū ʿAbd Allāh ʿUmar.

Furthermore, some modern authors grant to Šaṭībī 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. Fāḍil Ibn ʿAshūr and Abd al-Muṭaq all-Ṣaʿīdī also express the same opinion, but Ṣaʿīdī adds that Šaṭībī ranks alongside 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 Shāfiʿī in usūl al-fiqh had led.
The present dissertation, therefore, proposes to seek an answer to the following question: What are Shatibi's views on the adaptability of Islamic legal theory to social changes? To answer this question it undertakes to study Shatibi's doctrine of maqasid al-shar'ia which emerged as an exposition of his concept of maslaha.

Before an analysis of Shatibi's views can be launched, the question requires a proper understanding of the following terms: "adaptability", "Islamic legal theory", "social changes", and "maslaha". 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. Shatibi's concept of maslaha 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 Shatibi's thought and the concept of maslaha. 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 Shatibi's contribution, no exclusive study is yet known to have been made either on the life and works of Shatibi or on his legal thought.
Two reasons can, perhaps, be suggested for the absence of such studies. One, as 'Abd Allâh Darâz, the commentator on al-Muwâfaqât, remarks is the fact that Shâ'ibî's thought is too difficult and too complex to be easily penetrated. Margoliouth also referred to confusion and subtlety in Shâ'ibî's views. 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 Shâ'ibî lies, rather, in the fact that a study of his thought demands not only a sufficient knowledge of the development of usûl 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 Shâ'ibî'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.

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 Imám al-Ḥaramayn, but they
do not help us to a correct understanding of Islam". 13 Chehata maintains
that ʿusūl al-fiqh was born independently of fiqh and developed without in-
fluencing the science of law or being influenced by it. 14 Schacht concludes
that the theory of ʿusūl al-fiqh is of little direct importance for the positive
doctrines of the schools of law. 15 Why, if a study of ʿusūl 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-Muwafaqat 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-ʾIṣām, 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 Ghazālī's
work Fadāʾiḥ al-Bāṭinīyya 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-ʾIṣām with al-Muwafaqát (as he insisted on
identifying these extracts as part of al-Muwafaqát), yet he is the first scholar
who tried to place Shāṭībī's thought into a historical perspective. While comparing similarities in the treatment of the Bāṭīnīs by Ghazālī and Shāṭībī, he found them identical. He, therefore, drew a general conclusion that "in many ways Shāṭībī is through and through penetrated with the ideas of Ghazālī". 16

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

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

Al-ʿIṣṭiḥām 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 Shāṭībī 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 Shāṭībī'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-taḥrīr al-islāmī).

While Rashīd Riḍā's interpretation of Shāṭibī depended solely upon Al-ʾItīṣām, that of Khūṭrī was entirely shaped by Al-Muwāfaqāt. In the former he appears as a crusader against bidʿa, while in the latter as a philosopher-jurist.

Khūṭrī 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 Khūṭrī in presenting Shāṭibī's image as a reformer. 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 muṣāmalāt. A certain correspondent, in order to refute Ḥajawī's argument, quoted Shāṭibī on the point that the consideration of Taʿabbud is inevitable in muṣāmalāt as well. To reject this argument, Ḥajawī referred to ʾIzz al-Dīn ʿAbd al-Salām in his support and judged the quotation from Shāṭibī in this light as he said:

"This (statement of ʾIzz al-Dīn) is opposite to your quotation from the author of Al-Muwāfaqāt where he narrowed (the application of maslaha) by imposing Taʿabbud on all categories of acts. But he (Shāṭibī) did not support his contention with any proof."
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 Shāṭībī's view of taʿabbud is quite misleading. Shāṭībī 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 shārīʿ, 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. Among these Shāṭībī's fatāwā were also included. This study provides us with the actual historical context against which Shāṭībī'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-Muwafaqī, yet he confirms that in his fatāwā, Shāṭībī relied on the notions of tashīl (facilitation) and Īstīlāḥ. Shāṭībī defended custom against the rules of fiqī. It is also significant to note that Ortiz was impressed by the deep insight that Shāṭībī showed into the economics of the society.

Since Ortiz was concerned with Shāṭībī's fatāwā and not with his philosophy of law, one might be misled by his remarks to conclude that Shāṭībī's reference to tashīl and Īstīlāḥ was a measure of expediency. Such an understanding of
Shaţibi is misleading because the principle of maslaha in Shaţibi’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 Shaţibi’s doctrine of the Ends of the law.

In 1916, in his study on Malik b. Anas, Abū Zahra observed that on the problem of ‘Umūm and Khusūs (the general and specific use of words/expressions in general or specific meanings), Shaţibi 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 ‘āmm and khasṣ. According to Abū Zahra, for Ḥanafīs, the ‘āmm is rated as definite or absolute (qāṭī); while for Mālikīs it is only probable (zanni). Both schools, however, agree that a qāṭī can be particularized (takhṣīṣ) only by another qāṭī; consequently, Ḥanafīs reject particularization of the Qur’ān commands by those hadīth which have only probable (zanni) authenticity. Mālikīs, on the other hand, accept such particularizations, because, for them it is only the khasṣ in the Qur’ān, which is qāṭī, and which cannot be particularized by a probable hadīth.

In 1951 Ṣād al-Muṭaṣāl al-Ṣaʿīdī observed that in matters of dogma, Shaţibi was rigid like other jurists such as Ibn Taymiyya and Ibn Qayyim. Ṣaʿīdī refers to Shaţibi’s view of ribāṭ to uphold his point. He states that Shaţibi declared that to dwell in a ribāṭ for the sake of ‘ibāda only, constitutes bid‘a.25
Fāḍil ibn ʿĀshūr credited Shāṭībī with providing an escape from the impasse that Islamic jurisprudence faced in the fourteenth century. Furthermore, according to Ibn ʿĀshūr, Shāṭībī rejected the differentiation between theoretical and practical religion—a distinction which was maintained by a number of theologians and philosophers.26 Shāṭībī 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 ʿĀshūr argues that Shāṭībī and Ibn Lūbb had fundamental differences on the legally binding nature of certain acts. By binding nature Ibn ʿĀshūr means the process of acts being or becoming ʿibādat or religious obligations. Ibn ʿĀshūr concludes that Shāṭībī'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 ʿibādat.

In a study of transactions in the Sharīʿa, made in 1955, Šubḥī Maḥmāsānī was struck by the modern subjective approach adapted by Shāṭībī in torts.27 Shāṭībī 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. Maḥmāsānī 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 Maḥmāsānī to a further study of Shāṭībī.
In his lectures in 1962 he was more enthusiastic and admiring of Shāfiʿī.

Mahmānī 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. Mahmānī recalls Shihāb al-Dīn Qarāfī, ʿIzz al-Dīn ʿAbd al-Salām, Ibn Qayyim and Shāfiʿī as such philosophers of law. Among them, however, he singles out Shāfiʿī for the finest exposition of Islamic jurisprudence and philosophy of law.

Since 1960 references to Shāfiʿī 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 Shāfiʿī'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 Shāfiʿī'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. Rahman has observed Shāfiʿī'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 taqīd. Since these points have been studied mainly in reference to Shāfiʿī's epistemology, Rahman finds Shāfiʿī 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 Shariʿa." 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 Shariʿa. 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 Rida and others, signifies that he believed in the immutability of Islamic law.

Aḥjawi, Ṣādī 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, Khudrī, Mahmasānī and Lopez-Ortíz 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 Shāṭībī’s concept of din (religion) and Hajawi’s conclusion about Shāṭībī’s conception of taʿabbud (obedience) have very serious implications for Shāṭībī’s view of the adaptability of Islamic law. An all-comprehensive concept of religion and an all-inclusive conception of obedience suggest that Shāṭībī 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 qaṭṭī (definitive), cannot be particularized by what is zannī (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 Shāṭībī’s contribution to Islamic jurisprudence. Their disagreement stems from their differences of understanding and interpretation of Shāṭībī’s basic terms such as bidʿa, taʿabbud, din, etc. As is shown in the following chapters, the above terms are related to Shāṭībī’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 Shâ'ibî’s conception of maṣlaha.

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

Critical remarks and studies of the concept of maṣlaha 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 maṣlaha as a principle of change. Before going into the details of the criticism of the concept of maṣlaha by modern scholars, some remarks about the emergence of the concept of maṣlaha among modern Muslim scholars must be made.

In 1857 the Āḥd 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". In its preamble, maṣlaha 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 maṣā lilah. The document then expounded the following three principles as the components of the concept of maṣlaha: "liberty, security, equality".
In 1867 Khayr al-Dīn Pasha, in his Āqwam al-masālik, reaffirmed that the principle of maslahā must be the supreme guide of the government. 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.

In 1899, in his speech on the reforms in the court systems in Egypt and Sudan, Muḥammad ʿAbduh also stressed the use of maslahā as a guiding principle in law making. J. Schacht has argued that the principle of maslahā, according to ʿAbduh, was preferable to the literal application of Islamic law. Henry Laoust has also observed that the principle of maslahā 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.

It is to be noted that Khayr al-Dīn and ʿAbduh both referred to maslahā 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, ʿUbādī Muḥṣīnī, ʿAbd al-Razzāq al-Sanhūrī, Maʿṣūf al-Dawālībī, Muṣṭafā al-Shalābī, ʿAbd al-Wahhāb Khallāf, Muḥammad Khudrī and Muṣṭafā Abū Zayd.

In 1906, Al-Manār published Najm al-Dīn Tawfīq's treatise on masāliḥ. Tawfīq, a
Hanbali jurist, sometimes also considered a Shi'i, represented radical views on mafa\textsuperscript{b}a. For example, he held that the principle of mafa\textsuperscript{b}a could even restrict (takh\textsuperscript{b}i\textsuperscript{s}) the application of i\textsuperscript{jm\textsuperscript{b}a} as well as that of the Qur\textsuperscript{\textcircled{\textdagger}}\textsuperscript{n} 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 Tawf\textsuperscript{\textcircled{\textdagger}} as well as the concept of mafa\textsuperscript{b}a was bitterly opposed. Only to illustrate this opposition, we quote Z\textsuperscript{\textcircled{\textdagger}}hid al-Kawthar\textsuperscript{\textcircled{\textdagger}}} as follows:

"One of their spurious methods in attempting to change the Shari'\textsuperscript{\textcircled{\textdagger}}} 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 mafa\textsuperscript{b}a; if the text (nass) opposes this mafa\textsuperscript{b}a, the text should be abandoned and mafa\textsuperscript{b}a should be followed'. What an evil to utter such statements, and to make it a basis for the construction of a new Shari'. This is nothing but an attempt to violate divine law (al-Shari' al-\textdagger h\textsuperscript{\textcircled{\textdagger}}) in order to permit in the name of mafa\textsuperscript{b}a, what the Shari' has forbidden. Ask this libertine (al-\textdagger fi\textsuperscript{\textcircled{\textdagger}}) what is this mafa\textsuperscript{b}a on which you want to construct your Shari'... The first person to open this gate of evil... was Najm Tawf\textsuperscript{\textcircled{\textdagger}} Hanbali... 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

Kawthar\textsuperscript{\textcircled{\textdagger}}} did not deny that the Shari' took into consideration the interests and good of the people, but what is good and what is bad can only be known through revelation. Mafa\textsuperscript{b}a as an independent principle for the interpretation of law has, therefore, no validity whatsoever.

Kawthar\textsuperscript{\textcircled{\textdagger}}} 's criticism of mafa\textsuperscript{b}a is typical of the traditional view of the concept. To him mafa\textsuperscript{b}a is arbitrary and merely personal. In fact this fear of arbitrariness arising from regard for human interests, and resulting in violation of divine law
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 adapt-
ability.

As a problem of legal theory the question of adaptability to social change has 
been a controversial one in the history of usūl al-fiqh. The qādīs in the early 
courts of law, particularly in the Umawī period, relied mostly on ra'y (con-
sidered 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 hadīth 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 qādīs in various cities in-
creased the number of opponents to the use of ra'y.

The general attitude of the Hadīth 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 reli-
gious apprehension of distortion of Islamic tradition by the use of ra'y. This atti-
tude 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 ijma (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 qiyas. Trends similar to the use of ra'y survived in the form of principles such as istihsan, istiqlal, darura, munasaba, 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 qiyas.

The qiyas 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 (Qur'an, Sunna or ijma of 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'aris 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 qiyas 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 Zahirīs rejected qiyās altogether. The Shafiʿīs, 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 istisbāb (presumption of continuity of a legal evidence) to justify these changes. Hanafis and Malikīs employed certain methods which did not strictly adhere to the requirements of the theory of the sources of law, principally methods of qiyās. Two such methods are istihbsān (to decide in favour of something which is considered hasan, good, by the jurist, over against the conclusion that may have been reached by qiyās), attributed to Hanafis, and istislah (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 istihbsān and istislah 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 Shafiʿī jurists imposed upon this concept the approach of the "sources of law".
They divided *masla*ha into categories according to its basis in the sources. If *masla*ha accorded with the sources, it was not disputable, since it was somehow justifiable as a method of *qiya*s, 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 *masla*ha *mursala*. Naturally for the Shafi’i jurists the only discussion of *masla*ha that mattered was discussion of *masla*ha *mursala*. This view predominated in other schools, and even Malikis eventually accepted it.

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

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

Ignaz Goldziher compared *istihsan* with *istihsan* saying that the latter is a Hanafi 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 *istihsan* removes the rigidity of law depending upon the discretion of an individual jurist. *Istihsal*, on the other hand, depends upon a rather objective method; it removes the rigidity of law in consideration of general human "interests" (*masla*ha). He also suggests that *istihsal* partially resembles the Roman legal principle of *utilitum publicum* as well as Rabbinic law.
Recent studies on masla\(\text{\textl{a}}\) can be generally divided into two groups. First, there are studies dealing with masla\(\text{\textl{a}}\) mursala or isti\(\text{l}\)\(\text{\textl{a}}\) and, second, those dealing with masla\(\text{\textl{a}}\) as such. The focus in the first group of studies is not on masla\(\text{\textl{a}}\) proper but on masla\(\text{\textl{a}}\) mursala, yet it is significant to note that for them isti\(\text{l}\)\(\text{\textl{a}}\) is in no way different from masla\(\text{\textl{a}}\) mursala.

N. P. Aghnides and G. H. Bousqet also refer to isti\(\text{l}\)\(\text{\textl{a}}\) 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. Bousqet’s definition is as follows:

"Isti\(\text{l}\)\(\text{\textl{a}}\) consists of discarding by exceptional disposition the rules deduced by giy\(\text{\texta}s\) in cases where the application of general rules would lead to illogical, unjust and undesirable results."

J. Schacht’s treatment of masla\(\text{\textl{a}}\) is not much different from that of the above scholars. He described isti\(\text{l}\)\(\text{\textl{a}}\) as a special form of analogy, or rather a type of isti\(\text{\texth{s}\text{\texta}n}\) used by early Maliki scholars and which later came to be called isti\(\text{l}\)\(\text{\textl{a}}\). Schacht re-emphasized that isti\(\text{l}\)\(\text{\textl{a}}\) is identical with the Roman legal principles of utilitas publica which characterises jus honorarium.

R. Paret also finds isti\(\text{l}\)\(\text{\textl{a}}\) to be connected with isti\(\text{\texth{s}\text{\texta}n}\), 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 (masla\(\text{\textl{a}}\)""). Masla\(\text{\textl{a}}\) thus is the material principle underlying isti\(\text{l}\)\(\text{\textl{a}}\) which is a method of reasoning. In actual details where Paret traces the history of isti\(\text{l}\)\(\text{\textl{a}}\),
he specifically refers to maslaha mursala, rather than maslaha as such. This is why he finds nothing of much importance after Ghazâlî had theorized about istiṣlâh. His references to şûlû works are confined to the discussions of maslaha mursala.

Analysing the treatment of maslaha by modern Muslim scholars such as 'Abduh and others, A. Hourani criticised their use of maslaha in a utilitarian sense. He argued that such an interpretation of maslaha was not justified; "for the traditional thought, maslaha 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 istiṣlâh (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 Shari' developments. 50

Although all of the above opinions agree in regarding maslaha 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 maslaha in these studies is either that they have studied only maslaha mursala to the exclusion of other aspects of maslaha or that they have equated maslaha mursala with maslaha.

There are, however, a few studies which evince an integral approach to the problem of maslaha or which study the concept of maslaha as such. Among such
studies, the following four are relevant to our point. G. F. Hourani has examined maṣlaḥa as an ethical concept. M. H. Kerr and Saʿdīd Ramāḥān 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". He distinguishes two conceptions of istiṣlāḥ. In the original conception of istiṣlāḥ, the interests (masāliḥ) were divided into three categories according to its recognition by the law, the last category being masāliḥ 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. 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, physical integrity, descendance, patrimony and mental faculty).

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 maslaqa as an ethical concept in medieval 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 Mu‘tazila; the idea of rational good was called by them ḥasan or maslaqa. The theory of theistic subjectivism was maintained by the Ash‘arīs. 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 Mu‘tazilī theory of rational good [that there is an objective good including a real public interest (maslaqa) and a real justice (‘adl), 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 religious and political factors that prevented objectivism from being adopted by the lawyers, the Mu‘tazilī 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 Shāfi‘ī and Zāhirī views on legal reasoning, which opposed the use of ra‘y and any judgment independent of the revelation. Shāfi‘ī is denied the objective value of idle fancy, zann 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 maslahā, 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 maslahā by later usulliyīn such as Shāṭibī. In fact, Hourani’s criticism of objectivism is mainly ethical. The three deficiencies that he ascribed to maslahā as an objective value are not found in Shāṭibī’s conception of maslahā as a legal value.

Muḥammad ʿAbd Ramadān Būṭī presented his doctoral dissertation, Dawābiḥ al-Maslahā fi al-Sharī‘a al-Islāmiyya, at 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 maslahā as the fundamental principle of Sharī‘a. 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. After a detailed analysis
of etymology and the theory of the concept of maṣlaḥa, he deduces the quali-
fications 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. 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 Shariʿa out of the fortress of texts into the open, exposed to desires and
arbitrary opinions that deceive (us) behind the name of maṣlaḥa and maṣlaḥa." 58

In fact Būṭī's view of maṣlaḥa is no different from that of Zāhīd ibn Kāwthārī. If
Aḥ-Ḥūṭī'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 Shariʿc, then only means that maṣlaḥa is what the Shariʿc commands.
In other words, *maslaḥa* has no objective value. This is a logical conclusion from Büṭī's view of Islamic law according to which he rejects a distinction between this world and the hereafter. He does not separate *muğmalat* from *ṣibādāt* 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 *maslaḥa* in reference to human needs. His disagreement becomes particularly evident if his conclusions are compared with Shāṭībī's conception of *maslaḥa*.

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

The same deficiency is found in M. Kerr's study of *maslaḥa*, 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 *maslaḥa* would be that it is something equal to natural law and that *istiślāḥ* does not depend on the texts and *qiyās*. Such conclusions, however, are not spelled out by Riḍā himself. 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 *maslaḥa*, 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 maslaha in traditional jurisprudence, Kerr clarifies two general aspects of Islamic law which, in turn, affect the function of maslaha. 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 Ash'arīs and Mu'tazilīs about the will of God. In contrast to the Mu'tazila, Ash'āri 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 maslaha 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 (maslaha) 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 *maslama* as one of the aspects of munäsaba. He also divided *maslama* on the basis of the conformity to sources, and thus it is only *maslama mursala* which really needs to be discussed. According to him *maslama mursala* is a form of qiyas, because whereas qiyas looks for 'illa, *maslama mursala* seeks hikma, a more general 'illa. Kerr concludes that because it is not based on a specific 'illa, *istišlah* has been a subsidiary and occasional technique of disputed validity. 65

In a final analysis Kerr comes to equate *maslama* with *maslama mursala*.

"The *maslama* is therefore a more specific term for hikma 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 *maslama mursala.*" 66

To sum up, Kerr also confines *maslama* to its correspondence with the textual sources. It is noteworthy that Kerr, in his discussion, refers to such jurists as Ḥa-Ghazālī and Qaraḍī who viewed *maslama* in the above terms. He also discusses the views of Ibn Taymiyya, Ibn Qayyim and Ẓawī whom he chose as proponents of the validity of *maslama* as a principle of legal interpretation, but these jurists, too, regarded *maslama* as subordinate to the textual sources and qiyas.

The consideration of *maslama*, according to them, would prevail over the texts and qiyas only when the latter are harmful to obey.

Kerr has not taken into account jurists such as Shāfi‘ī who favour *maslama* as an independent legal principle. The significance of studying Shāfi‘ī's views is evident from Tyan's analysis of *istišlah* which gives a more integral picture of *maslama*. 
The absence of Shā'ibī from Kerr's analysis of maslaha is regrettable. According to Kerr, Rashīd Riḍā, whose views led Kerr to study the concept of maslaha in detail, characterizes Shā'ibī "as exceptionally outspoken in his defence of istiṣlāh." 67

It comes as a further surprise that Shā'ibī was not only disregarded but also suffered a sort of indifference when Kerr, probably following Paret, 68 confused him with Abūl Qāsim Shā'ibī. 69

To sum up, the present studies on maslaha 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 Shā'ibī's concept of maslaha, as already indicated by Tyan, can fill this gap.

The present study, therefore, aims to investigate Shā'ibī's concept of maslaha as a principle permitting the adaptability of Islamic law. The enquiry is concerned mainly with the theoretical aspect of the question of adaptability. Nevertheless, Shā'ibī did not conceive maslaha in isolation from the social realities of his time, and his doctrine of the maqāsid was actually an attempt to answer the questions that arose in relation to maslaha. The various developments in the society in which Shā'ibī lived and the actual legal problems with which Shā'ibī was faced must be studied, as they not only explain the cause of Shā'ibī's interest in this problem, but also clarify the nature of the answer that Shā'ibī was seeking in the concept of maslaha.
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 Shâ'ibî expounded this doctrine. Chapter three outlines the social developments in fourteenth century Granadian society in general. Chapter four deals with the available information about Shâ'ibî's life and his academic disputations with other scholars, and reviews his works. Chapter five analyses his fatâwâ to point out the actual legal problems which he faced. It also investigates whether or not Shâ'ibî showed willingness to adapt to social changes. The following four chapters deal with Shâ'ibî's concept of maṣlaba itself. Chapter six outlines the major problems that arose in traditional Muslim jurisprudence regarding the concept of maṣlaha. Chapter seven analyses Shâ'ibî's doctrine of the maqâṣid and reconstructs an understanding of his concept of maṣlaha. Chapter eight examines Shâ'ibî'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 Shâ'ibî's doctrine of maqâṣid al-sharî'â. The main sources of Shâ'ibî's thought for this dissertation are thus Al-Muwâfaqât, a part of which is devoted to the exposition of the above doctrine, and Al-ʿaṭāʾ."Among Shâ'ibî'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 Shâ'ibî'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 Muhammad 'Abduh and Rashid 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. Muhammad Khūṯrī, Uṣūl al-Fiqh, (Cairo: Matba' al-Istiqāma, 1938), p. 11, relates that when he was appointed to teach Islamic law in Gordon Law College in Sudan, he planned to write a book on uṣūl. He discussed with 'Abduh, when the latter was visiting Sudan, who then recommended al-Muwafaqāt to be used as a basis for the studies on the asrār al-taṣhrī' al-islāmī.

Also Muhammad 'Abd Allāh Darāz, in his introduction to al-Muwafaqāt, Vol. 1 (Matba' Tijārīya, N.D.) relates that "often we listened to the recommendation (waṣīyya) of the late (Shaykh 'Abduh) to the students to obtain this book, and I was ever anxious to fulfill his will." (p. 12-13).


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.


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


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

18. See note: 11.


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

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

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


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


31. Ibid., pp. 133-4.

32. Ibid., p. 160.


35. Ibid.

36. Ibid., p. 92.
37. Ibid, p. 93.


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.


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


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


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.


48. Rudi Paret, "Istihsân and Istiślâh", in Shorter Encyclopaedia of Islam, p.185.


52. Ibid.

53. Ibid.

54. Ibid., p.98.


57. Ibid, pp.23-60.

58. Ibid., p.414.


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.


69. Kerr, op. cit. p.194, referring to Rıdā’s mention of Shāṭibī rightly quotes his year of death, but in his index on p.247 identifies him as Abū’l Qāsim b. Fira ash-Shāṭibī.
The relationship between legal theory and social change is one of the basic problems of the philosophy of law. 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?

Shāṭībī sought an answer to such a challenge in the principle of maslaha. A discussion of Shāṭībī'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 Shāṭībī as well, it may be rightfully suggested that to evaluate Shāṭībī'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 ḥikmat works.

On the other hand, an attempt to establish the views of Shāfi‘ī’s predecessors by surveying the original sources is also beyond the scope of this study. The literature available on ḥikmat al-fiqh, belonging to the pre-Shāfi‘ī 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 ḥikmat 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 landmarks of the problem in reference to which Shāfi‘ī’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. 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 questioning the idea of the immutability of Islamic law.

This view of Islamic law was strongly criticised by Islamicists, especially by Snouck Hurgronje and G. Bergsträsser. 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.

Consequently, from that time, as J. Schacht also reported in his lecture on the status of scholarship on Islamic law, 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 methodology.

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. Further, a certain symbiosis of the schools of law and the schools of theology existed throughout the history of Islamic law.

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

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, H. A. R. Gibb, H. J. Liebesny, M. Khadduri, H. Lammens, G. Makdisi, and particularly J. N. D. Anderson have expressed this view.
Leon Ostrorog, S. G. V. Fitzgerald 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 sovereign is law', since God is the sole Head of the Community and therefore sole Legislator."

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. 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 Qurān 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.

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. R. Brunschvig also speaks of the irrationality of Islamic law in this special sense. G. F. Hourani's distinction of two theories of values in Islam is also concerned with the point we are discussing.

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

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'. Th. W. Juynboll 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.

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.

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.
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 huqūq even though it means "rights" in a sense, nonetheless, does not contradict the point. In Islamic law, huqūq 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 taʿẓīr, according to which a qāṭī (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 taʿẓīr 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 qādi; 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 Muhammad'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. J. Schacht and R. Brunschvig brought this criticism to bear upon that part of the Hadīth literature that concerned Islamic law. Schacht argued that a large number of legal ahādīth were, in fact, legal doctrines of the early scholars of Islamic law which were projected back to the Prophet in the form of hadīth, hadīth 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. 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.

The need for projection backward to the Prophet was not felt until Shāfī'ī 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
‘Abbasî 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 Hadîth 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 disagreed with Schacht’s conclusion that the Sunna of the Prophet was a late concept that emerged in consequence of the development of the Hadîth 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, 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 Qur’anic verse which, he says, establishes Muhammad’s role as law-giver. From the verse he concluded that the idea of Islamic law was not the result of post-Qur’anic developments but was formulated by Muhammad 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. 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. Schacht's investigation of the early development of Islamic law explains the above observation historically. 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-Muqaffa', a secretary in the ʿAbbāsī government, strongly recommended that the caliph control this diversity of opinions by state legislation. The jurists reacted to this suggestion by insisting that the law was superior to the state, and hence not subject to state legislation.

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. G. H. Bousquet concluded that the idea of successive adaptations to changing circumstances was strange to its system.

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 'Abbāsī jurists as abstract and turning the back on reality".

iii) Role of the Institution of the qādī:

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

In the 'Abbāsī period the office of qādī was connected with Islamic law, thus separating it from the general state administration and making it subject to Islamic
law only. Later when the schools of law were established, the role of the qādi 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 qādi 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 L. 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 qādi 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 Umawi qādis 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 qādi. The morally-inclined qādis 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 samal (juridical practice), as court law in the Maliki school. 58

H. Toledano has observed that samal became "an instrument for modifying and adapting the shari'a 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 qadi and the jurist. This requirement was called taqlid.

The effects of taqlid 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 taqlid 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  nazar fi al-maẓālim where decisions were reached through individual discretion and Siyāsa. The jurisdiction of the qāqī was limited, and even there interference by the governor and other government officials in the qāqī's decision, and restricting his competence in legal matters, was so frequent that, in fact, the applicability of shari'ā 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 'amal 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 Bergstrasser 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 Cohen believed the jurists to be very flexible 66 - which was constantly being adapted to social changes. In fact, Bergstrasser observed that this category of Islamic law diverged farthest and in some cases completely from the classical 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. In Common law the flexibility was achieved through Equity.

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

Modern scholarship also discusses the question of the method in reference to the sources of Islamic law. E. Tyan and Ch. Chehata observed that Islamic law did evolve methods to adapt legal theory to changes. Chehata spoke about the principle of Istihsan as being the counterpart of Equity in Common law. Tyan pointed out three such methods: Istihsan, Ististalih, and Siyasa Shariyya (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, 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 'urf, istihsan, istislah and 'amal 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 maslaha ("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 maslaha 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". 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 shari'a is understood as fiqh. The immutability-view is not so monolithic. In reference to the concept of law, Islamic law is identified with shari'a, 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 shari'a and fiqh are inseparably connected, shari'a 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 shari'a 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 shari'a. The immutability view also confuses the two levels. A distinction in these levels can help in demarcating shari'a from fiqh and also in distinguishing among various subject matters of fiqh.

The question whether shari'a 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. 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 shariʿa, though not law in the proper sense, is the law of Islam. Fiqh is a science that deduces rules of law from the shariʿa. Accordingly shariʿa is known through the fiqh. Does there exist shariʿa 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 shariʿa is a metaphysical reality known through the Qurʿān and the sayings of the Prophet. The question whether everything contained in the Qurʿān and hadīth 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 Usūl al-fiqh.

Usūl 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 usūl 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 Shāfi'ī's concept of maqāla in relation to his doctrine of maqāsid 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 fatwas in this period. (Chapter 5). Since these fatwas 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 Shājībī’s concept of maslahā 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, Shājībi’s concept of maslahā will be examined in this frame of reference. The analysis is undertaken in reference to the development of this concept in usūl al-fiqh (Chapter 6). The purpose of this analysis is to assess the direction in which Shājībī wanted this concept to lead.

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

In examining Shājībī’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 taṣābbud.

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. Şahibi's distinction between ḍādat and ḫādat on the basis of observability of maṣūliḥ in the former is understood as an attempt to separate positive law from religious elements.
NOTES: CHAPTER II


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 Hidayat was not in accordance with the Qu’ran on this point. The Privy Council confirmed the decision of the lower court and declined to go beyond Hidayat. 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.


4. For example, M. L. W. C. Van den Berg’s translation Minhâdj at-tylibîn, 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.


9. Ibid., 7.


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


24. Mohammedanism, 90f.


27. See Chapter I. p. 29f.


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


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

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


36. Ibid., 176f.

37. Ibid., 207.

38. "Closer acquaintance with the vast stock of hadiths 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 hadith, 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: George Allen and Unwin, 1971), p. 19.


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);


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 "Fikh" in *E.I.* (2nd edition) Vol. II, 887-8.


49. Ibid., 56.


54. Ibid., 25.

55. Ibid., 4.


57. Ibid., 226.

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.


63. Ibid., 76ff.

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


66. Cahen, op.cit.

67. Udovitch, op.cit.


69. Hurgronje, Selected Works, 260.

70. Udovitch, op.cit., 10.


73. See above Chapter 1. p.20ff.


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

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

79. M. H. Kerr, op.cit., 55; also see above Chapter 1. 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.


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:

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 Shāfi'ī's views on the adaptability of Islamic legal theory to social changes, a general study of the changes that occurred in Shāfi'ī's period is necessary. Shāfi'ī flourished in Granada in the reign of the Naṣrī ruler Muḥammad V al-Ghani 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 Ilkhânîs and the Golden Horde had been converted to Islam. The Mamlûks 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 Banû Marîn had emerged as powerful successors to the Muwâḥḥidûn. In Spain, the Banû Naṣr had succeeded the Muwâḥḥidûn. They maintained their rule by keeping a delicate balance of alliance with the Christian kingdoms in Spain and with the Banû Marîn 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 Khaldun (784/1382) worked on a philosophy of history. In Syria, Ibn Taymiyya (728/1328) reviewed the entire tradition of political and legal theory. In Persia, Al-Tijji (756/1355) resystematized Sunnī theology. In Spain, Shāṭībī was occupied with the philosophy of Islamic law. All of these efforts imply some breakdown in the community’s sense 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

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 Banū Naṣr dynasty for a better understanding of the nature of the political structure that Sultan Muḥammad V inherited from his predecessors.

Al-Ghālib Billāh

With the decline of the Muwahḥidūn, the political situation in Andalus (Muslim Spain) fell into a chaotic condition. Two warlords appeared in this period: Ibn Hūd in Murcia and Ibn al-Aḥmar in Arjona. Ibn Hūd revolted against the Muwahḥidūn in 625/1228 in Murcia. He received investiture from the ʿAbbāsī caliph Al-Mustanṣir Billāh (623-640/1226-1242)
in Baghdad. Once established as Sultan, he assumed the title Al-Mutawakkil Billah. Important cities such as Almeria, Malaga, Granada, Sevilla and the greater part of Eastern Andalus fell to him.


At the instigation of Ibn Abî Khâlid, the people of Granada proclaimed Ibn al-Ahmar their king. In 634 A.H. Ibn al-Ahmar moved to Granada and after inflicting a heavy defeat upon Ibn Hüd, captured Granada and declared himself the Sultan of Andalus, and assumed the title of al-Ghâlib Billah. Thus was founded in Granada the dynasty of the Banû Naṣr, also called Banû Aḥmar.

Ibn al-Ahmar's only rival was Ibn Hüd who died in 635 leaving Ibn al-Ahmar the sole Sultan of Andalus.

Toward his neighbouring states Ibn al-Ahmar pursued a policy of truce. He professed submission to his African neighbours and ordered that the name of the Ḥāfṣi ruler, Abû Zakariyya Ibn Ḥāfṣ (625-647/1228-1249), be recited in the khutba -- a sign of allegiance. This gesture was meant to acquire Ḥāfṣi help. He even included the name of the ‘Abbâsî ruler in the khutba to elevate his prestige among his subjects; later, however, he discontinued the practice.
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. 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 Ḥaḍīṣīs 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 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-Ghanî Billâh

At the age of sixteen, Muhammad V al-Ghanî Billâh succeeded his father in 755/1354 when the latter was assassinated. The affairs of the state were completely in the hands of his chamberlain (hâjîb), the Qâ‘îd Abû Na‘îm Riḍwân. 11

Other important offices of the kingdom were the following: the office of Shaykh al-Ghuzâ‘t was given to Ya‘yâ‘ b. ‘Umar; Qâ‘îd al-Jamâ‘a to Abû‘l-Qâsim Sharîf al-Sabtî; Kâtib al-Sîr to Ibn al-Khâfîb. 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-Khâfîb and Abû‘l Qâsim al-Sabtî were sent on a mission to seek help from the Marînî ruler, Abû‘l-Inân, against the Christians. The Castillian king, Pedro, was occupied with dynastic troubles. He confirmed his truce of 751 made with Muhammad V’s father. 12

This peaceful situation, however, did not last long. In 760 A.H. a revolt broke out against Muhammad V. He had two brothers whom Riḍwân had imprisoned in Al‘amrâ‘. Their mother sought the help of Ra‘îs Muhammad, the head of a contingent of soldiers. 13 Al‘Ra‘îs killed Riḍwân and proclaimed Muhammad V’s brother, Ismâ‘îl, as Sultan and himself as his regent. Ibn al-Khâfîb and other supporters of Riḍwân were imprisoned.

Sultan Muhammad V, however, escaped to Guadix. There he received a visit from Abû‘l Qâsim al-Sabtî, his former qâ‘îd who had joined the Marînî
Abū’l Qāsim was sent by Abū Sālim, the Marīnī, who invited Sultān 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’Inān. Muḥammad V accepted the invitation. Abū’l Qāsim then proceeded to Granada to negotiate the safe conduct of the Sultān to Fez as well as the release of other prisoners, including Ibn al-Khaṭīb. 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 Sultān.

In the meantime, Raʾīs Muḥammad, after assassinating Ismāʾīl, 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. 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. From there he proceeded to Malaga. Alliance of Ronda and Malaga in favour of the Sultān assured his capture of Granada. 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 Marinī court to get rid of him. On his way Ibn Kumātha heard the news of Sultan 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 Sultan 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 Ṣalī who had deserted 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 Ṣalī b. Badr al-Dīn and Ṣād b. Abī Ṣaʿīd, 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 Sultan himself. 20
The office of Qādī al-Jamāra was given to Qādī Abū ʿīl ʿHasan al-Nubāhī, and the office of Kāṭib al-Sīr to the fāqīḥ 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. 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, 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 wartime. 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 Murābīṭūn 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. The social impact of this situation is evident from the fact that the Granadian Muslims generally came to accept the Christian dress.
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, Banū Naṣr had depended more on the Banū Ḥafs 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. These clans played a very active role in Naṣrī politics because the office of Shaykh al-Ghuzāṭ 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 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 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. ʿAbdAllāḥ, 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
Mas'ūd b. Maṣāf. They were welcomed in Granada by Sultān Muḥammad V; he even appointed ʿAlī as Shaykh al-Ghuzāt. In the meanwhile Sultān 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 Sultān to send the prince and his wazīr back to Fez. The Sultān refused, but Ibn al-Khaṭīb whom Sultān ʿAbd al-ʿAzīz had taken into his confidence, prevailed upon Muḥammad V; yet the latter only agreed to imprison them. The Marīnī Sultān accepted but did not like this move. Ibn al-Khaṭīb, apprehensive of the intrigues against him in the Naṣrī court, was planning to escape. Sultān ʿAbd al-ʿAzīz welcomed him in the Marīnī court. Now Sultān Muḥammad V requested Sultān 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 Sultān 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-Ghuzat, Wazir and Qazi al-Jam'a.

Shaykh al-Ghuzat  The chief of the ghazis (warriors for the faith) actually was the office of the head of the armies, both regular armies and mercenaries. This office, according to Gaudrefroy Demombynes, was "comparable to that of the amir al-'umarai in the late Abbasi period." The peculiar tribal structure and allegiance to the chief provided the Shaykh al-Ghuzat with absolute power.

The office of Shaykh al-Ghuzat was introduced to replace the power of the Banu Ashqilula who had been responsible for the establishment of the Na't dynasty but who had soon fallen into the custom of revolting against the Banu Nasr on frequent occasions. To counterbalance their power the Banu Nasr welcomed the Marini clans left behind in Andalus by the Marini Sultan Mansur. The first Shaykh al-Ghuzat was appointed from among these Marinis.

The Shaykh al-Ghuzat was given vast powers as is evident from a zahir (investiture) conferred upon Yahya b. Sul'tan Abul-Hajjaj Yusuf (733-755/1334-54). The titles mentioned in the investiture include: 'Pillar of Power', 'Sword of Jihad', '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".

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

‘Uthmān soon came into conflict with the wazīr Ibn Maḥrūq. Ibn Maḥrūq succeeded in suppressing him temporarily. Soon, however, the situation reversed itself. ‘Uthmān gathered his troops and besieged Granada. Alfonso, seizing the opportunity, captured a few border towns. Sultan Muḥammad IV (725-733 A.H.) was forced to be reconciled with ‘Uthmān. 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 Sultan, ‘Uthmān’s ghāzīs assassinated Muḥammad IV in 733-34 A.H.

Muḥammad IV’s son Yūsuf’s attempt to replace Banū ‘Ulā’ with 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 Banū Raḥū participated in the plot against Muḥammad V, and supported the Sultan’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 Sultan 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. He appointed other individuals from 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 Jihad away from the Shaykh al-Ghuzāt. Second, he sent the Shaykh al-Ghuzāt on campaigns against the Banū Marīn, thus discrediting them as ghāzīs since they fought against Muslims and their own kith and kin.

Wazīr The wizārā was the second most powerful office in the Naṣrī political structure. Ibn Saʿīd observed that the institution of wizārā 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 ḥājīb. This office became hereditary and continued within certain families. The designation of wazīr was lower than that of ḥājīb.

During the Naṣrī period the emergence of the institution of Shaykh al-Ghuzāt had
overshadowed the powers of the hājib. Moreover, the offices of hājib and wazīr were often combined. Some wazīrs even claimed to be regents of the minor sultāns 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-Makhūt; Ibn Maḥrūq in the period of Muḥammad IV, Qāʿid Rīḍwān in the time of Abūʾl Ḥājjāj Yūsuf and Ibn al-Khājīb 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.

Early Naṣīrī wazīrs such as Abū Marwān b. Ṣanādīd, who was the ruler of Jaen, and the Qāʿid Abū ʿAbd Allāh al-Ramīmī, who was the son of the ruler of Almeria, both wazīrs of 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 political 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.

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 Sultān to support a qāḍī's
The Sultan and often the wazirs, as well, interfered in the administration of justice; yet symbolically, the Qādi enjoyed the highest prestige in the political structure.

In spite of the absence of executive powers, the chief Qādi 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 Qādi's power, as we shall see later in detail, lay in his being part of a sort of 'religious élite' which had grown in strength in the Umayri period and proven itself indispensable ever since.

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

As stated earlier, Sultan 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. He interfered with Qādi al-Nubāhī in many cases. It is evident from certain stories recounted by Ibn al-Khaṭīb in his Ṣamāl al-Aslām and Al-Kaṭība al-Kāmina, that Ibn al-Khaṭīb went beyond the limits of politeness in ridiculing Nubāhī in the court. Publicly insulting the Qādi al-Jamā'a must have undermined the office of qādi. This derision was not without the Sultan's approval. The Sultan must
have encouraged the wazīr for such derision to weaken the office of Qādī al-Jamāʻa. It was only after Ibn al-Khaṭīb had left for Morocco that 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 qādī to his advantage, also achieved his designs to make himself independent of the offices of the Qādī 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-Ghuzār, the Wazīr and the Qādī al-Jamāʻa, which were the major offices of political significance. He used the influence of each office against the others to weaken them all.

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

SOCIO-RELIGIOUS DEVELOPMENTS

We noted earlier how important a role was played by the jurists in political events during the early days of the Sultan Muhammad V, especially by Qāḍī al-Sabti 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. 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 and Goldziher 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, Hussain Monés and others, 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 'Abbāsī caliphs, the Banū Umayya in Spain needed the support of religion to justify their caliphate. Mālik b. Anas, being an antagonist of the 'Abbāsīs, was the ideal choice for them. 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. Thus from political necessity on the part of the Umawi rulers there arose a class of 'Ulama' and Fuqaha' who played a continuously important role in political affairs.

The third factor, suggested by L. E. Provençal and Roger Idris, was the establishment of a kind of 'religious aristocracy' composed of fuqaha' and 'ulama' 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. In these revolts the fuqaha' 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 fuqaha'.

We cannot agree that any one of these factors alone can sufficiently explain the influence of the fuqaha', particularly in the Naṣīrī 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. Conservatism was also absent from their ever-changing practices in trade and commerce. 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 fuqāhā.

Similarly it is hard to maintain that the rulers' alliance with the fuqāhā 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, 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, as expressed by their zeal for Jihād and Ṭaṣawwuf, the Banū Naṣr laid stress on genealogical nobility. The founder of the Naṣṭī dynasty was called ‘Marwān’ by a contemporary historian. 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 Madiṇa. Ibn al-Khāṭīb established the proof of their genealogy from earlier sources and Ibn Zumruk recited eulogies narrating the merits of the Khazrajīs in the days of the Prophet. This very fact that they stressed their descent from the Ḥanṣār 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 appellation “fuqahā’” had acquired a sense of nobility. Ibn Saʿīd points
out in his narrative of the Andalusian society that:

The appellation of 'faqih' is most honourable for them, so much so that if they want to make an honourable mention of their grand amir (sultan), they call him 'Faqih'. At present a faqih in the West is what a qadi is in the East. They even sometimes call the katab (secretary), a grammarian and a linguist faqih because it is the highest appellation for them. 21

The factors that contributed to the sustenance of fuqaha'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 fuqaha could preserve the Maliki 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 fuqaha in the following pages.
Religious and Judicial Offices

The highest religious and judicial office was that of Qādi al-Jamā'a, the appellation of the chief qādi 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 qādis. The Qādi al-Jamā'a also enjoyed a wide range of prerogatives. 22

Beside the administration of justice, the fuqahā' were officially attached to courts as muftis (jurisconsults), mushāwirs (consultants) and wuththāqas (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 faqih to supervise it. The appointments of Abū 'Abd Allāh al-Ḥaffār (811 A.H.) 24 and Ibn al-Qābbāb (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 Naẓīr al-Sikka were held by fuqahā'. 28
The office of Chief Khaṭīb was next to that of Qāḍī al-Jamā'ā in importance in the capital city of Granada as well as in other cities and towns in the kingdom. Often both offices of qāḍī and khaṭīb were held by one person.29 Since in Islamic history the sikka (coining) and khutba (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 muṭadhdhin, 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 TarTās 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 Naṣīrī 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 Saʿīd 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 Saʿīd stands in contrast to that of Ibn Khaldūn who praised the system in the East saying that the system of 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 Saʿīd 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 fuqāḥā 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 fuqāḥā. They were absolutely independent in choosing the materials of teaching in the manner of teaching and the assessment of achievement of the pupils. Shāṭibi, 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 Riqwān (d. 760/1359) the Ḥājīb of Abū Yūsuf al-Ḥājjāj (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 bid'ta (innovation), hence prohibited; second, that it suppressed the freedom of the 'ulamā' and hence the independence of ilm (scholarship).37

After the establishment of madrasas, the 'ulamā' 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 Sāfī Tariqas 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 Zindiq (heretic), and his days are numbered (qayyaḍat ‘alayhi anfāsuḥū). 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 Sultan." 28

Ibn Saʿīd’s observation is supported by stories that frequently refer to an aversion of philosophy. Ibn Khaldūn narrates that his teacher ʿĀbiyyī 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 fuqahā. 40 This antagonism had grown to such an extent that even Ghazālī’s works were counted as being philosophical. 41 One of Shāṭibī’s teachers, Sharīf Tilmāsānī, on one occasion was forced by his students to use a certain book by 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. 43 Qāḍī Nubāhī was asked to bring charges against Ibn al-Khaṭīb. He declared the latter as heretic because of his indulgence in philosophy and other such matters. Qāḍī 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."

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." 44

Sultan Muḥammad, assisted by Qāḍī Nubāhī and Ibn Zumruk finally succeeded after a few years struggle to have Ibn al-Khaṭīb charged in the Marinī 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 Sharī'a 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-Ṭib. 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 Sharî'a. I urged you to tear them up and burn them.

This unfortunate office tenure (Qâdi Nubâhi's period of qâdi during Ibn Khatib's wizâra) endured the nonsense resulting from your ridiculing the rules of Sharî'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 Abî'l Aysh, detained (muthaqqa't) 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 Abî'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-Khatib was very much distrustful of the fuqahâ'. His reasons for this attitude were the fuqahâ'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 fuqahâ'. 48

The main targets of his writings were the qâdi Ibn al-Hasan al-Nubâhi and qâdi Ibn al-Qatbâh. It is evident from Nubâhi's letter that Ibn al-Khatib did not agree with the fuqahâ' in condemning heretics to death. His interference in the implementation of court decisions was considered as ridicule of the Sharî'a.
Ibn al-Kha’ib’s boldly favourable attitude towards philosophy and pure thought was made possible among other factors, by the introduction of Râzism into Western Mâlikîm in the thirteenth century.

FâlÎr al-Dîn Râzî was responsible for raising the status of Kalâm to bring it closer to philosophy, but his influence also meant the revival of an interest in philosophy—a forbidden science among the conservative orthodox. Râzism was introduced to Mâlikîm mainly through Uṣûl al-fîqh. This made the acceptance of Râzism easier, and the resistance to pure philosophy, though it continued, but grew weaker and weaker.

In Eastern Mâlikîm this impact manifested itself in two works on Uṣûl al-fîqh which were in many ways based on Râzî’s work on Uṣûl al-fîqh, Al-Mahsûl. One of these works was by Ibn Ḥâjjib (d. 646 A.H., Alexandria), Muntahâ al-Su‘.l wa‘l-Amal fi ‘Ilmay al-Uṣûl wa‘l-Jadal. The second was the work by Ibn Ḥâjjib’s pupil Shihab al-Din al-Qarâfî (d. 684 A.H) Tanqîh al-fusûl. Both soon became very popular Uṣûl texts of the Mâlikî School. Ibn Ḥâjjib’s work had gained currency even in his life time. Consequently he had to prepare an abridged version of it. This abridged work on Uṣûl along with another short work on furû‘ were called Mukhtasâr aṣlî and Mukhtasâr farîf since they were used as texts in madâris.

Ibn Ḥâjjib’s Mukhtasârs were introduced into the Muslim West by one of his well known disciples, Naṣîr al-Dîn al-Mishdâlî (d. 731 A.H.) 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-Ḥaškūnī. 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-Fārabi.

Among the above-mentioned scholars Mishdhālī seems to be critical of Rāzism, although he retained his interest in philosophy. His son, Abū Maṣūr al-Zawāwī's and al-Ṣarīf 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 Ṭariqas. 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 Shari'a, the palladium of the power of the religious authority of the fuqahā', was threatened by philosophy as well as
Kalâm insofar as these two sciences undermined the authority of Sharî'a as the only guide to life. Taṣawwuf, however, probably presented a more direct threat to Sharî'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 Mâlikîs in the West.

In addition to this consideration, certain events heightened this feeling of danger. In the twelfth century when Mâlikism had been re-established by the Murâbiṭûn, the fuqahâ' had begun the purge of Taṣawwuf from Andalus. Among the sufis denounced by the fuqahâ', the following three were prominent: Abû Bakr Muḥammad from Cordova, Ibn al-Ṣârî' from Almeria and Ibn Barrajân from Sevilla. They were persecuted, and all three died in prison. Ibn Barrajàn had criticized the Mâlikî fuqahà' very severely for their neglect of Hadîth. He succeeded in gathering enough supporters in Almeria to form an opposition that was directed primarily against the fuqahâ'.

Another such uprising against the ruling class and the fuqahâ' was led by another Sufi, Abû'l Qâsim Ibn al-Qâṣîyy, a disciple of Ibn al-Ṣârî' (1088-1141). This insurrection took place in Algraves region (Southern Portugal) in 1141. Ibn Qaṣîyy was killed in 546/1151.

Viewing Taṣawwuf in the perspective of these uprisings, the fuqahâ'naturally considered Taṣawwuf a threat against Mâlikism and hence against themselves as a class.
One significant victim of this opposition to Ṭaṣawwuf was al-Ghazālī’s book, Ḥiyā' Ulūm al-Dīn. One of the earliest reactions to al-Ghazālī’s Ḥiyā' was that of Abū Bakr al-Turtushi (d. 520 A.H.) who wrote a treatise Al-Tibr al-Masbūk refuting al-Ghazālī’s Ḥiyā'. The aforementioned Sufi, Ibn al-Ṣārif, was the first to interpret Ghazālī’s Ḥiyā in the West. Along with the persecution directed against him came the suppression of Ḥiyā'. In 537 A.H. ‘Alī b. Yūsuf b. Tashufin, who also persecuted Ibn Barrajān and other Sufis, ordered that all copies of Ḥiyā be burnt in public. Qāḍī Ǧiyāḍ (d. 544 A.H.) also issued a fatwā in favour of burning Ḥiyā. Abū’l Ḥasan ibn Ḥirzihim prohibited the study of the Ḥiyā and ordered that all copies of it be burnt.

Like other movements of free thought Ṭaṣawwuf continued to be considered dangerous both by rulers and fuqaha’ until Muwaḥḥidūn toppled this alliance. Although the religious views of the Muwaḥḥidūn, because of their stress on the Qurʾān 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.

The Muwaḥḥidūn could not, however, destroy the power of the fuqaha’ in Spain. It grew stronger. The best illustration is the fact that Muwaḥḥid Sultan Manṣūr under the pressure of Mālikī fuqaha’, was forced to expel Ibn Rushd.

During this period another movement was gaining force. It grew much stronger
in the period of the decline of the Muwahhidun. We refer to the establishment of Sufi ribâts. As G. Margais has pointed out, originally the ribât 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 ribât. The volunteers for Jihad in the ribâts were also connected with Sufi Tarîqs. The Ribât, thus, was no longer a military post but also a place for ascetics and travellers. By the thirteenth century the ribâts were also transformed into Zawiya or centres for certain Sufi tarîqs. By that time every ribât had a resident Sufi-Shaykh.

This phenomenon had an effect on the fuqahâ' 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 Zawiya, notable Sufis and a number of works on Taṣawwuf, all in Spain. Ibn Battûta mentions, among other such centres of Sufism in Muslim Spain, two Zawiya in the vicinity of Granada: Zawiya Mahruq, and Rabiṭa al-’Uqab. Two of the significant works on Taṣawwuf in the fourteenth century were written by Spanish Sufis; Abû Ishâq Ibrâhîm b Yahya al-Ansâri (d. 751 A.H.) of Murcia, Zahrat al-Akmâm and Abû ‘Abd Allâh Muhammed b. Muhammed al-Ansâri al-Malqâ’î’s (d. 754 A.H.) Bughyat al-Sâlik fî Ashraf al-Masâlik fî marâtib al-Sûfiya wa Ţarîq al-Muridîn.

This phenomenon affected the intellectual as well as the social status of the fuqahâ’. The emphasis on piety and simple living in their personal lives by Sufis was in sharp contrast to the aristocratic way of life of the fuqahâ’. This difference in
life style made sufis more popular than the fuqahā' among the common people. The rising influence of sufis 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 sufī Shaykhs and ribāts. 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 sufism among the fuqahā'.

The impact of Taṣawwuf can be seen in two principal ways. First, the sufis did not abolish the Sharī'ah, 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 sufis appealed to the Qurʾān and the Sunna.

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

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

The influence of Taṣawwuf had grown very strong by the thirteenth century. At the same time with the passing away of the Muwahhidūn, 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 fiqāh and Taṣawwuf both are actively present on the scene, and both are alive with a rejuvenating spirit. The Banū Marīn and Banū Ḥafs who had succeeded the Muwāḥḥidūn, realizing the force of both movements, made steps toward combining the two. They encouraged the fuqahā' to concede to Taṣawwuf. They also began to endow the ribāts with large trusts.

The fuqahā', realizing the situation, soon became themselves involved in Taṣawwuf, but they still held to the supremacy of Sharī'a. A typical example of this rapprochement was the formation of a new silsila (chain of a tariqa) whose connection with the Shādhiliyya Ṭarīqa is discussed below, which combined the ṭāṣfīs and the fuqahā’. Abū ʿAbd Allāh Maqqārī (d. 758 A.H.), a famous jurist, is also noted for his work on Taṣawwuf, Al-ḥaqā'iq wa al-raqā'iq.72 Ibn ʿAbd Allāh Rundi (d. 792 A.H.), the famous Shādhili ṭūfī, was one of Maqqārī’s disciples of whom he was very proud.73

Maqqārī, along with his lectures on fiqāh, 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 ṭūfīs is to be seen in the names comprising this silsila.

This chain has been subjected to criticism by some authors mainly because of gaps in the chain between Abū'1 Ma'āli 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 Shādhili Order which became better known after Ibn 'Abbād. The chain comprises four parts: the first part consists of Maqqarī and Musfir both primarily ṣuḥūfīs; it is connected with the second part comprising a chain from Māḥyāwi to Abū Madyan—primarily ṣūfīs. They are connected again with the third part consisting of mainly fuqahā; starting with Ibn Ḥirzihim to Abū'1 Ma'āli. They are then connected with the traditional chain of early ṣūfīs, through Abū Tālib Makkī.

Nwiya's suggestion about the connection of this chain with the Shādhiliya, together with his conclusion that Ibn 'Abbād's reanimation of the Shādhiliyya was a revival of the early ṣūfism of Muḥāṣibī, 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 'Arabī which the fuqahā considered a threat to the supremacy of Sharia.

Having found this compromise possible, the fuqahā eased their opposition to Ṭaṣawwuf as such. There was, yet, another aspect of Ṭaṣawwuf which continued to threaten their status. This threat can be seen in three ways. First, Ṭariqat-Taṣawwuf required total submission to the Shaykh. This submission undermined the religious authority of the fuqahā. One event (probably an anecdote) illustrates this tension:
Qâdi Abû'l Qâsim al-Sabti had two sons. One, Abûl 'Abbâs Ahmad became qâdi; the other, Abûl Ma'âlî chose the path of 'qawm' (sûfîs). He never used or ate anything at his brother's house. After many years he visited Zâwiya Mafrûq in the outskirts of Granada. He saw Shaykh Abû Ja'far Ahmad al-Ma'âlûd 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 Zâwiya to answer that question. This person who appeared to be an illiterate villager answered that Abû'l Ma'âlî lost this torch as punishment for some of his actions. After a number of questions it was revealed that Abû'l Ma'âlî had taught someone the Divine name of al-Latif which he was not permitted to do. A curse fell on him as a consequence. He became Qâdî al-Jamâ'a and died a worldly man.

The second aspect of the threat to the fuqahâ' was that a number of sûtî practices such as dhikr and samâ' virtually substituted for the rituals prescribed by fiqh. This could not be tolerated by the fuqahâ'. Shâtibi goes as far as to declare insistence on such practices in defiance of Sharî'a, to be Kufr, and condemns the practitioners to death. To add to the offence caused by these practices, which were considered bid'â by the fuqahâ', 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 samâ' were also part of the celebration. A significant factor in this development was the patronage that rulers provided for this celebration. The fuqahâ' 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 bid'a.

The third aspect of the threat was economic. As we mentioned earlier, generous donations and trust properties were given to zāwiyas and ribâts. This wealth attracted a number of devotees as well as travellers. Ibn Battûta came across sufis in these centres from almost all corners of the Muslim world. 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 zāwiyah.

Some fuqahā' resisted the temptations of Sufi tariqas. According to these fuqahā' the Sufi 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 Zāwiyah. The finances of the Zāwiyah 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 Sufi Zāwiyah or ribât had become. The problem became acute in the days of Shāṭibi. A distinct economic view of the matter, in contradistinction to the older political and theological view
that had motivated the fuqaha to oppose Sufism now came to be.

The inhabitants of a small town Qanalish, an agricultural town on the borders of Aragon, sought a fatwa concerning the Shar'i attitude towards a zawiya in their vicinity. The Chief Qadi Al-Balfi answered vaguely, justifying the existence of such an institution. The Chief Mufti Ibn Lubb countersigned the fatwa. The people of Qanalish, however, mounted a protest against the fatwa accusing both muftis of subjecting the people to an unnecessary burden.

The same istifada was then sent to Shafi'i and Abu Abdallah al-Haffar. Haffar's fatwa spelled out the economic aspect in more detail. A few excerpts from this fatwa are worthy of notice:

"This band of people who claim their connection with Tasawwuf 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 fuqahâ' and judges protect the law (Sharî'ah) 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 (bakîm) 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 (muâhid) in this respect.84

To conclude, the political power of the fuqahâ' declined in the reign of Ghânî Billâh, because the factors that strengthened their religious authority, were no more controlled by the fuqahâ'. The introduction of madrasas deprived them from the control of institutions of learning which were, until then, a private business of the fuqahâ'. Since the madrasas were now controlled by the Sultân, the fuqahâ' 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 Taṣâwwuf into the Granadian society. Rather, as a general trend, they eagerly joined Sûfî Tariqas.

There were only a few jurists who, nevertheless, opposed Sûfî Tariqas. Unlike their predecessors who condemned Taṣâwwuf mainly because of political reasons,
these jurists rejected Sufi 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 fuqaha'.
Geography

Muslim Spain under 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): Gharnāja (Granada), Al-Marṭya (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, 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 (qūrā).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 Sūfīs, 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. 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 Berbers and Arabs, both usually soldiers and hence fief holders. 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. 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 Battûta who described Granada as the most prosperous kingdom in the West.

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. The permanent deposits in the treasury consisted, of course, of precious stones and diamonds, but the expenses of the kingdom were, however, met by the revenue.

The major source of revenue was land tax, called Kharâj. It was usually 1/9 or 1/10 of the produce, but another 1/5 was also levied as rent of land. Since land was scarce and irrigation facilities were not commonly available, the most fertile lands around Granada were procured by the Sultan. These lands were called Mukhtâs 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 Sāhib al-Ashghāl. 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.

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, 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.
Money and Currency

The Naṣīrī 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. From the legal documents it appears 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 Dīnār and the dobla (the well-known non-Muslim gold piece). Contrary to the conjectures of early scholars of numismatics, the silver and ʿaynī (copper) Dīnārs were not debased coins; but as studies of documents of contracts in the Naṣīrī period show, they seem to have been introduced by the Naṣīrī 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 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 دینار. 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 Nasrī 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. 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.

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

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

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. 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 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 and of production of cheese.

**Industries**

The existence of gold, precious stones, amber and metals such as copper and iron 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." Among others the major industrial centres were Granada, Malaga and Almeria.

The following industries flourished: Weaponry, Silk, Pottery, Leather, Cotton and other textiles. The most profitable industry was silk.

The cities that were busy in the silk industry were Jubiles, Granada, Guadix, Fīñana 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: Usqu-utilun, Georgian, Isphania, ʿUnābī, Maṣajir al-Mudhashsh.

In the fourteenth century, because of the growth of the Italian silk industries,
Nevertheless, the market demands for raw silk material insured that this industry in Granada remained profitable.

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.

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-Ghani Billāh meant his remounting the throne of Granada. His capture of Ceuta meant a greatly increased influence in Marinī political affairs.

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. 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.

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.

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.

Almería 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 suzerainty 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 Nasr 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. 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. 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 Najr 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 their 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 indication 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-rağaba52 (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 Orde de la Merci were established to ransom Muslim prisoners and slaves in Christian territory. 55

Ibn Battūta 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 Battūta. When he reached Malaga and arrived at the main mosque, he found the Chief Qādi Taŋālī 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 Fatwād 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 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 fiqhah 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 (qāḍā), 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 qādi was assisted by a concilium of fuqahā' called mushāwirūn.

3. In matters of procedure the litigants sought the fatwā of the muftis in favour of their claims and presented them in the court. The judge reached his decision after consulting the notables in his court. The Qādi'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 Suljān against the decision of the court.

4. Since Mālikī fiqh covered all matters relating to religion, ethics, family, property, etc., and the mufti could be consulted even on matters which were also in the qādi's jurisdiction, a confusion between the jurisdictions of mufti and qādi 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 fi tamyīz al-fatwā wa al-ḥukm. Qarāfī disagreed with the usual distinction made between fatwā and ḥukm by considering the former as only 'ikhbār (statement) and the latter as 'ilzām (binding). On the contrary, he maintained that both are 'ikhbār an ḥukm Allāh (statement about God's command) and both are "binding". According to him a fatwā is a statement which implies either 'ilzām or iḥbā (permission), and the ḥukm is a statement which implies either 'ilzām or 'inshā (preceptive action). In respect of subject-matter, the ḥokim has jurisdiction only in 'umūr 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 'ibādāt (ritual and worship) and ijmā'.

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 Sultan) but whereas he made the muftī responsible to God, he did not define to whom ḥokim 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.

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 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 muraçāt al-khilāf. These aspects have been discussed elsewhere in detail.

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-Nubāḥī in his treatise Khalaṣ al-rasan. He also wrote the following
books on legal theory: Sadd al-Dhari' a fi tafsîl al-Sharî' a, 12 Alfiya fi 13 uṣūl al-fiqh and Muthlā al-ṭarāqa fi dhamm al-wathīqa. 14 In his Muthlā al-ṭarāqa he strongly criticised the institution and practice of notaries (wuthṭāq). He condemned them for their ignorance of the Arabic language and of fiqh. His essential criticism of this practice was on the basis of wasl (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 Judiciatorum 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 (Franisco 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 masālih al-ṣibād (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. 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


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


4. Not to speak of secondary sources, even the primary sources on the Naṣīrī 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 indispensable. 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-Iḥāṣa (Cairo: Maṭba‘ Mawsū‘at, 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-Maqṣarī, Naḥḥ al-Ṭīb (ed. M.M. Ḥamid, Cairo: Sa‘āda, 1949), which derives its information mainly from Ibn Khaldūn’s Kitāb al-Ṭabar (Bayrūt, 1959). We have also used Qāḍī Nubāṭ’s al-Maqṣaba al-Fūlyá, (Cairo, 1948) to supplement Naḥḥ al-Ṭīb. Secondary sources have been used only complementarily.

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

Their attitude towards a sūltān 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, Naṣḥ al-Dīn 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 sultān of al-Andalus.

See Al-ḥāfa, op.cit., II, p.91


8. Ibid., p.62.

9. Ibid., p.65. Ibn al-Khaṭīb, however, does not mention the events that made Ibn al-ʻĀmar repent his submission to Castille. Ibn Khaldūn narrates further that in making truce with Ferdinand, Ibn al-ʻĀmar 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-ʻĀmar was irritated and repented his decision. See Gaudefroy Demombeynes "Histoire des Benou ʻAlmar", (translation from Ibn Khaldūn's Kitāb al-ʻIlbar in Journal Asiatique, 9th series, Vol. XII (1898), p.325.

10. Ibn al-Khaṭīb (Al-ḥāfa, II, p.59) mentions that Mūḥammad was born on 22 Jumāda al-ʻĀkhira 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.


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, Umar 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 Umar b. ʿAbdAllāh, apprehending the plan of Garcia, succeeded in assassinating him and thus became the virtual ruler. Ibn Khaldūn, Kitāb al-ʿilbar, Vol. VII, pp.648ff.

16. Ibn al-Khatīb gives no detail, and mentions the name of ʿUmar b. ʿAbdAllāh in derogatory terms (Khabīth: wicked), Ilḥāta, 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 Sultān Muḥammad V. Kitāb al-ʿilbar, op. cit., p.694. Ibn al-Khatīb, in Aḥmāl al-ʿilām (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 Marinī throne, was looking for a proper candidate for the throne from the Marinī family. He found the Marinī 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-Khatīb 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...” (Ilḥāta, II, p.15). He repeats the same reference in case of Shaykh ʿAlī Ghuzāt (p.20).


19. Ibid.

20. Ibid., p.48 ff.

21. The details of these campaigns are provided by Ibn al-Khatīb, Al-ḥaḍara II, pp. 48-59.

22. See p. 91.

24. 'Abbâdî, in his comments on Ibn al-Khaṭīb’s Miṣyār al-Ikhtībār (Mushāhādat, 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-Karrānī wandered in Spanish lands debating with priests. Another Muḥammad Kāqūfī went to Murcia to teach Jews and Christians. ‘Abcālāb b. Sahfī was well known in mathematics. His fame reached as far as Toledo, and many scholars came to Baeza to study with him.

25. Inan, Niḥāya... ap. cit., p. 432.


28. Inan, Niḥāya, p. 117.

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


31. This Zahir is mentioned by Ibn al-Khaṭīb in his al-Iḥāta 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 Shābānā, "Shuʿūkh Ghuzāt al-Maghārība fī l Andalus Kamā arrakha lahum ibn al-Khaṭīb fī Al-Iḥāta" 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 Aḥmāl al-ʿĀʾām fī man Bāyiṣa qaṭl al-Iḥtilām min Mulūk al-īslām, op. cit.,


41. See p. 102ff.
42. Ibn Khaldūn, op. cit., p. 694.
NOTES: CHAPTER III

Section Two

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


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 fâkîhs ou juristes-theologiens malikites".


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

13. See above Section 1, n. 24.


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

\[
\text{ويارات الأئمة عن كللة}
\]

\[
\text{حارة خلال ليغغف الرواية}
\]

For details see Ṣinā‘, Al-Athār al-Andalusiyā (Cairo, 1956), p.170.


\[
\text{الشامان نفت الملوك سياحة}
\]

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\text{الشامان نفت الملوك سياحة}
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\text{الشامان نفت الملوك سياحة}
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22. See for instance the Zāhir of Qāḍī Ibn ʿAṣim for his appointment as Qāḍī. This Zāhir is preserved by al-Maqqarī, Naḥḥ al-Ṭīb, Vol. VIII, pp. 262-268.


26. Al-Maqqarī, quotes Ibn Sa'id 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 Naft al-Tīb., Vol. 1, p.203ff.

27. The rules of Islamic law in this respect were based on the Qur'anic 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).


29. For instance see the notice of Qāḍī Ibn ʿAyyāsh in Nubāḥī, Al-maqābat al-ṣuliyā, op. cit., pp.20-21.


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 albas which were attached to mosques and the fuqahā's compbints when these lands were made subject to tax are indicative of the point we are making. For such fatūwā see Wansharīsī, Al-Mīyār al-Mughrib (Fas, 1314-15 A.H.), Vol. VII, 68ff.


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

36. Levi-Provençal, Inscriptions Arabes d'Espagne (Leide: Brill, 1931), p.158ff, particularly see n.1, where Ibn al-Khaṭīb is quoted calling this madrasa as bikr al-madārīṣ.
37. Nwiya, op. cit.
40. See p. 109
41. Qāḍī ʿIyāḍ (d. 544 A.H.) and Ibn Ḥirrizīm issued a fatwā giving orders to burn Ghazālī's ʿUlūm al-Dīn. See n. 59, 60.
42. Nayl, p. 261.
44. Nubāḥī, op. cit., p. 201.
45. Ibid.
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.
Margaret Smith, *Al Ghazali, The Mystic* (London: Luzac, 1944), in Chapter XIII mentions other critics of al-Ghazâli and omits Turtûshi whose refutation of *Ihya* is one of the most significant and voluminous contributions towards a criticism of al-Ghazâli. The reason why she omitted this work is probably her statement about the co-operation between al-Ghazâli and al-Turtûshi. She said, "...al-Ghazâli in consultation with Abû Bakr Turtûshi, a well-known authority on law and tradition (d.520/1126), addressed letters of advice to Yûsuf (bin Tashufîn), urging him to govern with justice..." (p.21). She made this statement on the authority of De Slane's translation of Ibn Kahlûn's statement in this connection. The original statement by Ibn Kahlûn, however, as we quote below, does not imply a co-operation between al-Ghazâli and al-Turtûshi. This misunderstanding probably led her to suppose the above-mentioned fact. Ibn Kahlûn's sentences are as follows:

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 adresserent aussi des lettres de conseils et l'engagement de la manière la plus pressante à gouverner avec justice..."


Ibid., p.27.


67. See for instance Ibn Qâbitâ’s appointment to supervise a trust donated by the Sultan to a Zâwiya. See p. 104.

68. See p. 121 ff.


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

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


73. Ibid., p. 261.

74. Ibid., p. 189-90.

75. P. Nwiyâ, Ibn ‘Abbâd de Ronda, op. cit., pp. XXXIX and XL1 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-‘Arabi (Qâdî Abû Bakr) and Ibn ‘Hîrizîm are juxtaposed with Ghazâlî. Ibn ‘Hîrizîm, as has been pointed above, is known for his fatwâ against Ghazâlî’s Ihyâ‘, and Qâdî Ibn ‘Arabi’s commentary bears a general trend of opposition to Şûfism.


78. Shâtibi’s fatwâ issued in 786 A.H., preserved by Wansharîsî, 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 Mārīnī ruler, Abū Ȳūsuf Yaṣāqūb in 691 A.H., from whence it came to Andalus, Salāwī, Al-Istiqāṣ, 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 Qurān were recited, and animal sacrifices were offered. Maqqārī, Azhār al-Riyād, (Cairo, 1939), Vol. 1, p.245. Some fūqhā' considered this a bid'a, 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. Wanshariṣī, op. cit. Vol. IX, p.181.

80. See p. 117.


83. See Wanshariṣī, Vol. IX, p.31.

84. Ibid., pp. 34-36.
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: Hārat al-Taif wa Ruhlat al-Shimat wa al-Sayf and Midyār al-Ikhṭīār fi dhikr al-Maṣāḥid wa al-Diyār edited and published by A. M. Abbādī, in Mushahadat Lisan al-Dīn Ibn al-Khatib, op. cit. The above must be supplemented with the study of fatwās of this period (i.e. 14th century) by López Oriz, "Fatwas granadianas de los siglos XIV-XV, Al-Andalus, Vol. VII (1941), pp. 73-127.


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


9. Ţāhā, op. cit. I, p.38. Źāhā 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 Naṣīḍ treasury are given by Ţāḥā, op. cit. I, p.38. Źāhā 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.
11. For this information we have relied on Lopez Ortiz' s above-mentioned study. See Ibid, pp.95-97.


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


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 dinar was 4.11 - 4.35 grams in weight and 22-24 millimeters in diameter. The Muwahhidun introduced double dinars averaging 4.55 grams and 27-32 millimeters, whereas their normal dinar averaged 2.27 grams and 19-22 millimeters. The Nasrid dinar seems to have been better than its predecessors. Two specimens registered in M. H. lavoix, Catalogue des monnaies musulmanes de la Bibliothèque Nationale, Vol. V (Paris, 1891), pp.328-329, provide the following data:


18. Luis Seco de Lucena, in Documentos Arabigo-Granadinos, Instituto des Estudios Islámicos, (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.XLVII-XLVIII.

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

20. See Lopez Ortiz, op. cit. p.94f.
21. See such statements by early historians and geographers as quoted ex-
larly pp. 136-138, where the description by Razi, the geographer, is
quoted at length.


24. Ibid., p. 106 ff.

25. Ibid.


27. Ibid., p. 103.

28. In the days of Muḥammad V, the irrigation system was further improved.

29. On this point we are relying on E. F. Heckscher, "Mercantilism" in
H. W. Spiegel, *The Development of Economic Thought* (New York:


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

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


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


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


39. Ibid., p. 428.
40. See p. 87.
41. See p. 92.
42. Bastieva, op. cit.
43. Lopez Ortiz, op. cit., p. 95.
44. 'Inān, op. cit., p. 428.
45. Ibid., p. 97.
46. Ibid., p. 100.
47. Ibid., p. 110.
49. Ibid., p. 98.
50. Ibid., p. 94f.
52. Al- Qurān 90: 12-13: "What would make thee know what is an uphill task? The freeing of a slave or captive."
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 Miṣār al-Ikhtibār, op. cit., p. 78.
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.
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-Mīyār ... op. cit. Vol. II, p. 166; Vol. V, 186f.
11. See p. 184f.
15. Ibid., pp. 280, 284 and passim.
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.


27. Ibid., pp.20ff.
This chapter attempts to construct a sketch of certain significant events in Shâṭibi'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 Shâṭibi's interest in the philosophy of Islamic law.

When writing a biography of Shâṭibi, 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 Ahmad Bâbâ\(^1\) (d.1036/1626) Nayl al-Ibtihâj\(^2\) contains the first biographical notice on Shâtibi.

Among his contemporaries Lisân al-Dîn Ibn al-Khatîb (d.776/1374) and Ibn Khaldûn (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-Khatîb and Ibn Khaldûn would have known Shâtibi, he goes unnoticed in their accounts. Ibn al-Khatîb and Shâtibi had common teachers\(^3\) (and one of the sources even describes Ibn al-Khatîb as a pupil of Shâtibi\(^4\)) and common friends.\(^5\) Ibn Khaldûn wrote a treatise,\(^6\) in response to Shâtibi’s query addressed to the scholars in the West. Nevertheless, neither of these important writers makes mention of Shâtibi.

A possible explanation for this omission might be that Shâtibi had not yet written his controversial work, al-Muwâfaqât, when the other two composed their works. This is quite possible because Shâtibi refers to Ibn al-Khatîb’s Al-Iḥâta in his work (though without mentioning his name).\(^7\) This reference means that Shâtibi’s work must have been written after the completion of Al-Iḥâta, as we believe after 771/1369.\(^8\) This fact also explains Ibn Khaldûn’s omission of Shâtibi’s name. Ibn Khaldûn visited Granada in 764-65/1362-63\(^9\) while Shâtibi had not yet become a sufficiently controversial figure to attract notice at that time.

Among the authors of the Tabaqât of the Mālikîs,\(^10\) Ibn Farâhîn (d.799/1396), author of Al-Dîbâj al-Mudhahhab was Shâtibi’s contemporary, but did not mention
him. Since it cannot be established whether Ibn Farhūn was acquainted with Shāṭībī we cannot be certain that this exclusion of Shāṭībī from al-Dībāj was deliberate. One possible explanation could, however, be suggested.

Ibn Farhūn was born in Medina and, except for a few journeys to the West, 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. Besides, he had already completed al-Dībāj in 761 A.H. As was previously suggested, it is most probable that Shāṭībī had not yet written his al-Muwāfaqāt. Otherwise, Ibn Farhūn could not possibly have overlooked him. The basis of our conjecture is Ibn Farhūn’s insistence on including in his al-Dībāj only the names of those who had been authors of some books.

Badr al-Dīn Qarāfī (d. 1008/1599) is known to be the next writer of Ṭabaqāt after Ibn Farhūn. His Tawṣīḥ al-Dībāj is the complement of al-Dībāj. He too does not mention Shāṭībī. His reasons seem to be the same as those we suggested in the case of Ibn Farhūn. In a number of places, as Aḥmad Bābā points out in strong language, 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 Shāṭībī belong to the twentieth century, and they depend largely on Aḥmad Bābā’s notice.

Aḥmad Bābā treats of Shāṭībī in Nayl al-Ibtihāj as well as in Kifāyat al-Muḥtāj.
which supplemented the former. *Nayl* was written during Āḥmad Bābā's internment period in Morocco, where he was taken as a prisoner after the invasion of the Sudan by the Sultān of Morocco in 1591. There, Āḥmad 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.

The reasons why Āḥmad Bābā mentioned Shāṭībī while his predecessors did not, could be the following:

First, as a general reason, the *Nayl* was meant to be a supplement to al-Ďibāj; "complementing what was missing in it and supplementing it with (the mention of) those eminent aʿīma who came after him".

Second, he was certainly better informed about the learned tradition in the Muslim West than Qarāfi or Ibn Farhūn, and hence he was capable of making up the deficiencies of al-Ďibāj.

Third, he felt this deficiency more strongly because for a long time there was no other work on the subject but that of Farhūn, and this too suffered from grave faults.

Apart from such general considerations, Āḥmad Bābā's high regard for Shāṭībī may be suggested as a specific reason why Āḥmad Bābā mentioned Shāṭībī. This esteem is reflected in the honorific titles with which he mentions Shāṭībī. His regard for Shāṭībī further manifests itself when he disputes Abū Ḥāmid Makkī's claim for his master Ibn ʿArafa (d.803 A.H.) as "being peerless in taḥqīq
Ahmad Baba mentions Shafi'i as one example of scholars who were in no way lesser than Ibn 'Arafa. Elsewhere he says,

"Among the people of the ninth century (sixteenth) there are those who assert their attainment of the status of 'ijtihad, while Imam-Shafi'i and Hafid Ibn Marzqua (d.842/1438) declined it for themselves. It is certain that both of them had more profound knowledge (of Shari'a) and thus (were) more deserving of this status than those who claimed it."

We have dwelt long on the question of why Ahmad Baba first took notice of Shafi'i while others did not. Let us now discuss Ahmad Baba’s sources for his biography of Shafi'i.

Beside the sources mentioned towards the end of Nayl, the most significant among them being Wansharisi, Ahmad Baba used Shafi'i’s own work Al-Iftad wa’l Inshadat. This work seems to consist of Shafi'i’s class notes and of anecdotes narrated by his teachers. The extracts from this work, as quoted by al-Maqqari in his Nafal-Iftid and by Ahmad Baba in Nayl, indicate that the Iftadat must contain considerable information about Shafi'i’s teachers and himself. If that be so, Ahmad Baba’s information about Shafi'i 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 Iftadat as quoted in Nayl and Nafih. We have also used Shafi'i’s Al-Muwafaqat and Al-Istigam. The preface of Al-Istigam explains the circumstances that led to Shafi'i’s thought on Shari’a passing through various stages and how he was accused of “heresy.” Al-Muwafaqat refers to the discussions in which Shafi'i became involved with other scholars.
To sum up, we may say that the information which follows has been compiled from Nayl and from Shāṭībī’s own works.
SHĀṬĪBI'S LIFE

His full name is reported as Abū Ishāq Ibrāhīm b. Mūsā b. Muḥammad al-Lakhmī al-Shāṭībi. 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 Shāṭībi was born or lived in Shāṭiba before coming to Granada. 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.

Shāṭībi grew up in Granada and acquired his entire training in this city which was the capital of the Naṣrī kingdom. Shāṭībi's youth coincided with the reign of Sultan Muḥammad V al-Ghanī Bīllāh, a glorious period for Granada. 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 Khāṭīb being sufficient to illustrate our point.

Training

We do not know when and what subjects Shāṭībi 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, Shāṭībi 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 Muhammad b. ʿAlī al-Fakhkhar al-Bīrī who was known as the master of grammarians (Shaykh al-Nuḥāt) in Andalus. Shāṭībī stayed with him until the latter's death in 754/1353. Shāṭībī's notes about al-Fakhkhar in Ifādāt illustrate clearly that he received a thorough training in matters pertaining to the Arabic language.

His second teacher in the Arabic language was Abūʾl Qāsim al-Sharīf al-Sabtī (760/1358), author of the well-known commentary on Maqṣūra of Ḥāşim. He was called "The Bearer of the Standard of Rhetoric". He was chief Qāḍī in Granada in 760/1358.

The famous Andalusian faqīḥ Abū Saʿīd Ibn Lubb began his lectures in the Madrasa Naṣrīya in 754/1353. Most probably he succeeded al-Fakhkhar 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". Shāṭībī's training in fiqh was almost entirely completed with Ibn Lubb. Shāṭībī owes much to this man, but he also entered into controversy with Ibn Lubb on a number of issues.

We need not recount the names of all of Shāṭībī's teachers; 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-Maqqārī who came to Granada in 757/1356 on a diplomatic mission sent by the Marinī Sultan Abū Ṣanān. Maqqārī had an eventful career. Sultan Abū Ṣanān chose him as his chief Qāḍī, but soon Qāḍī Abū ʿAbd Allāh al-Fishtālī succeeded in having him deposed. Maqqārī was sent to Granada from
whence he refused to return to Fez. The Nasir Sultan arrested him and sent him back. Abu'l Qasim al-Sabti and Abu'l Barakat Ibn al-Hajj al-Balfiqi, qadi of Granada, followed him to Fez to secure his release. Nevertheless, Maqqari was tried by al-Fishtali and was convicted. 47

Maqqari's academic tastes were versatile. He is the author of a book on Arabic grammar. He was known as holding the rank of "muhaqiq" (expert on the application of general principles of the Malik school to particular cases).

Maqqari seems to have acquainted Shatibi with Razism in usul al-fiqh. He started to compose an abridgement of Fakhr al-Din al-Razi's al-Mubassal. 49 He is also the author of a commentary on Mukhtasar of Ibn Hajib who introduced Razism into Malik usul al-fiqh.

Maqqari is also responsible for initiating Shatibi into Sufism - a special Silsila of which we have spoken elsewhere. 50 Maqqari is known for his book al-Haqiq wa'l-raaqiq fi al-tasawwuf. 51

Mention must also be made of two of Shatibi's teachers who introduced him to falsafa and kalâm and other sciences which are known in the Islamic classification of the sciences as the rational sciences (al-ulûm al-aqliya) as opposed to the traditional sciences (al-ulûm al-naqliya).

Abu Ali Mansur al-Zawawi 52 came to Granada in 753/1352. Ibn al-Khatib 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
Shāṭībī mentions Zawāwī quoting his teacher, Ibn Musfīr, saying that in his commentary on the Qurʾān, Rāzī relied on four books, all written by the Muḥtazīlīs: in ṣūṭūt al-ḍīn Abū ʿĪsā al-Ḥusayn’s Kitāb al-Dalāʾīl, in ṣūṭūt al-fiqh his al-Muṣṭamad, in ṣūṭūt al-tafsīr on Qāḍī ʿAbd al-Jabbār’s Kitāb al-Tafsīr (?), in ṣūṭūt al-ʿArabiyya and boyān on Zamakhshārī’s Kashshāf. This comment seems to imply that Zawāwī and his teacher saw in Rāzī a continuation of Muḥtazīlī kalām.

Al-Shāṭīf al-Ṭilimsānī (d. 771/1369) also seems to have been critical of Rāzī. He studied with ʿAbīlī and specialized in the rational sciences. Ibn Khaldūn mentions that Tilimsānī secretly taught Ibn ʿAbd al-Salām the books of Ibn Sīnā and Ibn Rushd. Tilimsānī was well-versed in both the traditional and the rational sciences. Contemporary scholars laid stress on his attainment of the rank of Muṭtahīd. Ibn ʿArafa lamented Tilimsānī’s death as the death of the rational sciences.

From the above account of his notable teachers it may be concluded that Shāṭībī’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 ṣūṭūt al-fiqh, particularly the latter.

**Shāṭībī’s Interest in Ṣūṭūt al-Fiqh**

Fiqh was a very profitable and hence popular subject, but interest in ṣūṭūt al-fiqh was rare in the Andalus. What induced Shāṭībī to interest himself in ṣūṭūt 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 Şāṭībī 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 šari‘a’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 šari‘a 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 (usul 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 bida‘ 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-a‘lām (the majority)."

One of the most perplexing problems for Şāṭībī was the diversity of opinion among scholars on various matters. Use of the principle of murāṣat al-khila‘f made the problem even more complex. This principle, as we shall see below, 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. Şāṭībī himself recalled that the diversity in the statements of Mālik and his companions used to occupy his mind frequently.

Studying with Abū Sa‘īd b. Lubb, Şāṭībī 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 murād al-khilāf shows that Ibn Lubb's clarification was not satisfactory. Shāṭibi 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 Shāṭibi's works were dedicated to such an investigation.

Shāṭibi's Career

We do not find any allusion to Shāṭibi's career or to his profession. Three conjectures, however, can be made. First, in Shāṭibi'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 Gharāṭa.
Among his disciples, Ibn ʿĀsim is noteworthy. He became the chief qādi of Granada. He is known for his ʿUḫfat al-Ḥukkām, a compendium of fiqh rules compiled for qādis. He also wrote an abridgement of Shāṭibī's al-Muwāfaqāt.

His Death
Shāṭibī died in 790/1388.

Shāṭibī Accused of Heresy
Sometime during his career Shāṭibī was accused of introducing innovations (bidā'). The exact date of this period of trial is not known. The inquisitive mind of Shāṭibī led to discussions and controversies with other fuqaha'. 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.

Shāṭibī recounts the story of this ordeal in Al-ʿIṣām in the following words:

"I had entered into some of the common professions (khutat) such as khutaba (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). ...."
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.  

Shaṭībi, at this point, enumerates the following charges that were laid against him:

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 (ṣalāt).

2. I was accused of ṭālī (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 khutba (Friday sermon).

3. I was accused of saying that I favoured rising against the aʿīma (the ruler)...that was because I did not mention their names in the khutba.

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 sūfis who opposed sunna..."  

Shaṭībi was accused of bidʿa (heresy) mainly because he opposed the practices of the fuqahāʾ. Particularly, as we shall see later, one of the controversial problems was that of mentioning the name of the Sulṭān in the khutba and praying for him towards the end of the ritual prayers. Shaṭībi 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 qādis in Spain and North Africa as well as by some dignitaries holding government offices.

Shāṣībī's account of his trial for bidā, refers to the controversies that brought him into conflict with other scholars. What follows are the details of his main disputation. Here we have limited ourselves to theoretical problems.
SHĀṬĪBĪ'S DISPUTATIONS

Taṣawwuf and Fiqh

Shāṭībī was much worried not only by the fact that taṣawwuf comprised a number of rituals which he considered as bida', but also by the fact that taṣawwuf was having an adverse effect upon fiqh and usūl. He did not oppose the sūfīs on certain matters if they followed their peculiar practices individually or as a requirement of taṣawwuf. What he opposed was that certain sūfīs or certain fudhūlī under the influence of taṣawwuf should suggest that these things were obligatory in a fiqh sense. The following two issues became very prominent in this concern.

1) The obligation of freeing one's inner self (siyū)

A certain scholar sent an epistle to Shāṭībī 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

Shāṭībī 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 ṭariqas, ṣūfism passed into a new phase. In the previous phase, more significance was attached to books on taṣawwuf. In the new phase, however, as we have pointed out earlier in the story of Abū l-Ma‘ālī, the initiation without a shaykh was considered forbidden.

Such an emphasis on submission to a shaykh generated a debate among the scholars.

According to Shāṭībī 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. According to some ṣūfīs, including Qushayrī, ṣūfism was nothing more than spiritual fiqh (fiqh al-bājin). It was, therefore, questionable for Shāṭībī that one should submit oneself totally to a shaykh to be initiated into a discipline; the discipline could be known from books.

Shāṭībī 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-Miṣyār al-Mughrib. They are reproduced by Paul Nwiya in Al-Rasā‘īl al-Sughrā of Ibn ʿAbbād and commented and elaborated in his well-known work Ibn ʿAbbād de Ronda. The third answer was written by Ibn Khaldūn in Shifā al-sā‘īl li taḥdhīb al-masā‘īl, available in two editions by Ṭavīt Ṭanji and by Khalifā.
Ibn 'Abbad maintained that, "on the whole, the (submission to a) shaykh is an essential fact in the journey on the path of tasawwuf; no one can deny that". He, however, distinguished between two kinds of shaykhs: Shaykh al-Tarbiya (educator) and Shaykh al-Ta'lim (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'akhkhirin) sufis, while the ancients relied on the "instructor" shaykh.

Ibn 'Abbad stressed that the initiation to the mystic state (hāl) exclusively belonged to special individuals. No one could open its doors except those whom God had chosen for that purpose.

3) Invocation after Prayers

The mention of the ruling Sultan or Khalifa as a symbol of legitimacy had long been accepted in practice. Al-Muwâhidûn gave the practice much more significance by making some additions. Especially the Muwâhid Caliph 'Abd al-Wâhid al-Rashîd (630-640/1232-1242), fearing the dissensions among various groups of the family and in order to check a general decline of al-Muwâhidûn, re-established Ibn Tûnâr's institutions which had been discontinued by such caliphs as al-Manṣûr (580-595/1184-1199) and al-Idris Ma'mûn (620-630/1229-1232). 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 fugahā about the consensus on the acceptance of this practice, Shāṭībī 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 fugahā, namely Abū ʿAbd Allāh b. Mujāhid (d. 574/1178) and his disciple Abū ʿImrān al-Mīralī, opposed it at the risk of their lives. 88

The practice continued even after the Muwahhidūn, obviously for political reasons. Most probably it was Shāṭībī who publicly opposed this practice by disregarding it whenever he was leading the prayers. This public act of defiance raised havoc for Shāṭībī. The issue became a subject of heated discussion; Shāṭībī, however, did have some followers. From a letter written by Shāṭībī to one of his followers, it appears that an imām who rejected this practice in favour of Shāṭībī'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 Shāṭībī were the following: one by the Qādi of Andalusia, Abū ʿl Ḥasan al-Nubāhī's Masʿalat al-ṣalāt, 90 the other by the mufti and mushāwir of Granada and Shāṭībī's teacher Abū Sāʿid ibn Lubb. The book is called Masʿala al-
Shâtibî’s disciple Abû Yaḥyâ ibn ʿÂsim (d. 813/1410) then wrote, refuting Ibn Lubb and supporting Shûtibî. 92 Muhammad al-Fishtâli, the Qâqî al-Jamâ’a in Fez wrote a refutation of Ibn ʿÂsim, supporting Ibn Lubb, entitled Kalâm fi’d-dûa’ ba’d al-salât al-hay’a al-mahûda. 93 Ibn Ṭarafa (d. 803/1400), the Qâqî of Tûnis, also entered into the discussion when he was asked for a fatwâ on this issue by someone in Granada. 94

Shâtibî considered this practice of du’â a bid‘a, while the other fugah6’ accused him of introducing a bid‘a by opposing the practice. One result of this discussion was that a rather clear definition of “bid‘a” emerged in Shâtibî’s discussion of this issue.

Allowance for the Disagreeing Opinion (Murâ‘ât al-Khilâf)

It has been stated earlier that the aspect of disagreement in Mâlikî fiqh was the problem that struck Shâtibî’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 maqâṣid al-sharî‘a (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, Mâlikî 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. It was essentially this position that Shāṭībī came to adopt after lengthy discussion. Shāṭībī's views are discussed towards the end of this section.

Secondly, the position was taken under the influence of the tasawwuf. 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 rukhsa (concession) in contrast to azīma (regular) cases which were the only path to be followed by a resolute person.

Shāṭībī 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-waraʾ biʾl khurūj an al-khilāf" (piety consists in avoiding (the cases of) disagreement).

Under the impact of tasawwuf, this position had been accepted by a number of fuqahāʾ as well. Shāṭībī did not question the attitude of Ṣūfīs towards rukhsa as an attitude appropriate to the khawāṣṣ (special, élite) and Arbāb al-Ahwāl (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 "warāf" as obligatory for everyone.

Shātibī 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.

In his question, Shātibī 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 sharīʿa were like mutashābihāt (equivocal statements) which the sayings of the Prophet urged to be avoided. Shātibī 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 sharīʿa. Ibn 'Abd al-Salām also condemned the trend to choose the more convenient of any two fatwās.

The third position regarding differences of opinion was that held by scholars who
considered the existence of "disagreement" as proof of permissibility. Shàtibî distinguished "disagreement" from murācāt al-khilāf which is discussed below. He stated this position in the following words:

"Often a fatwā on a certain question recommended abstention (manṣ) 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 murācāt 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, Shàtibî differed and disputed it with a number of scholars. Among them the names of Ibn Qaddām, Fishtālī, Ibn Ārafa and Shàfī Tīlimsānī 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 Shàtibî posed to the scholars are the following:

In Granada there arose a problem in which different opinions were attributed to Mālik. According to the usūl 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 (qarūra), Mālikī fugahā adopted
the principle of murā'at al-khilaf, but the application of this principle posed
a number of problems.

Shāṭībī 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 Shāṭībī were the following:

i) It disregarded the established principle of usūl 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"
(murā'at al-khilaf). 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
Shari'ah as a principle of fiqh is not known. Apparently this
problem refers to the evidence (dalil). 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.
Thus murātāt al-khilāf would mean granting each one of such statements what is required by the other, entirely or partially.

Sharīf Tilimsānī answered the question by refuting Shāfi‘ī'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 (shārī‘). He distinguished among shārī‘, "mujtahid muṭlaq" and "mujtahid fi‘l madhhab". Since it was the shārī‘ 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 "fi‘l 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 shari‘a; the mujtahid fi‘l 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 shari‘a, 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 murātāt 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 sharī'ī by neglecting any of them one would be committing the wrong of rejecting sharī'ī evidence.

Tilimsānī's elaboration, however, did not answer Shābi'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 sharī'ī bearing on the same case.

Ibn Ṭ'ārīq's answer was longer than others. His answer consisted partly of the arguments already seen in Tilimsānī's answer and partly of whittling down Shābi's use of terms to contradictions.

He explained the principle of murācāt al-khilaf from a different perspective.

He defined murācāt as abiding by the implications of sharī'ī evidence in a given case (madhhab) 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 murācāt 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 'Abd Allāh 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.

Ibn al-Qabbāb's answer was very succinct and brief. He regarded murāṣat al-khilāf as one of the best principles of Malikī 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 ṭa’āruḍ (conflict) and tarjīh (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 murāṣat al-khilāf.

Shātibī's Views

Shātibī 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 murāṣat like that of tarjīh. The only answer that pleased Shātibī was that of Ibn al-Qabbāb who agreed with him that the problem was really very abstruse.

Shātibī contemplated this problem for some time and reached his own conclusions. He came to believe that there was no place for "disagreement" in sharī'a such as that which constituted the basis of murāṣat al-khilāf. Hence the principle of murāṣat was a false problem.
The main conclusion that Shāfi‘ī reached was the unity of the origins of shari‘a. He maintained that, "all rules of shari‘a 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 Qur’ānic verses stress the original unity of shari‘a 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 (usūliyin) 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 shari‘a itself that seem to favour disagreement. Among these three factors are worth noting:112

First, the existence of mutashābihāt (equivocations) in the Qur‘ān. 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. Shāṭībī dis-
cussed the problem of mutashābihāt in detail in al-Muwafaqāt. He maintained
that there was no tashābuh in the fundamentals of sharī'a. 113

Shāṭībī also disputed the assertion that tashābuh was the intention of the Law-
giver. Dealing with the matter in detail, he distinguished between two intentions
(īrādat) of the Lawgiver. One was  

khalqīyya ṣadāqīyya (creational predestined
intention) in which human will had no place. 114 The second was ṣamriyya ṣa-
tashrīqiyya (imperative legal intention) in which Divine Will did not impose itself
on human will. Shāṭībī 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 sharī'ī permission for the exercise of ijtiḥād
(legal reasoning) which, it is maintained, would naturally lead to disagreement.
Shāṭībī 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 cor-
rectness or error depended on its correspondence with the intention of the Lawgiver
which does not favour disagreement.

Third, an analogy was drawn from the existence of the principle of rukhā in sharī'ī.
This principle, which means to opt for a concession from regular rules in special
cases, allows for the existence of disagreement.

Shāṭībī refuted this argument by stressing that rukhsa 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 shari'a. The principle of rukhsa is applicable only in those cases where it becomes hard or impossible to abide by the regular rules. Thus, in fact, rukhsa 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.

To conclude Shāṭībī's arguments, it may be said that he understood khilaf (disagreement) essentially as tāṣū simultaneous al-badilla (contradiction of evidences) while for others it meant essentially tasāwi al-badilla (equal validity of evidences). Hence, for Shāṭībī khilaf involved the problem of tāṣū simultaneous al-badilla (preponderance) while for others it involved only the problem of jamā' (combining) or murāfāt (making allowance).

Shāṭībī's methodological objection concerned the distinction made by Mālikī scholars between muttafaq salayhī (agreed upon) and mukhtalaf fihī (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 fihī, however, the evidence on which the opposing decision was based must also be considered. Shāṭībī viewed the above standpoint as inconsistent. If it were shari' evidence which provided the basis of a decision, then why was it to be disregarded if it opposed a muttafaq salayhī? Why should a decision be considered as mukhtalaf fihī when it was based on a shari' evidence?
To agree with the upholders of khilaf would mean, for Shâbibi, to believe in the existence of contradictions or diversity in the principles of sharica. This belief would be a negation of the unity of the origins of sharica.

It was, however, difficult to explain this unity in the presence of an obvious diversity of evidences in the sharica. Shâbibi, in his investigation of this problem, came to conclude that the unity of sharica could be explained by the unity of the intentions of the Lawgiver. The result of these investigations was his doctrine of magâsid al-sharica (the objectives of sharica). This doctrine constitutes the basis of Shâbibi's legal thought. An elaboration of this doctrine and its theoretical and methodological implications are discussed later.
The following is a list of Shāfībī's works known to us. They belong mainly to two fields; Arabic language and grammar, and jurisprudence.

1. **Sharh ʿalā al-khulaga fi al-nahw.** A commentary on *Alfiya* by Ibn Mālik, in four parts:

   Mentioned in:
   

   Ms. al-Azhariyya /1487/ 10806. Beginning:

   
   Four volumes containing Parts I, II, III and V, written in old naskh. Copyist's name: ʿUmar b. ʿAbd Allāḥ al-Manṣūrī. 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.

2. **ʿUnwān al-ittifāq fi ʿilm al-ishtīqāq.**

   Mentioned in:


Mentioned in:

(i) Nayl, 49; (ii) Al-ʿAlīm, 1, 71; (iii) Shajara, 1, 231. Ṣhāṭībī mentions both of the above books (i.e., nos. 2 and 3) in his Sharḥ al-Alīya but Aḥmad Bābā recalls reading elsewhere that Ṣhāṭībī destroyed both of those works in his life-time. 118

4. Al-Ifādāt waʾl inshādāt/ inshāʾāt.

Mentioned in:

(i) Nafḥ, VII, 187-192, 276-301; X, 139-140; (ii) Nayl, 48; (iii) Sarkīs, Muṣjam, 1090; (iv) Al-ʿAlīm, 1, 71; (v) Kaḥṣāla, Muṣjam, 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 Ṣhāṭībī’s collection of class notes and discussions. 119 Maqqārī and Aḥmad Bābā, both have used it as a source of information about the scholars whom Ṣhāṭībī mentioned in this work. 120


6. Al-Muwāfaqāt. The original title being ʿUnwān al-taṣriʿ bi ʿasrār al-taṣlīf. An epitome of this work was done by Qāḍī Abū Bakr b. ʿAsim (d. 829 A.H.). 121

Published: (a) First published in 1302/1884 in Tunis by the Tunis government

(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 Matbaʿ al-Islāmī, Cairo, edited by Muḥammad al-Khīḍr Ḫusayn, 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 Matbaʿ Muṣṭafā Muḥammad (n.d.), edited with extensive notes by Shaykh ʿAbd Allāh Darāz.

(e) Fifth print in Matbaʿ Muḥammad ʿAlī, Cairo, in 1969, edited by Muḥammad Muḥdiy al-Dīn ʿAbd al-Ḥamīd.

A summary view of its contents is presented in Appendix A.


(a) Partly published in Al-Manār, XVII, (1333/1913). 122

(b) Published in Matbaʿ 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 Shātībī. The catalogue, however, attributes this treatise to Shātībī and, significantly enough, it describes it as having been written down by his (Shātībī's) pupil (?) Ibn al-Khaṭīb.124

The probability that Shātībī was the author of this treatise is heightened by the following points. Among Shātībī's teachers, there is mention of one al-Shaqqūf.127 We have no further information about him. From other sources we know that a family from Shaqqūra was known as a family of physicians. Among them Abū Tamām Ghālib al-Shaqqūrī and Abū ʿAbdullāh al-Shaqqūrī 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 Shātībī, having been taught by one of these Shaqqūrī's, had an education in medicine and hence could be the author of a medical treatise.

2. Available to us in two editions; in Maghribī script, (Fas: Matbaʿa 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:


4. See p. 199.


6. Ibn Khaldūn's Shifāʾ al-Sāʾil li Tahdhīb al-Masāʾil, ed. by Muḥammad b. Ṭāwīl al-Tīnī (Instāmbūl, 1957) was written in response to a query sent to scholars in the west of whom the names of Ibn Qabbāb and Ibn Abbād are confirmed by Wanshariṣī. The attribution of this treatise...
to Ibn Khaldūn has been doubted by scholars (see: Taibī, "Ibn Khaldūn", E.I. (2nd edition), Vol. III, p.828. Talī, the editor of this work, however, argues in detail in favour of such attribution. He is of the opinion that it was Shātībī whose taqyīd (query) is referred to in this treatise. See his Introduction, p.1.


8. Various dates have been suggested for the year when Al-Iḥṣāt 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-Khatib enumerates among the works of Ibn Khaldūn, already completed, a treatise on logic which he wrote for Sūltān Muḥammad V of Granada. We know that Ibn Khaldūn's stay in Granada was in 764-65. Hence the date of Al-Iḥṣāt must be after 765/1363. 2) Secondly, Al-Iḥṣāt 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-Iḥṣāt must have been finally completed in 771/1369.


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-Iḥṣāt (of which probably the fragments were available to him). Al-Qabbāb's commentary on Qawā'id al-Islām is noticed in the following manner: "someone among my pupils mentions that he (i.e.al-Qabbāb) wrote a commentary on Qawā'id al-Islām". 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.


15. See Fagnan, op.cit. p.111.
Still in Manuscript form. (Bibliothèque Nationale de Paris No. 4627, also No. 4614; Zaitûna, No. 3245) vide Fagnan op. cit. p. 111.

See for instance Nayl, pp. 51, 52, 88.

Among these notices we may mention the following:

Ignaz, Goldziher, Streitschrift des Ġazâlî gegen die Baṭintijja - Sekte (Leiden, 1916), pp. 32-34, where he discusses Al-Muwāfaqāt.


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.

Nayl was completed in 1005 A.H. (Fagnan, op. cit.). For details on this invasion and Abūd Bābā’s life, see the sources mentioned above in n. 1.

Compare the sources mentioned towards the end of al-Dībāj by Ibn Farḫūn and those mentioned by Abūd Bābā for his Nayl. Abūd Bābā’s sources mostly relate to the Muslim West, while Al-Iljām is the only source related to the Muslim West, which is mentioned by Ibn Farḫūn.

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 muqāṭat al-Khīlāf. See Ibn Maryām, Al-Bustān fī Dīhkr al-Awliyā’ wa-l-Ālamā’ bi l-Tīlīmān, Ed. Muḥammad b. Ṣheve (Algiers, 1326 A.H.), pp. 194-195.

27. Ibid.

28. Ibid., p.217.


30. See Nayl, pp.69, 283, 346.


34. I. Goldziher, Streitschrift des Gazoli 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 Précursure 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.


36. See p.86ff.


42. Shajara, p.230.
43. See pp. 182, 222ff.
44. Nayl, p. 47.
47. Nayl, p. 250
50. See p. 117f.
52. Nayl, op. cit. p. 245, 346; Shajara, I, p. 234. Zawawi was alive until 770 A.H.
54. This extract from Shatibi's al-Ibadat is quoted by Ahmed Baba in Nayl, p. 346 and by P. N wiya, in Ibn Abbâd de Rondo, p. XXXIX, No. 2.
55. Mubsin Mahdi, op. cit. p. 35, n. 2; Nayl, p. 256.
57. Nayl, p. 258.
58. The lack of interest in usul al-fiqh is observed by Ibn Sa'id as quoted by Maqarrî in Naft al-Tib, Vol. I, p. 206.
60. See p. 184ff.
61. Nayl, p. 221.
62. Ibid.
64. Shāṭībī, 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 bidʿa practices. See Wanshariṣī, Miṣyār al-Mughrib, Vol. XI, p. 109.


67. Ibid.

68. Al-Iṣābā, op. cit. p. 9f.

69. Ibid., p. 11.

70. Ibid., p. 11 ff.

71. See p. 182ff.

72. See p. 183ff.


74. Ibid., 1.103.

75. Ibn Khaldūn, Shiḥạl 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-Iṣābā, op. cit., p. 208.

78. Ibn Khaldūn, Shiḥạl al-Sā'il, op. cit., p. 11.


81. Ṣāʿīt Ṭanṭā. Ṣāʾīt. Our references to Shiḥạl are based on this edition.
84. Ibid., p. 107.
85. Ibid., p. 109.
91. Shajara, op. cit. p. 231.
92. Ibid., p. 247.
93. Nayl, op. cit. p. 266.
101. Ibid.
103. Ibid., p. 254.
104. Ibid.
105. Ibid. and Nayl op cit., p.262.
107. Ibid., p.274.
108. Ibid.
109. Ibid., p.271.
111. Ibid., pp.118-132.
112. Ibid., pp.211-214.
115. Ibid., Vol. IV, p.127.
116. Ibid., p.144ff.
118. Nayl, op.cit., p.49.
119. See above. Recently P. Nwiya (Ibn 'Abbād 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.
122. These extracts from al-‘Iṣām were mistaken for extracts from Al-Muwāfaqāt by I. Goldziher, and the same mistake was carried on in Brockelmann.
124. Ibid.

125. Nayl, p. 47.


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 Sūfī tariqas, the influence of Razism, and the establishment of a madrasa system were particularly important contributions to the decline of the supremacy of the fāqahāʾ. 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 ʿIṣḥāq Shāṭibī. This study is, therefore, based on Shāṭibī's fatāwā which are available in the following sources:

1) Al-Wansharīsī, Al-Mīṣyār al-Mughrib..., 12 volumes.  
2) Lopez Ortiz, "Fatawa Granadinas..." In this study, in addition to the above-mentioned Al-Mīṣyār, Lopez Ortiz used another collection of fatāwā that still exists in manuscript form.  
3) Certain references to Shāṭibī's fatāwā in the following: Al-Muwāfaqāt, Al-İtiḥād, Nayl al-İbtihāj.

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 hadīth qudsi, 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 hadīth implies anthropomorphism, but without denying the authenticity of the hadīth, he explains how the
apparent anthropomorphic implications can be removed by the method of *ta'wil* (interpretation).

Strictly speaking, "exegesis" is not a *fiqh* 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 Qur’ānic 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.
Shatibi in very clear terms declared that the šūﬁ was a kāfīr, and that he must be sentenced to death (wājib al-qatl). This "šūﬁ" rejected and ridiculed the "sharīqa" and its transmission and mocked the names of God.6

This fatwâ appears to disagree with Shatibi's view on heresy. As Fazlur Rahman has pointed out, Shatibi 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 Shatibi 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 Shatibi does not correspond with his absolute belief in the kufr of an individual šūﬁ or in the unacceptability of the practices mentioned in the fatwâ. We do not, however, here face a contradiction. Rahman's observations are derived from a certain context where Shatibi 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? Shatibi, 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; Shatibi'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. Shāṭibi dismissed the objection and declared this industry lawful. Quoting earlier Mālikī jurists, Shāṭibi 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.

ii) 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 ḥibādāt. In his response to the inquiry about these practices, Shāṭibi condemned them on two grounds: first, that they were ḫidā (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 Shāṭibi in this regard included the following:

a) Reciting in congregation the Qurānic chapter Yāsīn on the occasion of bathing the deceased in preparation for burial.
b) The practice of the group of people called süfiyya who assembled in some zāwiya, performing dhikr (chanting the names of God or some such formula), singing and reciting poetry.

c) Congregational recital of the Ḥizb (certain prayer formulas).

d) Recital of certain books in congregation in the mosques.

e) The congregational invocations after the regular prayers (ṣalāt).

f) The practice of insisting on the completion of the recital of the Qurān in the month of Ramaḍān.

g) Saying loudly the takbīrs (the formulae declaring the Greatness of God) on the eve of ʿĪd prayers.

h) Shaking hands and embracing each other after the ʿĪd prayers.

i) Adding certain sentences in the ʿadhōn (call to prayer). In Al-Jītīṣām, Shāhībī refers to the practice of adding the following in the call for morning prayers: "The day dawned, praise be to God".

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. Shāhībī considered the custom equivalent to maṣṭam (mourning) which was forbidden in Mālikī fiqh.

Whereas the above ten responses emphatically rejected the common religious practices as bid'a, there were two customs in regard to which Shāhībī showed flexibility. In Mālikī fiqh uncleanliness (naẓṣa) is a legal qualification (ṣīfa ḥukmiyya) in opposition to sensory (ḥissiyya) or rational (ṣaqliyya) qualification. Cleanliness (tahāra) can be determined only on legal bases. Khamr (wine) and mayta (a corpse) are unclean according to the Qurān. 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 Shābībī for an opinion. In one case a piece of earthenware was made unclean by khamr; 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) 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.

Shābībī, 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.

In the case of books, Shābībī 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.
iv) **Family**

Someone repudiated his wife with the regular expression of the formula of divorce, and after some time he also pronounced *zihār* (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. *Shāṭībī* was asked about this case; whether the divorce had occurred or not. Treating *talāq* and *zihār* as two distinct acts, *Shāṭībī* advised that in the *Mālikī* school one declaration of repudiation was revokable (*rajīf*) 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 *zihār*.

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 apostasy. 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. *Shāṭībī* 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-Mal. 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 apostasy, 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 (shawāṣ). 33

v) Property
a) Objects of property: As referred to earlier 34, some of the cultivated land around Granada along the river Maṣūra (?) 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 'Abd Allāh al-Ḥaffār, who was appointed as supervisor of awqāf. 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.

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 ḥabbās (trust properties) were attached to them. The officer in charge of these ḥabbās 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 ḥabbās. Whereas there were some restrictions in the case of ḥabbās, 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 taṣyīn (non-specification). Because of taṣyīn, the increase from ʿahbās 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 ʿahbās were specified for mosques but that the mosques were not specified individually. Shāṭībī, however, explained that, formerly, these ʿahbās 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

Shāṭībī took a similar view in another case of ʿahbās. Someone bought the trees on a tract of land that was adjacent to a ḥāb property. A doubt passed through his mind that this tract of land might be the anqād (the demolished and unused part of an estate) of that ḥāb. In Mālikī fiqh, the act of sale of a ḥāb 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 anqād of a ḥāb and, after the ḥāb and milk (ordinary property) were confused or joined deliberately, to share the income of such a sale. The person concerned asked Shāṭībī what to do.
Sha'tibi replied that the practice of combining habās 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 habās itself. The Mālikī scholars had different opinions. Yet Sha'tibi 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. Sha'tibi differed on this point on the basis of his distinction between bayt al-māl and habās.

He advised the person in question to go to the court for the cancellation of the sale contract; otherwise, he should appeal to the Sulțān. This person accordingly appealed to the Sulțān after securing fatāwā from ʿAbd Allāh Ibn al-Ḥaffār and Ibn ʿAllāq which were endorsed by Sha'tibi. The Sulțān accepted the opinion of the muftīs and referred the case to the qāḍī concerned. Despite the Sulțān’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.

vi) Taxes

In the three fatāwā pertaining to taxes, Sha'tibi departed from the traditional viewpoint. In fact, Lopez Ortiz interpreted this departure as
"the skill of an economist from the fiscal point of view." Two of these fatwa concerned kharāj and one was about zakāt.

In view of the deteriorating financial conditions, the Sultan 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 shari'a.

Shāṭibī disagreed with Ibn Lubb. He viewed taxation from the point of view of mašlaḥa (public weal). His idea was, and he quoted Ghazālī and Ibn al-Farrā'ī 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.

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. 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.

Shātībī 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. Shātībī, therefore, opined that the products of the artisans should be taxed, as they were potentially sold merchandise.

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. We should keep this observation in mind as we turn now to the responses which Shāfiʿī made to inquiries about contracts.

a) Contracts of Sale: Shāfiʿī 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 āthārs (pharmacists and general merchants) were obliged to abide by that prohibition.

In his response, Shāfiʿī, first of all, denied any special concession
Cities (or countries) could not be classified on these bases; even the ḥādin (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 ḥādin but not to an ḥarbī. Shātibī 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 ḋattārs, 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 Shātibī 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 ḋattārs 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 Shātibī 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 ghasshsh (adulteration), analogous to the mixing of saffron with yellow colouring powder. Shētībī 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.

Shētībī 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. Shētībī was asked if such a sale contract was valid.
He responded that, since the stipulation of a contract of sale (the offer, *āqāb*, and acceptance, *qubul*) 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' (ījāra). 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 muzāra'a the lease of a field. Early Mālikīs maintained distinctions between the two and regarded muzāra'a as valid only if the field were situated in the middle of the plantation. Later, however, it seems that this stipulation was no longer observed, and muzāra'a 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 (underdetermined 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 muzāra'a and musāqāt.

Santillana marked out four basic types of contracts of muzāra'a in Mālikī fiqh involving situations where:
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-zār*), 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 *mukhtass* lands belonging to *bayt al-māl* were leased to cultivators with the stipulation that everything 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 Shāfībī 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 *muzārafa* according to Māliki 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 *muzārafa* 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 *mazāqī* 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.

Shaṭībi, 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.

Shājībī responded that, in principle, the wages not be paid from the produce, but if the case were made analogous to muzāra'a 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. Shāṭibi explained that, in principle, the mixing of milk in unequal quantities to make cheese could not be allowed because it resembled muzābāna (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 rafī‘bāraj (removal of hardship). The consideration of bāraj 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. Shāṭibi 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. Shāṭibi 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: Shāṭibi was asked whether it was allowed for an imām (leader of prayers) to live on income from the habs of a mosque, without any other vocation. Shāṭibi 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 muṣīn al-dhabh. 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 muṣīn al-dhabh was to safeguard maṣlaḥa (public interest) in the observance of shari'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 Muhammad used to eat meat brought by badawīs after simply saying the name of God. 58

Abū ʿAbd Allāh 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-qādiyya). 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.

<table>
<thead>
<tr>
<th>Subject matter</th>
<th>Total number of cases</th>
<th>Those which imply social change</th>
<th>Related to the general social conditions</th>
<th>Shāṭibī's attitude</th>
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<td>1. Exegesis</td>
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<td>2. Theological matters</td>
<td>2</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>3. Ritual and worship</td>
<td>12</td>
<td>11</td>
<td>1</td>
<td>10</td>
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<tr>
<td>4. Family</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>3</td>
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<tr>
<td>5. Property</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>4</td>
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<tr>
<td>6. Taxes</td>
<td>3</td>
<td>3</td>
<td>-</td>
<td>3</td>
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<tr>
<td>7. Contract and obligation</td>
<td>11</td>
<td>11</td>
<td>-</td>
<td>11</td>
</tr>
<tr>
<td>8. Procedure</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>TOTAL</td>
<td>40</td>
<td>34</td>
<td>6</td>
<td>34</td>
</tr>
<tr>
<td>PERCENTAGES</td>
<td>100</td>
<td>85</td>
<td>15</td>
<td>85</td>
</tr>
</tbody>
</table>

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 Rejected adaptation

social change to social change

<table>
<thead>
<tr>
<th></th>
<th>Adaptation to social change</th>
<th>Rejected adaptation to social change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Exegesis</td>
<td>-</td>
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<tr>
<td>2.</td>
<td>Theological matters</td>
<td>1</td>
</tr>
<tr>
<td>3.</td>
<td>Ritual and Worship</td>
<td>1/12</td>
</tr>
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<td>4.</td>
<td>Family</td>
<td>3/5</td>
</tr>
<tr>
<td>5.</td>
<td>Trust (Property)</td>
<td>-</td>
</tr>
<tr>
<td>6.</td>
<td>Taxes</td>
<td>3/3</td>
</tr>
<tr>
<td>7.</td>
<td>Contract and Obligation</td>
<td>6/11</td>
</tr>
<tr>
<td>8.</td>
<td>Procedure</td>
<td>-</td>
</tr>
</tbody>
</table>

The subject matters in which Shāṭībī 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 Shāṭībī. In matters relating to theological matters, ritual and worship, and
trust he rejects adaptability of law to the social changes by declaring these changes *bid'a* (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 *Shāfi‘ī* does not invoke this principle in other matters. Apparently a social change affecting the above mentioned subject matters implied, for *Shāfi‘ī*, 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 *Shāfi‘ī*’s concept of *bid'a* 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), *ṣadām haraj* (removal of hardship) and *māslaha* (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 analogous 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 muzāra'ah 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 (taqlid) to Mālikī fiqh in order to borrow from other schools. This method, though employed by other jurists, was rejected by Shāfiʿī because 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 usūl al-fiqh in order to investigate the foundations, objectives and purposes of Islamic law.
It would not be accurate to presume that Shâtîbî alone was facing these problems. It is true that Shâtîbî invoked the general principle of *masla*ha more often than other jurists, still, it is important to note that other contemporaries of Shâtîbî, Ibn ʿAllaq (d. 707 A.H.), Ibn ʿAṣim (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*, *darūra*...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 fāl-zar* 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, Shâtîbî and other jurists resorted to general philo-
sophical principles such as *mašlaḥa*. 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. Shāṭibi sought this justification in the principle of *mašlaḥa* as we shall see in the following chapters. There were, however, certain theoretical and methodological objections raised by the jurists against using *mašlaḥa* as a method of legal reasoning. Shāṭibi’s analysis of *mašlaḥa* cannot be fully understood without a general understanding of such objections. The following chapter, therefore, outlines the development of the concept of *mašlaḥa* in *uşūl al-fiqh* prior to Shāṭibi.
1. These fatâwâ are recorded by Al-Wansharîsî, Al-Miṣyâr al-Mughrîb ân fatawëi C'ularrKi' IfrfqiyawatlAndaluswa'l Maghrib (Fâs, 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 Escurialensis, I, 460/no:1,096. vide Lopez Ortiz, op. cit.

4. Ḥadîth qudsî, in opposition to the ḥadîth nabawi, represents those sayings of the Prophet in which the actual "word of God" is believed to be found, whereas ḥadîth nabawi represents the sayings attributed to Muḥammad. See Shorter Encyclopedia of Islam, article Ḥadîth, 117.


7. F. Rahman, Islamic Methodology in History (Karachi, 1965), 166.

8. Ibid.


13. Most probably the practice of ḥizb was introduced into the Andalus with the Shadhiliyya. The most well-known ḥizb, ḥizb al-bahr, which was supposed to be chanted while crossing the sea, is attributed to Abū'l Ḥasan Shadhili. See D. B. MacDonald, "Ḥizb", E.L. (2nd ed.), Vol. III, 513-14.


15. Ibid.

16. Ibid., see also Ch. IV. p. 182f.

17. Ibid., 89.

18. Ibid.

19. Ibid.


24. The fiqh 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..."


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.
37. Ibid.
38. Ibid., Vol.VII, 68.
See also Bercher's note: 873, p. 387.
41. Lopez Ortiz, op.cit., 97.
42. Ibid., 85; Nayl, 49; Miṣyār, Vol. XI, 101-107.
43. Al-Mudawwanat al-Kubra, 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:

On p. 294, Mālik states about zakāt on fruit as follows:

44. Ibid., Vol.V, 186-187.
47. Ibid., 19.

50. Santillana, loc. cit.

51. Lopez Ortiz, op. cit., 97. Shâ'îbî's fatwa is understood better in the context of the following two stipulations of musaqaat, mentioned by Ibn ʿAšîm:

(i) ًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًًً®
CHAPTER VI

THE CONCEPT OF MAṢLAḤA BEFORE SHĀΤĪBĪ

Shāṭībī's doctrine of maqāṣid al-Sharī'ah, 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 ṣūrūt al-fiqh prior to Shāṭībī. 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-h. The verb ᵍᵃᵘ[a 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 ʿl 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. Mafṣada is the synonym of fasād. In Arab usage, it is said: naẓara ʿl maṣaliḥ al-nās, which means: "He considered the things that were for the good of the people." The sentence ʿl-amr maṣlaḥa is used to say: "In the affair is that which is good or cause of good." ¹

In the Qurʾān various derivatives of the root ṣ-l-h are used, but the word maṣlaḥa does not appear there. The Qurʾān uses ṣalāma (He did wrong) ¹V:397 and fasada (He/it corrupted) ¹XXVI: 125; XXVII: 48; VII:142, II: 229 as
opposite terms to صلٰح. صلٰح, the active participle of صلٰح, occurs very frequently in the Qurʾān. 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 (صليحین)".

It is quite often claimed that مسْلَحة 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 مَالِك بن عَنَس. There seems, however, to be a confusion in these statements in equating the use of مسْلَحة as a general term with its use as a technical term. The early use of مسْلَحة may have been in its general sense similar to other terms such as رأي. Rudi Paret has observed that the word مسْلَحة as a technical term is not used by مَالِك or شافٰئي; hence this concept must have developed in the post-Shafiʿī period.

Paret's observation, however, does not refute the possibility that considerations similar to مسْلَحة were employed by pre-Shafiʿī jurists. Such considerations do not, however, seem to have been formulated in technical legal terms. The proponents of the use of مسْلَحة in the early period have, apparently, confused the early similar considerations with مسْلَحة. It is, therefore, not incorrect to say that the post-Shafiʿī development of the concept of مسْلَحة was a continuation
of such early methods of reasoning as were not yet formally defined. Later, when Shafi'i'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 qiyas, prevailed over other methods of reasoning, the concept and method of maslaha was also seen, especially by Shafi'i jurists in terms of 'sources'.

From Imâm 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 Shafi'is and a number of mutakallimûn are claimed to have maintained that the acceptable maslaha is only that which has a specific textual basis (asl). The mursala (a maslaha not based on such an asl) and the like are contradictory to the textual evidence (dalîl), hence not valid. The second school of thought is attributed to some followers of Shafi'i and to Ḥanafis in general. They believe that maslaha, even if it is not supported by a specific basis, can still be used, provided that it is similar to those masâlih which are unanimously accepted or which are textually established. The third school is attributed to Malik who held that a maslaha 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 maslaha but it is very significant to note what divides these schools on maslaha. First the comment shows that the method of reasoning on the basis of maslaha was different from an other method of reasoning which sought its basis in the revealed texts. Secondly if we also accept the attribution of maslaha to the
names of the jurists given in this comment, the comment also shows that the
method of maslaha in its early formulation by Malik and his followers was inde-
pendent of the consideration of 'sources' or 'bases' and further that maslaha
was accepted by others if it conformed to 'sources' - to the text in the case of
the first group and to ijma in the case of the second group. They rejected only
maslaha mursala because it did not conform with the sources. This explains why
the concept of maslaha which originally was not necessarily conceived and con-
fined within the framework of 'sources', came to be seen, particularly by later
Shafiis, in reference to 'sources'. This confused the discussion of the concept
of maslaha 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 maslaha
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.

Juwayni analysed maslaha or munasib which is often used synonymously, as
an 'illa and divided it as such into five categories. First is the category
where its ma'na (significance) is rationally understandable and where it is related
to certain essential necessities (darura) which are inevitable. The second
category concerns what is a general need (al-hajat al-qamma), but below the
level of darura. 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 masalih, whose ma'na (significance) is not obvious,
and is not demanded by ُدَرَعَة, nor by ُحِقَة nor is it required by ُمُكَرَّمَة.

Examples of this category are the purely physical ُعَبَدَة. ⁵

مَسْلَحة as a technical term is not used in the ُذَهْرِي jurisprudence of Ibn ُHazm (456/1065) Al-ُمَكَيْمِ fi ُعْصُلُ ُمَكَيْم, or in ُهُنَافِي jurisprudence, Pazzaw’ī’s (d. 482/1089) ُعْصُل.

The terms مَسْلَحة and مَسْلَى are used by the Muʻtazili Abū ُهُسَيْن ُبَرِّ (d. 478/1085) ُبَرِّ in a general sense and as technical terms. To him مَسْلَى are good things, and مَسْلَحة means goodness. ُبَرِّ discusses مَسْلَحة in reference to ُعَلَّم (reasoning) and ُمَلَأ (reason), and in arguments against his opponents who maintain that مَسْلَى cannot be known through reasoning at all. At one point he defines مَسْلَى شَرْعِيّة as those acts which we are obliged to do by the ُشَرِّف، such as ُعَبَدَة. ⁶ Related to these acts are the means to achieving the ُشَرِّف commands; these means are also connected with مَسْلَى. These means are دَلَٰل, ُعَضُّ, ُسَبَّاب, ُمَلَأ, ُشَرَّط. The illustrations of these terms are given respectively as follows: the validity of consensus, analogy, the sunset for ُجَلَّ, measurability for ُرِبَّ, the conditions in contracts of sale.

All of these means are connected with مَسْلَحة. ⁷ For instance, the connection of ُعَضُّ and ُمَلَأ is evident in what follows:

"When a correct sign (ُعَضُّ) indicates (دَلَّ) a quality (ُعَضُّ) being (ُمَلَأ) reason, we decide that it is the basis of مَسْلَحة...It indicates that the basis of مَسْلَحة is to be found wherever an ُمَلَأ is found". ⁸

For ُبَرِّ, then, مَسْلَحة is an end for which ُمَلَأ and other related terms are
means. Basřī, however, does not elaborate what these masāliḥ are and what is the connection between masāliḥ Shariyya which he mentions, and other masāliḥ which he does not mention.

In the following centuries, however, the concept of maslaha advanced quite significantly. There are two main stages in the development of this concept, before Shātiṭī. 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 maslaha is discussed more clearly and fully than by Basřī.

Ghazali defines maslaha as follows:

"In its essential (ašlān) meaning it [maslaha] is an expression for seeking something useful (manfaṭa) 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 (ṣalāh) of Creation consists in realizing their goals (maqāṣid). What we mean by maslaha is the preservation of the maqāṣid (objective) of the law (Shari'ah) which consists of five things: preservation of religion, of life, or reason, of descendents and property. What assures the preservation of these five principles (usūl), is maslaha and whatever fails to preserve them is maṣaṣa and its removal is maslaha."

Maslaha as understood in the above definition is then divided into the following three categories. First, the type maslaha 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.
second is obviously forbidden. It is the third category which needs further con-
sideration. Accordingly, the element of mašlaḥa contained in the third category
is further examined from the viewpoint of its strength (quwwa). From this angle
there are three grades of mašlaḥa: ḍarūrāt, ḥājāt, tabānāt or tāzyīnāt. The
preservation of the above-mentioned five principles is covered in the grade of
ḍarūrāt. This is the strongest kind of mašlaḥa. The second grade consists of those
mašāliḥ and munāsabāt which are not essential in themselves but are necessary to
realize mašāliḥ 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 mašlaḥa mursala - i.e. that which
is not supported by textual evidence, will be accepted which has three qualities:
ḍarūra, qaṭāyya, 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 qaṭī because it is definitely known
that this way the lives of the Muslim community will be safe. It
is kulli, because it takes into consideration the whole of the
community, not a part of it. 12

The other two grades of mašāliḥ, however, are not admissible if they are not sup-
ported by a specific textual evidence. If these are supported by the text, the
reasoning is then called *qiṣaṣ*, otherwise, it is called *istiṣlah* which is similar to *istiḥṣān*, and, hence invalid.

Ghazālī counts *istiṣlah* along with *istiḥṣān* among the methods of reasoning which do not have the same validity that *qiṣaṣ* has. He calls such methods "*usūl mawhūma*"—those principles in which the mujtahid relies on imagination or on his discretion rather than on the tradition.

The above definition and classification of *maṣlaḥa* have a particular place in Ghazālī's structure of the discussion of *usūl 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 *usūl* in *al-Mustasfā* into six parts. Apart from the first two parts which deal with introductory matters such as definition of *usūl* and an introduction of methods of logic, the remainder of the four parts discusses the following subject matters of *usūl*: *Ḥukm* (command); *ʿAdilla arbaʿa*, the four evidences, i.e. Qurʿān, *ṣunnah*, *ijmaʿ* and *ṣaqīl*; method of reasoning (*istiṣḥmār*), 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. 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 (*ḥaṣāla*) 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 fihi (the object of command, the act of Mukallaṭ).

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 shariʿa.

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 maṣlīḥ in place of Ḥasan. 17 He frequently refers to maṣṣada in the course of his analysis of maḥkūm fihi, in dealing with the question whether only voluntary acts are objects of command or not. He regards it a maṣṣada 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 qiyāṣ (analogy), he explains that qiyāṣ has four components: (1) ʿasl, the root to which analogy is made; (2) farṣ, 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 qiyāṣ, here, must be distinguished from qiyāṣ 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 naqūliyya (traditional), meaning the Qurʾān, Sunna and ijmāʿ. The ʿilla is either explicit (qarib), or it is implicitly indicated (īmāʿ), or it is known from the sequence and order of the command (sabab and tarīf). The fourth manner of finding the ʿilla is
istinbâr (inference). The only valid methods of istinbâr are two: 1) Al-sabr wa'L-taqsim (observation and classification; method of exclusion), and 2) munäsaba (affinity). It is in reference to munäsaba that mašlaha as a main element of affinity with Şarî' is frequently discussed.

Ghazâlî defines munäsib as "that which, like mašlîh, becomes regulated (is achieved rationally intâjama) as soon as it is connected with the command (bukm)". For a discussion of the meaning, classification and grades of munäsib, Ghazâlî refers to the annex which is significantly enough the discussion of mašlaha and its grades.

Munäsaba and mašlaha are, however, not identical. Although Ghazâlî analyzes munäsib also in terms of effectiveness and validity in the same way as he does with mašlaha, yet the details vary. Among the various classifications of munäsib, one is of particular significance for us, as it explains the relationship of munäsib to mašlaha as well as the difference between istiḥsân and istidlal in the eyes of Ghazâlî. Munäsib is divided into four categories: first, the munäsib which is suitable to and is supported by a specific textual evidence. Second, that munäsib which is neither suitable to nor is supported by the textual evidence. Third, that munäsib which is not suitable to but is supported by textual evidence. Fourth, that munäsib which is suitable to but not supported by textual evidence. Ghazâlî adds that in the above classification the first category is acceptable to all jurists. The second category is called istiḥsân which clearly means to make law according to personal discretion. The fourth is called istidlal or istidlîl mursal. It is clear from this classification that mašlaha is the basic consideration for deciding the suitability or munäsaba of
something which istihsān lacks. But again the munāsaba of mašlaḥa further depends on its suitability or conformity to the text in general; otherwise it will fall into the category of istihsān.

From Ghazālī's treatment of mašlaḥa, it can be concluded in general, that his predilection for theologization of fiqh and for qiyās as a method of reasoning, led him to examine the concept of mašlaḥa with reservations. From the point of view of theology, he rejected the conception of mašlaḥa 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 mašlaḥa subordinate to qiyās. He did not reject mašlaḥa altogether, as he did with istihsān, but the qualification he provided for the acceptance of mašlaḥa, did not allow it to remain an independent principle of reasoning.

Furthermore, with the above limitations on the concept of mašlaḥa, he could not bring into focus in the discussion the other elements which are quite relevant to mašlaḥa, such as taklīf, hāqīqa al-hukm, fahm al-khitāb, niyya, taṣabbud, etc. The discussions of these elements are scattered through various chapters in his al-Mustasfā. Also, he did not see the necessary relationship among different categories of mašlaḥa.

Some of the above points were taken into consideration by some jurists after Ghazālī, but more systematic consideration was given them by Shājibī, 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 usūl works that is mostly known to us, Ghazālī's influence, particularly in reference to mašlaḥa, is very strong. As Ibn Khaldūn
noticed, Baṣrī's book al-Muṣṭamad and Ghazālī's al-Muṣṭafā remained a major source of influence for later writers on ṭuṣūl, until the appearance of Rāzi's monumental work al-Maḥṣūl. 24 Al-Maḥṣūl combined the above two works and reformulated a number of concepts. Rāzi's Maḥṣūl then in turn became a source of considerable influence for later ṭuṣūl 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 ṭuṣūl 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 Shāfī ibī knew and in general opposed, were largely under the influence of Fakhr al-Dīn al-Rāzī's (606/1209) Maḥṣūl.

Rāzi's Maḥṣūl 25 is structured more on the pattern of Baṣrī's al-Muṣṭamad than on Ghazālī's al-Muṣṭafā. 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 qiyyās, where the question of munāsaba as a manner of findingṣilla 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 Shariʿa in addition to qiyyās.

Rāzi 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" (taḥsīl) and "preservation" (iḥā')." He explains that taḥsīl means to seek "utility" (manfa'a), and manfa'a is pleasure (lādhdhā) or its means. Lādhdhā is to achieve what is suited (mulā'im). Iḥā' is explained similarly as removing harm, maḍará, which is 'ālam (pain) or its means. Both lādhdhā and 'ālam are evident and cannot be defined. Thus munāsib in its final analysis is related to lādhdhā in the positive sense and to 'ālam in the negative sense.

The second definition of munāsib is as that which is usually suited (fi'il 'ādāt) to the actions of the wise.

Rāzī then clarifies that the first definition is accepted by those who attribute ākam and maṣāliḥ as causes or motives to God's commands. The second definition is employed by those who do not accept the above causality. 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 Sharṣ. 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 MustazILA have done. Rāzī, after detailed analysis concludes that, if defined in the latter sense, good and bad can be established only by Sharṣ. 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 'illa. He argues that to prove that munāsaba can be 'illa, there are three premises to be established: first, that God issued the commands for the maṣālih 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 maṣālih. He explains, however, that in contradiction to the Muʿtazila the fuqahā do not regard maṣlaḥa as gharaḥ (personal motive); they rather view it in terms of maṣnā (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'īs, we find that the commands and maṣālih occur together, without being separated from each other, this is known inductively... 34
To sum up, Râzî 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 maslaḥa of the people, and this maslaḥa or munāsaba can be considered īllā for that command. The paradox in this position is resolved by two explanations: first, that these masāliḥ 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 maslaḥa 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.

Râzî has offered these explanations in view of the possible objections against his admission of ṭafṣīl aftāl-Allâh, (to attribute causes to God's acts). It is significant to note that Râzî 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.

Râzî'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 (mashrū'a) because of the masāliḥ. As to the rational arguments that you have enumerated, they are not applicable here (ghayr masmū'a). Because if they are established they would infringe upon the legal obligation (taklīf), whereas the controversy over analogy (qiyyās), whether in favour or in opposition, is based on the acceptance of the obligation. This well-considered answer suffices all what you have mentioned."
Secondly, your criticism applies to those "who maintain that to attribute maslahā as sūla 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 Rāzi could maintain that munāsāba or maslahā were evidences for sūla, and could still insist that God's commands had no motives. It is with this reservation that Rāzi apparently accepted the first definition of munāsib. This is also the reason that he divides munāsib into two categories: ḥaqqiqi (true) and iqlātī (apparent). ḥaqqiqi is that munāsib which consists of either a maslahā in this world or one in the hereafter. iqlātī only appears to be a munāsib; in fact, it is not. 38

Like Ghazālī, Rāzi also divides maslahā into darūrī, ḥājī, and tahṣīnī. He divides munāsib according to ta'rīf and shahādat al-sharī' (textual evidence), and mulahma. 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 maslahā in Ghazālī was completed by Rāzi with much more emphasis. Ghazālī objected that a conception of maslahā in reference to human utility alone and independent of God's determination, is not theologically possible. Rāzi gave this general objection a specific theological content. He made it clear that even to attribute the consideration of maslahā 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 maslahā. If there existed the content of maslahā in Shari'ā, 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 maslahā 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 maslahā as whatever God commands. Second, there was a methodological determinism which, aiming to avoid the apparent arbitrariness of the method, tried to subject maslahā to qiyās so as to link it with some more definite basis. Both considerations were inadequate. First, in order to decide that something is maslahā, even to say that God's commands are based on maslahā, 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 cilla, 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 Shariʿa. 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 Shariʿa, 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 Shāṭibi, 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 Ḡazālī’s and Rāzī’s definitions of munāsib and maṣlaḥa.

Among Mālikī jurists Shihāb al-Dīn Ḥarāfī (684/1285) and among Ḥanafī’s Ṣadr al-Shārī’a Maḥbūbī (747/1346), 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.

Jamāl al-Dīn Ḥusnawi (771/1370) and Taj al-Dīn Subkī (771/1369) combine Ḡazālī and Rāzī. Saʿd al-Dīn Taftāzānī (792/1290) interprets the Ḥanafī position, mainly that of Fazdawī (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 Shāfiʿī jurist Sayf al-Dīn Ḥamīdī (631/1234) and the Mālikī, Ibn Ḥājib (646/1249). In their arguments against maṣlaḥa mursala both follow Ḡazālī rather than Rāzī. To them maṣlaḥa is acceptable only if it is textually supported.

The third trend is illustrated by the Shāfiʿī jurist, ʿĪzz al-Dīn Ibn ʿAbd al-Salām (660/1263). He was inclined towards taṣawwuf. 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 ʿAbd al-Salām maṣlaḥa means ladhāha (pleasure) and farāḥ (happiness) and the means leading to them. 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, masâlih differ according to the level of the approach of the people. The lowest level of masâlih is that which is common to all men. Higher than this is the level on which the adhkiyā' (the wise people) conceive masâlih. The highest level is peculiar to the awliyā' Allāh (friends of God, sufis) alone. The awliyā' and asfîyā prefer masâlih 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 'Abd al-Salām divides masâlih 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 ma'rifah (gnosticism) and ahwâl (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 Qawā'id al-Anām, indicate that Ibn 'Abd al-Salām's legal thinking was deeply influenced from a mystic viewpoint. For instance, he did not reject ḥuqūq al-nafs, but a masâlaḥa aiming at the realization of such rights was lower in rank than one which aimed at maṣrīfah and ahwāl.
In fact, Ibn 'Abd al-Salam represents the stage where the Sufi conception of maṣāliḥ came to permeate uṣūl al-fiqh. It is not possible at this point to go into details of the Sufi conception of human maṣāliḥ and its history. It must, however, be pointed out that at a very early stage in sufism, rejection of ḥuzūz al-nafs (pleasures of the animal soul) became significant as a means of controlling the nafs. In Sarrāj's (378 A.H.) al-Luma, ḥuzūz al-nafs are frequently opposed to ḥuqūq al-nafs. 54 Zuhd is defined as abandoning the ḥuzūz. 55 The ḥuqūq are defined as ahwāl, maqāmāt, maṣārīf, etc. 56

Ḥuzūz had its apparent connection with maṣāliḥ, and more particularly, with the question of rukhāṣa (legal allowance) in case of hardship. The Sufi stress on zuhd, waraṣ and ikhlāṣ required abandoning of ḥuzūz. An obvious example of this encroachment of taṣawwuf on fiqh and uṣūl al-fiqh may be seen in Qushayrī's wasiyya (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 rukhāṣa of Shari'a, he dissolves his covenant with God and violates the mutual bond between him and God." 57

Closer to the period of Shāṭibi, the opposition to ḥuzūz appears still stronger.

Abu'l-Ḥasan al-Shadhili (656 A.H.) with whom Ibn 'Abd al-Salām's connections are claimed, 58 used to define tawḥīd (unification) in terms of abandoning the ḥuzūz al-nafs. 59 He also explained it as a curse from God when someone is found indulging in the ḥuzūz so as to be barred from 'ubūdiyya (servitude). 60
Ibn `Abbad al-Rundi (792/1390), the famous Shadhil Şüff, with whom Shètibi was in correspondence on matters relating to tasawwuf and fīqh, also stressed the rejection of ḥüzūz. Commenting on the Ḥikam of Ibn ṢAṭā Allāh, Ibn `Abbad said that "the nafs always seeks ḥüzūz 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 ṭaqāt (trial by wants and needs) is a happy occasion for the disciples", Ibn `Abbad explained that the Şüff, contrary to a common Muslim, finds pleasure by losing his ḥüzūz. Situations of neediness provide a disciple with purity of heart, which is not achieved by sawm (fasting) or ṣalāt (praying), because in sawm and ṣalāt there is a possibility of ḥawā (desire) and shahwa (lust). 62

The Şüff 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-Salam accepted the Şüff 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, Istihbân, kashf (mystic revelation) and dhawq (mystic taste) of whose validity he was suspicious, and hence rejected them. On the other hand, he refuted the moral implications of the denial of maslaha to the commands of God.

Ibn Taymiyya also counts maslaha mursala as one of the seven ways of knowing the commands of God, along with the traditional sources of law. He defines maslaha 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 sharīa that opposes this consideration."

Ibn Taymiyya, however, concludes that to argue on the basis of maslaha mursala is to legislate in matters of religion, and God has not permitted this. To do so is similar to istihbân and tahṣīn aqāli. He admits that sharīa is not opposed to maslaha, but when human reason finds maslaha 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 maslaha at all. The obvious assumption in Ibn Taymiyya’s arguments is that all the possible masālih are already given in the Text. The other assumption is, of course, that all of God’s commands are based on maslaha. 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 Muṣtaṣzila and the Jabriyya in reference to the question of maslaha. The Muṣtaṣzila 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 maslaḫa. He questioned their assumption that the intention of maslaḫa 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 sharīyya (the legal religious will) and al-irāda qadriyya kawniyya (the potentive creative will.) When God commands, He wills the first kind of will.

The consideration of maslaḫa, or as Ibn Qayyim, following Ibn Taymiyya, often calls it, Siyās, plays an important part in explaining legal obligations, legal reasoning and legal change in Ibn Qayyim's Ḥiṣām al-Muwāqqfīn. He expounds the principles of Ḥanbalī fiqh, and enumerates the following five as sources and principles: (1) Nusūṣ, (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. Thus it is in reference to the three sources that the consideration of maslaḫa is expounded. Ibn Qayyim explains that it is valid to attribute Sīla 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.

The larger part of the Ḥiṣām is devoted to illustrating how various commands are based...
on certain reasons which he calls ḥikma or maslaha.

The following passage contains a clear statement of his views on maslaha. 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 Şarī'a, which have caused hardship, difficulty and obligations that are not required by Şarī'a; as is known, the magnificent Şarī'a, which keeps the highest level of public interest, does not bring forth these things. The foundations of Şarī'a are laid on the wisdom and on the interest of the people in this world and in the hereafter. Şarī'a is all justice, kindness, interests [of the people] and wisdom. Hence any case which departs from justice to injustice... from maslaha to mafsada, is not part of Şarī'a even though it has been imposed by literal interpretation [of the texts of Şarī'a]." 71

The fifth trend is illustrated by Najm al-Dīn Tawfī (716/1316). He justified the use of maslaha even to the extent of setting aside the text. He stressed maslaha as the basic and overriding principle of Şarī'a. Maslaha, therefore, prevails over all other methods such as ijmāʾ. 72 Tawfī regards maslaha as a fundamental principle.

Tawfī's preference of maslaha over against texts and ijmāʾ was also prompted by his belief that textual sources as well as the opinions on which ijmāʾ is claimed were diverse, inconsistent and often self-contradictory. The principle of maslaha provided a consistent method of decision. 73 Tawfī, however, did not elaborate on a concrete criterion of maslaha, how they are to be decided, especially in a case where there is a question of choosing among more than one maslaha. 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, *tasawwuf*, logical analysis and, most significantly, with social and legal changes. Theological determinism introduced by Ash'ari jurists appears largely in the discussion of *taklīf*. To Ash'aris, obligation is created by divine command. The Mu'tazila refuted this sense of theological determinism. They differentiated between two senses of obligation: *taklīf* and *wujub*, the latter was rational and ethical, while the former was theological. 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 knowledge 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 Sūfis. 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 Sufis, this attitude, even in its lawful aspects, was quite opposite to the meaning of obligation towards God. They opposed this attitude as ḥuzūz of nafs (lower soul) who is one of the enemies of the traveller on the path to God.

Shātibī 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 Shātibī rejects the connection of the method of reasoning by maṣlaḥa with bid'a, 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.

Refuting the association of maṣlaḥa mursala and bid'a as maintained by some jurists, Shātibī asserts that the two are completely opposed to each other. 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. Secondly, Shātibī explains, that munāṣib mursal which is neither specifically supported by the legal texts nor is it rejected, is not a bid'a. One finds in it two categories. First, where munāṣib mursal agrees with the general function (tāsarrufat) of Sharī'a, 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 Sharī'a, and this genus is considered valid by Sharī'a. This validity is not based on a specific evidence but on its consideration as a whole.
Shâṣṭibi illustrates maṣālah 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. He finds three elements common in all the ten examples. First is the element of suitability with the objectives (maqāṣid) of Sharī’a. Maṣālah mursala do not conflict with the fundamentals or with the evidences of Sharī’a. Second, they are rationally intelligible. Maṣālah mursala do not belong to taqabbudāt because the latter are not rationally intelligible in detail. Shâṣṭibi gives more than ten examples to prove this point. Thirdly, maṣālah mursala refer to the following principles: protection of (human) necessities; removal of impediments which are harmful to religion; and protection of an indispensable means to the end of law.

Shâṣṭibi, thus, shows that the acceptable maṣālah cannot be equated with bid’ā and that they are not limited to the category of darūf, as some jurists have maintained; they cover other categories as well. In fact, the above explanation of maṣlaḥa mursala conforms to Shâṣṭibi’s concept of maṣlaḥa which is of fundamental significance to his doctrine of maqāṣid al-sharī’a.

Shâṣṭibi’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, huzūz and maṣlaḥa in sufficient detail. He tries to refute the implications of theological determinism and the dilemma of the relativity of maṣlaḥa first by suggesting...
on two levels. On the first level he discusses the maqāsid of the lawgiver and on the second level he deals with the maqāsid 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, Shāṭibi 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 Shāṭibi’s discussion of maqāsid is as follows:

I. Qasīd of the Shāri‘ (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. Qasīd 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: datāla asliyya (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 ḥuẓūz in relation to hawā and taqabbud.

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.


7. Ibid.

8. Ibid., p.805.


10. Ibid., p.284.

11. Ibid., p.290.

12. Ibid., p.294-295.


14. Ibid., Vol.I, pp.274, 284, following Shāfi‘ī, Ghazālī says:


16. Ibid., pp.56-57.

17. Ibid., p.60.

18. Ibid., p.87.


23. Ibid., Vol. I, pp.5-7. Ghazālī complains that Transoxian jurists, such as Abū Zayd have tried to bring too much fiqh into ʿushūl al-fiqh. (p.10).


25. Fakhr al-Dīn Rāzī, al-MaQūl fi ʿUṣūl 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 ʿijbār to which Shātibī refers. See Ch. VIII, p. 368.


43. See p.299.


49. Ibn ʿAbd al-Salām was initiated into the Suhrawardiyya Ṭarîqa. He is also claimed to have joined the Shâdhiliyya. His relationship with Ibn ʿArabi has, however, been a subject of dispute. For details see Riḍwân ʿAlî Nadwi, Al-ʿīz b. ʿAbd al-Salām (Damascus: Dâr al-fikr, 1960), pp.103-110.


51. Ibid., p.6.

52. Ibid., p.24.

53. Ibid., p.129.


For this opposition of terms cf.
55. Sarraj, op. cit. p. 47. (quoting Ṣāfi Ruwaym b. Aḥmad.)

56. Ibid., p. 336.


58. See above, n. 48.

59. ʿAbd al-Ḥalīm Mahmūd, Al-Madrasa al-Shādhiyya wa Imāmuhā Abūʾl Ḥasan al-Shāḍhīlī (Cairo: Dar al-Kutub al-Ḥadīthā, 1387 A. H.)

60. Ibid., p. 137.


62. Ibid., p. 106.

63. See p. 300.


65. Ibid.

66. Ibid., p. 23.

67. Ibid.

68. Ibid., p. 30


70. Ibid., pp. 197 ff.


73. Ibid., pp. 35-37.

74. Ibid., p. 47.

76. Shātibī, Al-Iṣṭiṣām (Cairo, 1332 A.H.), Vol. II, pp.95-140.

77. Shātibī, here, refers to Mālik whose reliance on ma‘ālīh mursala is strongly criticised by other jurists. Shātibī defends Mālik in the following manner:

Mālik, adhering to the principle of not applying rational explanations in matters of ībādāt “revolves entirely around his approach to stop at the limits prescribed by Shāri‘a, and thus disregarding what munāṣib requires...” This is in contradiction to ībādāt which are governed according to suitable reason (al-ma‘nā al-munāṣib) which is evident to human reason (uqūl). 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 Shāri‘a and opened the gate of law-making. How far is it from truth?!” Al-Iṣṭiṣām, 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, Shātibī explains, Shāri‘a’s prescriptions about cleanliness 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

SHÂTIBI' S DOCTRINE OF MAQÂSID AL-SHARI'KA

As we have said elsewhere, in order to appreciate Shâtibi's concept of maşlaÂha, one must study it within the structure and formulation he himself devised. This chapter, therefore, aims at presenting Shâtibi's concept of maşlaÂha 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 Shâtibi's Al-MuwaÂfaqât, which is wholly devoted to an exposition of Maqâsid al-Shari'ka.

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-MuwaÂfaqât which, in our opinion, are relevant to our problem. To keep Shâtibi's structure of analysis intact, his method of dividing and subdividing the concept into its various components, has been faithfully followed.

The scheme of Shâtibi's discussion of Maqâsid has been given in the previous chapter. Accordingly the present chapter is divided into five sections which analyse the following concepts and terms: maşlaÂha, dalâla, taklîf, taçabbud and niyya.

As a preamble to the exposition of the maqâsid, Shâtibi 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'ī (laws) for 'masālih (benefits, good) of the people, both immediate and future. (6)' There exists, however, a difference of opinion among scholars concerning the details of this premise. For details of the discussion Shatibi refers his reader to Minh al-Kalam. 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 masālih, yet they differ from one another if the masālih are understood in terms of sīla (pl. of sīla) meaning "causes" or "motives". The Ashārī 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 masālih to act in a certain way. Since such an obligation proposed limitation on God's omnipotence, the Ashārīs reject the idea that masālih are the sīla of sharā'ī. They, however, accept the premise by interpreting masālih to be the 'grace' of God, rather than the 'cause' of his acts. On the other hand, the Muṣṭazila, even though they too maintained God's omnipotence, yet believed that God is obliged to do good. Consequently they accepted the above premise, regarding masālih as sīla of sharīa.

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 usūl al-fiqh as well. Theological arguments penetrated into usūl al-fiqh also because a number of writers on usūl were theologians.
Usul al-fiqh, however, required a manner of thinking and a method of reasoning different from that of kalâm. 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 masålîh must be accepted in usûl in terms of "cause", "motive" and "purpose".

The premise of masålîh came to be generally accepted in usûl. Some usûliyyîn, such as Ghazâlî and others, in order to be consistent with their theological views, redefined the term ʻilla so as to rid it of the connotation of "causality" and "motivation" in which sense it was used and disputed in kalâm. Passing from kalâm to usûl, the term ʻilla thus underwent a semantic change. For the explanation of the meaning it acquired in usûl, we now turn to Shârîbî.

Shârîbî explains that Râzî held that like His acts, God's commands also cannot be analyzed in terms of ʻillât (causes) whereas the Mu'tazila believed that His Commands are caused (mu'alla la) by the consideration of masålîh of the people. The majority of the fuqahâ' accepted the latter view in fiqh. Since it was inevitable that ʻillât be established for ahkâm al-Shariyya (the rules of Shari'a), the ʻilla as used in connection with the usûl came to be interpreted as "the signs that make a rule known specifically". (6)

Shârîbî argues that the premise of masålîh is established in Shari'a by the method of induction, both as a general theme and by the evidence of the description of
the 'ilal of various commands in detail. For instance, the Qurʾān explains the reasons for ablution, fasting and ḥaḍ as being cleanliness, piety and eradication of oppression, respectively. (7)

After explaining this premise, Shāṭili proceeds to discuss the details of the maqāsid, which are analyzed in five aspects; four in relation to the lawgiver, and one in relation to the mukallaf (subject of law).
SECTION ONE

MA'ALAH, THE FIRST MAQSID OF SHARI'AH

The primary objective of the lawgiver is the ma'alah of the people. The obligations in Shari'ah concern the protection of the maqsid of Shari'ah which in its turn aims to protect the masalih of the people. Thus maqsid and ma'alah become interchangeable terms in reference to obligations.

Shafibi defines ma'alah as follows: "I mean by ma'alah 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 ma'alah in its absolute sense. Shafibi, however, takes into account various other senses in which ma'alah can be studied. The masalih belong either to this world or to the world hereafter. Further, these masalih 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 ma'alah is the sense of protection. Shafibi explains that Shari'ah deals with the protection of masalih either in a positive manner as when to preserve the existence of masalih, Shari'ah adopts measures to support their bases. Or in a negative manner, to prevent the extinction of masalih, it adopts measures to remove any elements which are actually or potentially disruptive of masalih. (8)
Sha'ibī divides the maqāsid into darūrī (necessary), ḥāḍī (needed) and tāhsīni (commendable). The darūrī maqāsid are called necessary because they are indispensable in sustaining the maqālīh of Din (religion and the hereafter) and Dunyā, in the sense that if they are disrupted the stability of the maqālīh 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 darūrī category consists of the following five: Din (religion), Nafs (self), Nasl (family), Māl (property) and ʿAql (intellect). (10)

Scholars, says Sha'ibī, have observed that these five principles are universally accepted. Analyzing the aims of the Shari'a obligations, we find that Shari'a also considers them as necessary. The Shari'a 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), ġadāt (habits, customs) and muṣāmalāt (transactions), and falling into the negative group are ʿināyāt (penalties).

ʿIbādāt aim at the protection of Din (religion). Examples of ʿibādāt are belief and the declaration of faith (the Unity of God, the Prophethood of Muḥammad), ṣalāt, zakāt, ẓiyām and ḥajj. ġadāt aim at the protection of nafs (self) and ʿaql (intellect). Seeking food, drink, clothing and shelter are examples of ġadāt. Muṣāmalāt also protect nafs and ʿaql but through ġadāt. Sha'ibī defines ʿināyāt as that which concerns the above five maqālīh in a preventive manner; it prescribes the removal of what prevents the realization of these interests.
To illustrate jināyāt, he gives examples of qisās (retaliation) and diyāt (blood money) for nafs, and hadd (punishment for drinking intoxicants) for the protection of āqāl. (8-10)

The ḥājiyāt are so called because they are needed in order to expand (tawassus) the purpose of the maqāsid and to remove the strictness of literal sense, the application of which leads to impediments and hardships and eventually to the disruption on the maqāsid(objectives). Thus if the ḥājiyāt are not taken into consideration along with the darūri maqāsid, the people on the whole will face hardship. The disruption of ḥājiyāt is, however, not disruptive of the whole of masāliḥ, as is the case with the darūriyāt. 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 ʿadāt, the lawfulness of hunting; in muʿāmalāt, permission for qirād (money lending), musāqāt (agrarian association) and in jināyāt, allowances for weak and insufficient evidence in decisions affecting public interest. (10-11)

Taḥsināt means to adopt what conforms to the best of practices (ṣadāt) 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 (tahāra) or decency in covering the parts of the body (ṣatr) in prayer; in ʿadāt, etiquette, table manners, etc.; in muʿāmalāt, prohibition of the sale of unclean (najīs) 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)
Shatibi regards the above division of makālih 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, qisās (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 (mawsūf), 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 Shari'ā to save life. The reason is that the preservation of life is of the utmost importance, and preservation of mānū'a (manliness, honour) is only complementary (takmil) 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 edarurî masha'aba 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 mašâlih with one another is the same as that of the complementary mašâlih to the original objective of the law. The tahsiniyat are thus complementary to the hâjiyät which are complementary to the darûriyät. The darûriyät are the fundamentals of mašâlih. In view of the above explanation, Shâtibî deduces the following five rules in this relationship:

1. The darûrî is the basis of all mašâlih.
2. The ikhtilâl (disruption) of darûrî necessitates the ikhtilâl of other mašâlih absolutely.
3. The ikhtilâl of other mašâlih, however, does not necessitate an ikhtilâl of, and within, the darûrî itself.
4. In a certain sense, however, the ikhtilâl of tahsini or hâji absolutely necessitates the ikhtilâl of darûrî.
5. The preservation (muḥafaza) of hâji and tahsini is necessary for the sake of darûrî. (16-17)
These rules may be illustrated by the rule of qisás (lex talionis). Qisás is darūrī, and tamāthul (consideration of equality) in qisás is tabshīnī and takmīlī.

To illustrate the first rule, tamāthul (tabshīnī) is complementary and exists only because of qisás (darūrī). Thus a darūrī mašlaḥa (qisás) is the basis of a tabshīnī mašlaḥa (tamāthul).

To illustrate the second rule, if there is no qisás, there is no consideration of tamāthul. In other words, the ikhtilāl of the darūrī means the same for the other grades of mašāliḥ necessarily.

To illustrate the third rule, the ikhtilāl of tamāthul does not require ikhtilāl of qisás.

The fourth and fifth rules can be appreciated if one grasps the sense in which darūrī is affected by the ikhtilāl of other mašāliḥ. Shātībī explains the effect of other mašāliḥ on darūrī mašāliḥ with the following four similes:

1. The relationship of other mašāliḥ to darūrī mašāliḥ is like that of protective zones (himā). The interruption (ikhlāl) of one protective zone amounts to the interruption of the next zone and eventually to the disruption of the darūrī mašāliḥ which are at the centre of these zones.

2. This relation may also be understood as that of the part and the whole; other mašāliḥ together with the darūrī mašāliḥ make one whole. The disruption of the parts obviously means the same as the disruption of the whole.
3. The ḥājiyāt and taḥṣiniyāt can be understood as individuals in relation to the universal, i.e. ḏarūriyāt.

4. The ḥājiyāt and taḥṣiniyāt serve the ḏarūf maṣāliḥ as a prerequisite (muqqaddima), or as associates (muqarin). (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 shariʿī 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 (istikhlaṣ) 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 mafāṣid 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 (cāda). (26)
It must be noticed here that this principle is applicable only to acts relating to *cāda*, and only to the determination of *mašlaḥa* or *mafsada* in this world through knowing them as they exist. Acts which are not *cāda* are not affected by this principle. (26)

The second approach to considering the *mašliḥ* of this world is to observe them in reference to their connection with *Sharīʿī* proclamation (*Khīṭāb*). The basic rule in this approach is that the *mašliḥ* or *mafasid* 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 *sharīʿ*. (27) As explained above, *mašlaḥa* or *mafsada*, in this world, is determined by the predominant side (*al-jiha al-ghalība*) of a matter. It is the predominant part which is the object of *Sharīʿī* proclamation. The dominated (*al-maghlūba*) part, whether *mašlaḥa* or *mafsada* is not the objective of the *Shāriʿ*. Why is it then that the dominated elements, even though they may be *mašlaḥa*, are not the objectives of *sharīʿa*? On the other hand, how can they, when they are not the objectives of *sharīʿa*, still be *mašlaḥa*? *Ṣāhibī* solves this apparent contradiction with the following explanation.

He argues that *mašlaḥa* *maghlūba* is that which is considered as such according to the acquired habitude (*al-īthiṣād al-kasbi*) alone, i.e. without adding the *Sharīʿ* requirements of *mašlaḥa*. Customarily such a *mašlaḥa* is not considered worth seeking. This is the part of *mašlaḥa* which is also not the objective of the law-giver insofar as the *sharīʿyya* (legality) of rules (*ahkām*) as a whole is concerned.
Further, if the dominated part were also taken into account by the Shari', 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 yutāq (impossible obligation) as well as an absurd situation. (28)

The above explanation, however, does not clarify the existence or occurrence of mafsada despite the Shari' s intention to the contrary. Shā'ibī elaborates the matter further by saying that the above position may appear to be that of the philosophers' and the Mu' tazila 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 Mu' tazila believed that evils are not intended to occur; their occurrence is against God's will (irāda).

Shā'ibī 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-khalqi al-takwini) and second the intention of legislation (al-qaṣd al-tashri'i). The positions of the philosophers and the Mu' tazila concern the former and Shā'ibī's the latter. As he argues, the
occurrence of mafsada, despite God's will and intention for maṣlaha, is justifiable in the case of ḥaqiq al-tashrīf, 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 ḥaḏir al-takwīn, as this would imply imperfection in God's powers. (30).

The above discussion of maṣlaha has been concerned with the cases where the actual practice may be used as the basis of determining a maṣlaha. There are cases where the judgment of habitue is not so definitive. For instance, eating carrion in case of dire need and killing a murderer for the prevention of crimes, are considered maṣlaha 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 maṣlaha in themselves on the whole, the acts in the above examples, though mafsada in themselves, become maṣlaha 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 Sharī'a, because it necessitates that Sharī'a should intend prohibition and permission simultaneously.

Furthermore, if one side is preferrable, it is still possible that the Shari' 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 (yanqadibu) the intention of the Shāri‘, not what is intended by the Shāri‘ 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 nazar (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 murā‘at al-khilaf. As mentioned elsewhere, this principle, to Shātibī, meant an impossible and hence void obligation.²

Shātibī sums up the above discussion by saying that al-jiha al-marjūha (the dominated aspect) when it is found mixed with al-jiha al-rājiha (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 ma‘āli‘ of this world. Ma‘āli‘ 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 masālih and mafāsid is that they are all determined according to Shari'ah, because the reason has no place in matters relating to the hereafter.

Sometimes a confusion may arise because of considering the pure masālih 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 Shāfi'ī, 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 wasf (quality). (36).

From the above discussions, Shāfi'ī deduces the following rules as characteristics of maşlaḥa:

1. The purpose of legislation (tashrīq) is to establish (iqāma) masālih in this world and in the hereafter, but in a way that they do not disrupt (yakhtall) the system of Shari'ah.

2. The Shari'ah intends masālih to be absolute.

3. The reason for the above two considerations is that Shari'ah has been instituted to be abadi (eternal, continuous), kullī (universal) and āmm (general) in relation to all kinds of obligations (takālīf), mukallafīn (subjects of law) and ābwāl (conditions, states). (37)

The above three characteristics thus require maşlaḥa to be both mutlaq (absolute)
and kullî (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: ʿahwāʾ al-nuʃūs (personal likings), manāfiʿ (personal advantages), nayl al-shahawāt (fulfilment of passionate desire) and aqhrād (individual interests). According to Shâibli all of the above considerations render the concept of maṣlaḥa relative and subjective, which is not the consideration of Shāriʿ in maṣlaḥa, though it may be so in ṣāda.

He argues on the following grounds: First, the objective of Sharīʿa 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 Shāriʿ.

Second, maṣāliḥ cannot be considered as mere manāfiʿ because in ṣāda as well as in Sharīʿ they are mixed with disadvantages. The point of emphasis here is that nafṣ is not essential in the consideration of maṣlaḥa - neither in ṣāda nor in sharīʿ.

In ṣāda some higher goal like the subsistence of life forms the basic consideration in determining maṣlaḥa. In sharīʿ 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 sharī'ī consideration of maṣlaḥa; it must, therefore, be absolute. In sharī' 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' it is al-ghālib al-akthārī (the major dominant) which is the general-definitive element (al-tāmm al-qatīfī) in the consideration of a maṣlaḥa. This is the characteristic (sha'īn) 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', because both are waqīf (instituted, conventional) not ṣaqīf (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, Shāḥibī takes into consideration
the criticisms of this concept by other jurists. Among them he specifically refers to Fakhr al-Din Razi, Shihab al-Din Qarafi and Ibn Abd al-Salam. He has answered their criticism. As these criticisms and answers are quite relevant to the discussion of maslaha, a brief summary of this debate is given below.

Analysing the position of those who favour maslaha, Razi refers to their argument that the basic rule in manafi (useful things) is 'idhn (permission, lawfulness) and in maqar (harmful things) is man (abstention). Shatiibi rejects this analysis as an unfaithful representation of the maslaha-view. It is possible to speak about manafi and maqar only in absolute terms as they do not exist as absolute in reality; actually they are largely relative. Second, since masali refer to shari proclamations which take into consideration the differences among persons, times and states, it is inadequate to talk in absolute terms. Third, since no manafi are to be found that are not mixed with maqar, if we accept Razi's principle, we will have also to accept that 'idhn and nahi (prohibition) can apply to one and the same thing - which is absurd.

Shihab al-Din Qarafi, the commentator on Razi's al-Mabsul, had some doubts about the principle that maslaha constituted the basis of legal obligations. He argued that maslaha cannot be the basis of ibaha. This is true, first, because maslaha cannot be realized and hence defined in simple and absolute terms, because no maslaha can be gained without 'alam (pain) and mafasid (evils). Thus to maintain that every mubah must be based on maslaha amounts to a com-
plete negation of mubāh. Second, in order to argue that mašlaḥa is the basis of obligation, mašlaḥa 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 mašlaḥa 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 mašlaḥa, simply because it is an obligation.

Qarāfī adds that the mašlaḥa view is difficult to maintain for our people (ašḥābunā lasharīs?), as well. They cannot say that God takes mašlaḥa into consideration over against mafsada, because there are many mubābāt 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 that God's actions, commands and considerations are entirely dependent on His will and nothing else. The Mu'tazila are also led to the same conclusion. (42)

To answer Qarāfī, Shāṭibi refers to his own discussion of the relativity of mašlaḥa. Second, he answers that a survey of the rules of Shari'a by the method of induction is claimed to have proved that Shari'a has taken into consideration what is
regarded as maṣlahā in customary practice as well. He argues that such a survey on the basis of the method of induction provides the dawābīt (determining factors) of maṣlahā. The examination of the events by way of induction where the takālīf al-ṣharī‘a (legal obligations) have been realized in practice shows that these takālīf and mubāḥāt did not harm human interests (or masāhiḥ) but have conformed to them and established them.

Ibn ʿAbd al-Salām distinguished between maṣāliḥ al-dār al-akhira and al-maṣāliḥ al-dunyawiyya on the basis that the former can be known only by sharī‘ while the latter are known by needs, experience, custom and by considerations of probability. He even says that when one wants to know a maṣlahā he may simply consider it rationally, supposing that the shāri‘ has given no indication. Judgment is reached rationally in this manner except in the case of taʿabbudāt where maṣāliḥ or mafāsid are not given.

Ṣātibī, quoting Ibn ʿAbd al-Salām here, probably to indicate his disagreement, refers to him not by name but by terms such as baʿd al-nās (some person) and ḥādhā al-qāril (this speaker). To Ṣātibī maṣāliḥ in the hereafter are not independent of maṣāliḥ of this world. Hence not only maṣāliḥ ukhrawiyya but also the dunyawiyya, as long as they are obligations, are known by sharī‘ alone. If the distinction between the two maṣāliḥ were absolute, the sharī‘ would have been concerned only with maṣāliḥ ukhrawiyya. In fact, to realize the ukhrawiyya, the establishment of the dunyawiyya is inevitable. Ṣātibī refutes the implication in Ibn ʿAbd al-Salām’s statement that the dunyawiyya are rational and hence the consideration of sharī‘ only supplementary. (48)
SECTION TWO

AN ANALYSIS OF THE TERMS DALÂLA AND MA'NÂ

The preceding section discussed the first aspect of maqāsid which focussed on maṣlāḥa as being the primary objective of law. In the present section Shāṣibī goes further to argue that the second maqāsid of Sharī'a is its intelligibility; Sharī'a was revealed in such a manner that it was to be intelligible for every mukallaf. Although Shāṣibī does not say so explicitly, his analysis of dalāla develops an argument against the Zāhirīs and the Ḥadīth-group who discouraged any interpretation of Sharī'a on the basis of maṣlāḥa. Zāhirīs attach more significance to the letter of the law (laft: words) than to the spirit of the law (ma'nā: meaning). Shāṣibī, 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 Sharī'a by maṣlāḥa serves to fulfil the objectives of Sharī'a.

The idea of Sharī'a 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), Shāṣibī first discusses the problem of foreign words in the Qur'ān.

Shāṣibī opens his discussion by analysing this very fact of revelation in Arabic.
He explains that in the claim 'that sharī'a is all Arabic and there is nothing atjami (foreign) in it', the point of emphasis is not whether there are foreign words in the Qurān or not. Unfortunately, many a jurist has understood the problem in this sense. In fact, the point to be stressed is that Qurān was revealed in the language of the Arabs as a whole, and it is in this general sense that Sharī'a 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 āmm (general) sometimes to mean zāhir (apparent), sometimes to mean āmm in one sense and khāṣṣ in another sense, and sometimes to mean khāṣṣ only. The Qurān 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. Shāfī noticed this aspect of sharī'a and stressed its significance for usūl al-fiqh, but the later jurists have generally disregarded this aspect. (66) Shāṭibī retakes from Shāfī and develops the theme of the universality of the understanding of sharī'a by an analysis of the meaning-indication process in the Arab language. Shāṭibī's discussion of the universality of the intelligibility of Sharī'a 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. Shāfībī 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.

Shāfībī calls the process, which indicates this special 'meaning', dalāla ‘āsliyya which may explain how Shāfībī proposes that Sharī'a can be understood even by those who do not know Arabic. Dalāla ‘āsliyya 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 dalāla ‘āsliyya (essential denotation).

Second, the limited aspect in which the words and expressions denote subsidiary meanings. This denotation is dalāla ‘ābì ‘āsliyya (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 trans­
lated into another. This is the sense in which one speaks of universal understand­
ing 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-maqsūd 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
(awgāf) of the essential meaning. These attributes depend on the essential
meaning and will be disregarded if the essential meanings exist no more or are dis­
rupted. (68)

To satisfy the requirements of universality and absoluteness in the comprehensibility
of Shari'ah, 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 Şarī'a, 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-ma'na al-maqṣūd) subsists. The seven readings of the Qur'ān are examples to this effect.

Further, a number of evidences are found in the transmission of verses. For instance, Ibn al-Aṣrābī (d.848), the famous linguist, once recited:
Wa mawdżi'in zirin la urīdu mabītahū
ka'annī bihi min shidda (t) al-raωfī 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 mawdżi'in ḍīqin' (a narrow place) instead of 'wa mawdżi'in zirin'.
Ibn al-Ἀrābī 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-ahkām
al-latīfa) which the words demand according to theoretical analogy (al-qiyās
al-nazarī) but which are, nevertheless disregarded. To illustrate, Shājibī says
that the words "samūd" and "yaṣūd", and "ṣāfīd", 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 (tašammuaq) 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. Shâṭibi makes a distinction between al-maṣna al-ifrādi (single meaning), and al-maṣna al-tarkībī (contextual meaning). The ifrādi is disregarded whenever it does not agree with the latter. (87)

The purport of the above discussion of meaning is Shâṭibi'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., dalāla asliyya, which according to Shâṭibi 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 maqāliḥ function in this world. (85)

Since Sharī'ah concerned the maqāliḥ of the Arabs who were ʾummiyyīn (unlettered), the Sharī'ah had also to be ʾummiyya. Şahībi explains that ʾummiyya means that the Arabs did not possess the sciences of the Ancients (Greeks). Literally, ʾummi 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 Sharī'ah (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 ʾummiyyīn can generally understand. This consideration would also require that the obligation whether pertaining to beliefs (iṣtiqādiyyāt) or to actions (ʿamaliyyāt) must be within the intellectual capacity of an ʾummiyyīn. 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, Sharī' 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 Sharī', Shāfi'ī neither claims that everything in the Qur'ān or Sharī' is and must be understood by an 'ummī, nor does he discourage any thinking or action beyond the comprehensibility of an 'ummī. 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 relevant to the fundamentals of Sharī' (qawā'id al-Sharī') and has no meaning for theological matters (umūr 'ilāhiyya). The latter are additional matters which are not primarily obligatory. (91)
In this section, Shāfiʿī discusses the concept of taklīf which is the term used for 'obligation' in ʿUsūl. Etymologically the term has the connotation of 'toil', 'pain' and 'hardship'. On the other hand the principle of taklīf mā la yutāq (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, Shāfiʿī, therefore, indulges in an analysis of the terms qudra and mashaqqā. According to Shāfiʿī 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 shart (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 Shāfiʿī, though it may be so cāalan (rationally). (107)

To define qudra, Shāfiʿī chooses to analyse what is considered ghayr maqdūr (that which is not within the power of a man to do) in ʿUsūl. Shāfiʿī’s term ghayr maqdūr is synonymous to mā la yutāq.

Shāfiʿī observes that ghayr maqdūr may be used in four senses. First, it may
refer to those obligations which are impossible to fulfil (mā ลำ 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 dakhilan tahta kasbihi (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 nazar (observation, reasoning, syllogism). (111)

The other two senses with which the term ghayr maqdūr is associated are mashaqqa (hardship) and haraj (impediment). Shāṭibī maintains that, strictly speaking,
mashaqqa and haraj are not ghayr maqdūr. He explains it by arguing that legal obligations in Sharī'a are related with mashaqqa and haraj, but not with the above-mentioned first and second senses of ghayr maqdūr, and since Sharī'a is not mà lā yutāq, the mashaqqa and haraj are not ghayr maqdūr.

Shāṭibī does not deny the fact that in Sharī'a 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 sharī'ī 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 (qarin) with it or succeeds (lābiq) 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 Sharī'a 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 (hubb) or the detestation (bughd) of the Shari'a. Even though the
acts which are ghayr maqdûr are neither within the capability of the mukallaf
nor within his intention, yet they may be desired by the law-giver. To
illustrate, Shatibi refers to the above-mentioned example of the obligation to
know. If the object of knowing is something qarûri (a priori), then there is
no action involved to fulfill 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
maqdûr and yet desired by the Shari'a. (111)

In the latter category of ghayr maqdûr, Shatibi refers, in fact, to acts which
are involuntary, being fitri and igtirari and musabbab. (110, 112)

Shatibi's argument is that such ghayr maqdûr 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 Jaza' (reward and punishment). (112)

On this point Shatibi's position rather appears puzzling. How an act despite
being the object of Shari'a's desire and subject to Jaza', be not the object of
obligation?

Shatibi 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 maqdûr.
Another group believes that reward and punishment both attach to ghayr
maqdûr at the same time. In contrast to these groups, Shatibi maintains that
either reward or punishment attaches to ghayr maqdûr to the exclusion of the
other. (110)
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)

Shāfi‘ī 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 favor 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)

Shāfi‘ī 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 Shāri‘ī 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 maqdûr act and related act is necessary for reward and punishment, the meaning is that ghayr maqdûr act is certainly effective in determining reward and punishment. (118)

Shâṭibi, 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 maqdûr may be desired or rewarded, yet it does not mean that it is obligatory. To be obligatory, an act must be maqdûr.

From here, Shâṭibi proceeds to an analysis of mashaqqa and ḫaraj which, he maintains, are not to be equated with ghayr maqdûr in the senses which have been discussed so far. Mashaqqa and ḫaraj make an act hard and difficult, but they are capable of being object of obligation. Shâṭibi, however, lays stress that acts consisting of mashaqqa and ḫaraj may be object of obligation, yet mashaqqa and ḫaraj are not objectives of obligation for their own sake. Shâṭibi develops his views in a detailed analysis of the term mashaqqa.

Mashaqqa

Mashaqqa is often confused with ghayr maqdûr. The discussion below contends that a distinction among taklîf mā lâ yuṭqā, (ghayr maqdûr) and mashaqqa must be observed. Sharî‘a 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 ‘alayya al-shay (the matter became difficult for me), denotes something "tiresome" and "hard". The Qur’an 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 (wad’i) meaning in Arab usage -- acquires five particular technical (istilahiyya) 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 ēda i.e. whether a certain act is considered mashaqqa by ēda 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 yutāq is also called mashaqqa, because in order to fulfil a command which is supposedly mā lā yutāq 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 yutāq not mashaqqa; mashaqqa is rather the effort made to achieve the end (i.e. flying...). Thus it becomes obvious that even linguistic usage associates mashaqqa with maqdūr only.

2. In the second sense mashaqqa is applied to acts which are extraneous to the muṭṭād (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 ḍāda, and thus it incurs mashaqqā. It is here that the Shariʿa makes certain allowances which are called rukhṣa by the fuqahāʾ.

3. The third sense of mashaqqā 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 mashaqqā and makes them difficult to carry out. In such cases the Shariʿa recognizes the principle of rifq (leniency, moderation) by commending the choice of acts which are not tiresome.

4. In the fourth sense of mashaqqā, the hardship of an act does not result from its being against ḍāda but rather because it is additional to ḍāda. In other words customarily it is not mashaqqā but it becomes so because one is obliged to do it. It becomes mashaqqā also because it creates responsibility in addition to the acts required by this worldly life.

5. The fifth sense of mashaqqā also flows from obligation, but in a manner different from the fourth. Whereas in the fourth an act is mashaqqā 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 takṣif requires one to reduce (mukhālafa) his own desires which incurs toil and hardship, since hardship is quite evidently seen in prevailing customary practices (ḥadāt jāriya). (119-121)
These five senses of mashaqa constitute the framework for investigating whether mashaqa is included under the requirement of obligation or not. Shâ'ibi conducts this investigation by analysing the intention of the law-giver, the understanding of the term in āda, and the intention of the mukallaf.

The first question is whether the Shārīć intends mashaqa or not. There are two kinds of answers to this question. One is given through the Shārīć's declaration of his own intentions, known through the Qurān or tradition. The second may be known through an analysis of the notion of mashaqa in Sharīć as distinguished from that in āda. Both kinds of answers agree on the point that the Shārīć does not intend mashaqa per se. The first kind of answer is manifested in the following:

a) various statements in the Qurān and Ḥadīth categorically deny any intention by the Shārīć to impose hardship. (121-122)

b) the existence of well-known allowances (rukhs) in Sharīć prove the existence of concessions to remove hardship. (122)

c) the consensus on the absence of any intention by the Shārīć to make shāqq acts obligatory. If it were supposed that the Sharīt did such a thing, it would be guilty of self-contradiction and hence self-negation; the Sharīt cannot and does not aim at both comfort and hardship. (122-123)

The second kind of answer is sought by investigating the notion of mashaqa in relation to āda.

Not every bit of toil and hardship is called mashaqa in āda. 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 āda when "it is possible (mumkin) habitually (muṣṭād) and the hardship (kulfa) entailed by the act does not interrupt the act in general practice (fī al-ghālib al-muṣṭād)" (123) In this sense mashaqqa in relation to muṣṭād can be of two kinds: Mashaqqa muṣṭād, 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 khārijā fīn al-muṣṭād, 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 (sāhibuhū) in his person, property or in his states". (123) Such acts are called mashaqqa and are extraneous to muṣṭād because they are not possible to perform habitually.

Having established this distinction, Shāḫibī points out that mashaqqa khārijā fīn al-muṣṭād is obviously not maqṣūd by Sharī'a. Even mashaqqa muṣṭāda 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 mashaqqqa. An act is demanded only insofar as it entails mashaqqqa, and this is why it is called taklif. Hence mashaqqqa is the maqṣūd of the Shāri'. (124)

Shaitibī answers this objection by explaining that taklif can be directed to the mukallaf in two aspects:

1. First because taklif is mashaqqqa and 2. Second because there is an immediate or forthcoming maṣlaḥa and good to be achieved for the mukallaf. Shaitibī obviously favours the second aspect as the only maqṣūd of the Shari'. 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 mashaqqqa per se cannot be maqṣūd. Why, then, is an obligation called taklif? Shaitibī 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 taklif because it entails kulfa and mashaqqqa, not because taklif in the sense of Kulfa is the aim or purpose of this act. The consideration of Kulfa is possible only when the term taklif is applied in a majāzī (metaphorical) sense to a certain act rather than using the term in its ḥaqīqa al-wadʿ al-lughawi (the essential posited meaning of a word in a language). (125-126)

(2) The second objection is that the Shari' knows what a taklif is and what it incurs, and since it is known that every taklif incurs mashaqqqa it follows
that the Sharić knows that a taklif incurs mashaqqa. It is, therefore, evident that by imposing a taklif, the Sharić purposes also to impose mashaqqa. (124-125)

Shā'ibí answers this objection by refuting the equation of the knowledge of sabab and musabbab with qasd (intention). He argues that even if in this particular case knowledge of sabab and musabbab is considered as intention (qasd) 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 manfa'ā (maslahā). Hence the Sharić does not intend mafsada i.e. mashaqqa. (126-127)

Secondly, it is evident from the Qur'ān and etc. that the Sharić intends to remove hardship. How can it be then maintained that the Sharić intends to impose and remove mashaqqa at one and the same time?

To sum up the discussion, Shā'ibí maintains that:

"The obligation of mustadāt and the like does not entail mashaqqa as explained. Hence what necessarily follows from taklif 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 Sharić does not intend mashaqqa in his imposition of taklif, 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 shari'ī does not do so and because the mukallaf's intention must correspond to that of the Shari'ī. 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 Shari'ī imposed as such, as for instance punishment (ṣuqūbāt). Shāṭibī maintains that even here the intention of the Shari'ī is not to impose mashaqqa as such, but to acquire mašlaḥa or to remove mafṣada by this mashaqqa. Accordingly, the mukallaf's intention must also be mašlaḥa and not mashaqqa as such. This is the reason why if a mashaqqa (such as a half oath to give all his property for charitable purposes) contravenes some darūrī or hājī principle in din (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 idtrārī (imposed on man not by his choice). Another point to be considered regarding mashaqqa is whether it is so called in ġada 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) Idtrārī, where mashaqqa is an inevitable consequence of a certain action.
3) Khārījī, 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 Shāri‘ does not intend mashaqqa per se, one must not seek for mashaqqa. Mashaqqa ikhtiyāriyya 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 (ṣama‘) and this is also that at which the Shāri‘ 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 Shāri‘ so as to produce acts which are intended by the Shāri‘.
To seek mashaqa, in this case, would be to violate the intentions of Shārif. This violation cannot earn reward. (129)

In opposition to Shāfī'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 Shāfī is the situation of arbāb al-āhwāl (sūfīs) who try their utmost to increase fazīma and hardship in rejection of rukhsa. (130)

Shāfī refutes these evidences on the following grounds:

1. All such reports are akhbār abād and relate only one matter. They do not constitute istiqār qāfī. Our concern is Qāfīyya not ṣanniyya. Hence these ṣanniyyāt cannot invalidate our position. (130)

2. In the final analysis these traditions do not favour the intention of mashaqa; rather they stress the acts themselves. The intention to bring about mashaqa is a secondary (tābi'a) not the primary (matbū'a), concern. (130)

3. Rather there are traditions in which the Prophet reproached those who opted for hardship. His proscription (nahy) of hardship (tashhid) is so well known in Sharī'a that it has become a definite principle (asl qafī). (132-133)

4. As for arbāb al-āhwāl, even in their case it is not correct to say that they intend to bring about mashaqa only. Their purpose is to disregard their own huzūz (self-considerations) so as to fulfill their duties toward God. Shāfī explains this point more fully in the case of haraj. Haraj is an act which causes an impediment in fulfilling the huzūz. The arbāb al-āhwāl prefer to forego their huzūz in favour of their duty towards God, because of fear or love of God. (132, 147-148)
Mashaqqa Iḥtirārīyya

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 kulfā, ta'āb etc. This is called by Shā'bī mashaqqa muṣṭād. 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 Shā'bī mashaqqa ghayr muṣṭād. 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 ḫaraj. (133)

According to Shā'bī 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 ḫaraj 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 ḫaraj, 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 khārījī. The category ḫaraj thus deals with ḫaraj actions. On ḫaraj actions, Shā'bī's basic position is that they are revoked where they
become impediments in fulfilling essential obligations.

According to Shāṭibi ḥaraj is revoked in the following two cases:

1) First where one fears being cut off from the Path (al-khawf min al-inqitāʿ ʿan al-tarīq). 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)

Shāṭibi’s argument in favour of the above observations are based on evidences from the Qur’ān 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 Shāṭibi’s position.

Shāṭibi resolves this problem, still maintaining his original position, by concluding on the basis of an analysis of verses of the Qur’ān and of certain ahādīth that, “The maqṣūd of the Sharīʿa is that the prohibition be based on some intelligible ʿilla.” (138)
Shā'ibī maintains that the *ṣīla* 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 *ṣīla* 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.

Shā'ibī thus concludes:

"In fine, prohibition based on some intelligible *ṣīla* is the *maqād* of the *Sharī'a*. Since this is true, the prohibition depends on there being an *ṣīla* 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? Shā'ibī examines this situation by asking the following question: Did the *Sharī'a* remove *mashaqqa* because it is His right (haqq) or because it is the right of the *abd*? (142) In his answer, Shā'ibī 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 *abd*, it is not absolutely forbidden, but rather be left to one's choice." (143)

In this context Shā'ibī reconsiders the case of arbāb al-ḍiyāwāl and their like, the people who choose extraordinary hardship in preference to *Sharī'a* allowances.
or who indulge in certain duties in order to disregard others. Shātibī considers the attitude of arbāb al-ahwāl towards Sharī‘i obligations as extraordinary.

Shātibī explains his view by making a distinction between two kinds of people:

1. **Arbāb al-ḥuẓūz**: those for whom carrying out a particular act causes extraordinary hardship, or for whom not availing of Sharī‘i allowance means inviting harm. Such people must not carry out an act of this kind and should avail themselves of Sharī‘i rukhsa.

Shātibī, however, warns against the other extreme of following one’s ḥuẓūz absolutely so that one departs from the bondage of ‘ubūdiyya. (146-147)

"The true position according to Sharī‘a is a combination of both aspects with a view of balance (fadl); to pursue one’s ḥuẓūz as long as the pursuit does not interfere with an obligatory duty, and to abstain from ḥuẓūz as long as the abstinence does not lead to prohibition." (146)

2. **Ahl isqāt al-ḥuẓūz**: 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 ḥuẓūz. 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 khāriji (external) to his intention as well as to his action.

Shātibī maintains that the Sharī‘ 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 mukallafin.
It is, nevertheless, understood from the totality of Shari'a that it is per-
missible to remove mashaqqa absolutely to eliminate the related mashaqqa
and to protect the permissible huzūz from being affected by mashaqqa.

Shari'a even allows preventing mashaqqa before it occurs. (150) This
permission is known a priori (darūratan) in din. (151)

Shāfī'i illustrates mashaqqa khārija with the following: hunger, thirst, cold,
heat, sickness, bodily harm, etc. Removing all of these mashaqqas is allowed. (150-151)

Shāfī'i, 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 hard-
ship and the endurance of trial must be borne. One must submit to such a
mashaqqa as a qadā' (decree of destiny).

Shāfī'i 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 mashaqqa khasa), or falls upon others together with him or falls upon others because of him, (called mashaqqa tamma), in every case, a mashaqqa is not required by Shari'a 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 tamma (general) will prevail over the elimination of a mashaqqa khasa (particular). (154-155)

2. Mashaqqa may be mustad or kharij an-mustad. In case of its being mustad, its removal is not intended by the Shari'a just as its imposition was also not intended. The removal of this kind of mashaqqa means the discontinuation of taklim.

In case of a mashaqqa which is kharij an-mustad, since it is conducive to disruption in either din or dunya, its total removal is the maqsud of the Shari'a.

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 kharij an-mustad in certain cases while, in fact, it is mustad.

Shafii explains this difficulty by saying that a mashaqqa following from a single act has two ends and a middle. The higher end of a mashaqqa is such that when something is added to it the mashaqqa ceases to be mustad. This does not, however, exclude mashaqqa from being essentially mustad. The lower end is such that were something subtracted, there would remain no more mashaqqa attributable to that act.

3. Sharia, 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 Shari'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 kulliyah (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 tashfi'd (severity) is brought forward to balance the laxity in a mukallaf's regard for Din. The tendency to takhfif (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 Shari'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, Shāṭibi 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 ikhlās, as expounded by the Ṣafī's, laid special stress on tark ḥuẓūz al-nafs as a necessary qualification of ṭabūdiyya or the Ṣūfī understanding of obligation. Shāṭibi maintains that although legal obligation also aims at ta'abbud, yet ḥuẓūz 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 perseverance in fulfilling the obligation and its universality that makes it hard.
The Sufi sense of ta'abbud is further refuted by the limitation of the scope of ta'abbud in the sense of mere obedience. For Shatibi, this sense applies only to the ibadât, while 'adât are governed by maṣlaḥa. Since according to him, in the final analysis, the ta'abbud in ibadât is only one aspect of maṣlaḥa, and maṣlaḥa in 'adât is not opposed to ta'abbud, Shatibi 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) ta'abbud and the problem of ḫuzūz; 2) 'awā'īd; 3) the division of obligations into ibadât and 'adât in accordance with the considerations of ta'abbud and maṣlaḥa.

Ta'abbud and the Ḫuzūz

Shatibi opens the discussion by saying that "the legal objective in instituting the law is to relieve the mukallaf from the stimulus of his passions (hawâ) so that he be a servant of God voluntarily (ikhtiyâran) as he is so naturally (īḍṭirâran, by compulsion)". (168)

To prove this point he argues from the Qur'ān and sayings of the Prophet where following one's passions (hawâ) is condemned. (169) He further contends that human experience in society (al-tajarib wa'l-'adât) also tell us that mašâlih, 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-\textit{maslaha} 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 Shātibī makes a significant distinction. He denies the identification of \textit{mašā|līh} with \textit{shahawāt} (desires), \textit{hawā} (passion) and \textit{aghra~} (personal interests). He stresses that \textit{Sharīa} aims at the \textit{mašā|līh}, not at realizing \textit{hawā}. He does not accept the idea that \textit{'akhddh} \textit{büzūz} can be equated with \textit{hawā}. \textit{(172)} In order to distinguish between \textit{hawā} and \textit{büzūz}, Shātibī 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 \textit{büzūz} are concerned. \textit{(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 \textit{büzūz} and \textit{aghra~} is not opposed to the objectives of \textit{Sharīa} in the above sense. \textit{(174, 172)}

One can seek \textit{büzūz} by making them subservient to \textit{mašā|līh} which are the purpose of law. Referring to the \textit{Sūfis'} states and experiences, Shātibī argues that by denying \textit{büzūz 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. \textit{(175)}

On the contrary, Shātibī argues that one cannot avoid \textit{büzūz} in fulfilling legal obligation. He says furthermore that \textit{ikhlās} or more specifically \textit{takhlīs al-ḥazz} (purification of \textit{ḥazz}) does not mean denial of \textit{büzūz}. The main points of Shātibī's arguments are as follows:
1. From the standpoint of ḥaẓẓ, maqṣṣid may be divided into two types: maqṣṣid al-ğaliyya (essential objectives) in which the mukallaf has no ḥaẓẓ and maqṣṣid tābi’a in which the ḥaẓẓ is provided. Maqṣṣid al-ğaliyya means universal necessary obligations consisting of the Five Maqṣṣilīh. (176) Examples of tābi’a are obligations in which the natural desires (shahawat) and pleasures are also aimed to be satiated. (178) Shatibi argues that in maqṣṣid tābi’a, the shahawat are, in fact, a means to achieve the maqṣṣid al-ğaliyya and, thus, no longer remain ittibā’ al-hawā. In fact, God knows that din and dunya are maintained and well preserved by these stimuli 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 ḥuzūz is, in a sense not entirely a hawā. On the basis of this consideration seeking of ḥuzūz is made permissible, not prohibited. (178-179)

2. Through a detailed analysis of maqṣṣid al-ğaliyya and tābi’a, Shatibi demonstrates that in obligations where ḥaẓẓ of the mukallaf is not the primary goal (bi’il qasd al-awwal) it is realized indirectly (bi’il qasd al-thāni). He shows also that where ḥaẓẓ is the primary goal, the act is naturally relieved of ḥaẓẓ, because to seek ḥaẓẓ in this case becomes part of the obligation. (183-186)

3. Takhlis (purification) or tajrid (abstraction) from ḥaẓẓ is thus achieved in those cases where ḥaẓẓ is permitted or demanded even when one is actually seeking ḥuzūz. This occurs for the reason that if the seeking of ḥaẓẓ is qualified by legal provisions and other such conditions, there is,
in fact, no more a hazz for mukallaf insofar as hazz is a requirement. (186)

4. The legal penalties in which there apparently figures no hazz for the mukallaf, are, in fact, a means to protect or realize hazz 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)

Shāṭibi maintains that in fulfilling an obligation an act would thus accord either with al-maqāṣid ḥaššiyya or with al-maqāṣid ṭabīqa. If it conforms with al-maqāṣid ḥaššiyya, its validity cannot be questioned, no matter whether it be free from hazz or provide for hazz. In other words the criterion is the seeking of maqāṣid not ġur huzūz. (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 huzūz to be ikhlāṣ, Shāṭibi concluded that it is conformity with maqāṣid ḥaššiyya which draws an act closer to ikhlāṣ al-ṣamal, and the act then becomes an act of ṣibāda, whether it was originally ẓād or ẓibāda. (202)

In cases where the act accords with al-maqāṣid ṭabīqa, the case is somewhat different. Here the criterion cannot be ṭabīqa, hence it must be seen whether the act is connected with al-maqāṣid ḥaššiyya. If it is so connected, even though it seeks hazz 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 ḥaššiyya is absent, then the act is simply one of hazz and hawa. (207)
Shāḥībī explains the matter further by saying that if the seeking of ḥuḍūz were the absolute opposite to obedience, it would not have been permissible for anyone to perform any act of ṣāda unless there were no intention and effort to achieve the ḥazz al-nafs. In fact there is no such command in Shari'ā, nor is the goal of ḥuḍūz in al-ṣamal al-fādiyya prohibited, even though the lawgiver always lays stress on ikhlās. (208)

If the intention to achieve ḥazz is denied in al-ṣamal al-ṣādiyya, any hope for paradise or fear of hell in reference to acts of ṣibādat would render them invalid (ṣamal 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 ḥuḍūz. (210)

To defend his conclusion, Shāḥībī, in addition to rational and traditional criticism, particularly mentions Ghazālī's views on ḥuḍūz and clarifies his own position by criticizing Ghazālī (214-215). Shāṭībī explains that obligations are divided into two categories. First, there are the ṣibādat, by which one seeks closeness to God. They consist of Belief (ʿīmān) and its subsidiaries as fundamentals of Islam and all ṣibādat. The second category is ṣadat. Satisfaction of ṣadat obligations means spreading masālih absolutely, and opposition to meeting these obligations means spreading mafāsid. The second kind of obligation belongs to this world and aims at masālih of the people. The first has to do with the rights of God in this world. It does not aim to yield masālih in
this world but rather in the hereafter. (215)

Now in the first category: ḥazz in the hereafter is established and lawful. The seeking of ḥazz in this sense cannot be called shirk (polytheism), nor is it a denial of ikhlās. Furthermore, even according to Ghazālī, the highest aim of ṣubūdiyya is Ṿazīr ilā al-mabūb (the vision of the beloved) in ākhira, which is also a ḥazz. (216) In fact Ghazālī calls it ḥazz ʿazīm (great joy). Also to demand complete negation of ḥuzūz is an impossible obligation.

(216) Seeking ḥazz 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 ikhlās of ʿibādāt. (218-219)

As to the second category of obligations, i.e. ʿādāt such as nikāh (marriage), bayʿ (sale), etc., it is well known that the lawgiver intends through these things the maintenance of the immediate maṣāḥih of the people. Since such is the case, seeking ḥazz in performing this category of obligations cannot be contradictory to the intention of the lawgiver. Further, if it were wrong to seek these ḥuzūz, the Qurʾān 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 ḥazz 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 ḥazẓ is distinguished from ḥawā, Shāṭibi enumerated three characteristics of the obligation which provide assurance that the effort to achieve ḥazẓ in obedience to the lawgiver will not reduce one's act to ḥawā. These characteristics are dawām (perseverance) (242) universality (kulliya) and the generality (rumūm) of the obligation.

It is a test of one's obedience when one has to meet an obligation constantly. (243) The characteristic of kulli (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 rumūm, the obligations are obligatory upon each mukallaf without distinction. The only exception to this rumūm 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-cadāt (deviation from regular habits) are often equal to cadāt 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-cadāt are impossible to be followed, the latter must be considered
as special to the Prophets. They are not obligatory to be followed unless the
\textit{Sharî'ah} explicitly demands so and then only if they do not disagree with
\textit{Sharî'ah}. (249-266) The main argument that underlies this discussion is that
the extraordinary acts of the Prophet where he appears to be abandoning \textit{huzûr} are
in fact \textit{khawāriq al-cadät} in the case of common men. (269) Since \textit{Sharî'ah} is
universal, it cannot oblige all men with things which are \textit{khawāriq}. (275)
Invalidity of the \textit{khawāriq}, however, does not mean that law does not or cannot
be changed. What Shātibi is stressing is the fact that the \textit{khawāriq} do not convey
the sense of legal change; they are rather exceptions to laws of nature. In
addition to Prophetic revelation, Shātibi includes \textit{Kashf} (mystic revelation) and
\textit{ru'ya} (dreams) of the \textit{awliya'} in \textit{khawāriq}. (266-269) In order that it
may be understood fully, this discussions requires a rather detailed analysis of the
notions of \textit{cadät} and \textit{khawāriq}, and their relationship to the rules of \textit{Sharî'ah}.
The analysis of \textit{cadät} is presented in the following chapter, as it is more suited to
the discussion there. Briefly, Shātibi uses \textit{cadät} both in the sense of habits,
customs and human behaviour and as an opposite term to \textit{ibādät}. Essentially,
\textit{cadät} belongs to the physical world. \textit{Cadät} are constant; and when some event
happens contrary to \textit{cadät} it is called \textit{kharq al-cadät}. Not all of the \textit{cadät} are
constant, however; it is, in fact, only the universals of being which are constant;
Shātibi calls them \textit{awā'îd mustamirra}. Some of these \textit{awā'îd} are either introduced
or sanctioned by \textit{Sharî'ah}, hence called \textit{awā'îd sharâ'iyya}. Others are current
in the practice of the people, hence called \textit{awā'îd jâriy a}. \textit{Sharî'ah} does not
oppose \textit{awā'îd jâriy a}; in fact, it shows a constant regard for them. There are,
however, variations in the practice of these ḍādat. Also they change with time and place.

A detailed analysis of ḍawā'id sharī'yya by Shāṭibi reveals that maṣlahā is the basic consideration both in the change and the continuity of these ḍawā'id. In the light of this view it may be seen that taʻabbud toward ḍawā'id sharī'yya is not devoid of ḥuzūz and maṣlahā.

Taʻabbud and Maṣlahā

From the above analysis Shāṭibi concludes that the essential consideration in ḍībādat, insofar as the mukallaf is concerned is taʻabbud without regard for maṣāmān (inner meanings). In ḍādat, on the other hand, the essential consideration is that of maṣāmān. (300) This conclusion is further demonstrated by the following points of argument. First, from a survey of Sharī'ā it may be inductively known that provisions such as tahlāra (ritual cleanliness) and tayyammum (ablution with dust) in the realm of ḍībādat are difficult to explain, except in terms of taʻabbud. (301) In the realm of ḍādat, it is obvious that such provisions are based on maṣlahā of the people. It is thus inductively discoverable that the lawgiver relies on a regard for maṣlahā in ḍādat. (305)

Secondly, in ḍībādat the extension of the scope of taʻabbud is not intended. (301) In other words, the obligation is limited to the specific commands comprised in ḍībādat. This is why no explicit reason is given for promulgating such commands. In the case of ḍādat, on the contrary, the extension of the rules is the purpose. Hence the lawgiver generously explains the rules of law relating to ḍādat in respect to their ilāl (reasons) and ḥikam (wisdom). (306)
Tacabbud and maṣnā/maṣlaḥa, however, are not opposite terms for Shāṭibī. He characterizes tacabbud by various statements: "al-rujūʿ ilā mujarrad mā ḥaddahu al-Shariʿ" (recourse only to what the lawgiver has determined); (304) Al-ingiyād li ʿawāmir 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 adami maṣquiyat al-maṣna (that which refers to the non-intelligibility of its meaning). (318) Shāṭibī defines maṣna in this context as follows: that is "dabtu wujūḥ al-мaṣāliḥ" (to define the aspects of maṣāliḥ). (308)

The distinction between tacabbud and maṣna 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 maṣna; otherwise, it is tacabbud. (314) This explanation is as yet insufficient, however, because the "intelligibility" needs further to be qualified. Shāṭibī explains that "intelligibility" applies where the maṣnā or maṣlaḥa can be extended as an ṣilla to other similar cases. If the maṣnā is extendable, it will still be taken as tacabbud. (309)

To illustrate,

"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 (ṣifāh). But (if they are considered as being the ṣilla of marriage) they are but general principles just as humility and submission to the Sublime are the reasons for the obligation of ṣibādāt. This amount (of ṣilla 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 ta'ābbudūt according to Shāfī, are absolute obligations in the sense that they must be fulfilled without asking for the reason, and second, that ta'ābbudūt cannot be made the basis of analogy. Shāfī seems to be stressing the second implication, rather than the first. In other words, he is implicitly arguing that the absoluteness of obligation in matters of ta'ābbudūt is maintained only in the sense that they are not to be extended. There is no denial of 'illa; in fact it is only after the search for an 'illa in the command that one can decide whether the 'illa given or implied is general or specific. What is denied is the extension by taqlī and qiyyās. The denial of taqlī amounts to placing a limitation on the scope of application of these commands. It is in the sense of specifically limited command that ta'ābbudūt is spoken about in this context. As Shāfī himself says, "In all those matters where a consideration of ta'ābbudūt is established, there can be no tafrīc (deduction, extension by analogy) from them." (310)

Shāfī, however, also accepts other senses of ta'ābbudūt in addition to the one mentioned above. He explains that even matters, where the consideration of meaning without ta'ābbudūt (in the sense mentioned above) is established, are not free from ta'ābbudūt (in the general sense of the term). (315) This general sense of ta'ābbudūt is demonstrated by the following considerations. First a mukallaf is bound to obey a command because of the sense of demand (iqtīdā) and option
imposed by the command, not because he finds in it a certain maslahah. (311)

Second, even if a decision about an ilaha is taken, this process does not assure us that the ilaha decided upon is the only ilaha of that command or that it is the only maslahah to be realized. This state of indecisiveness (waqifin) is removed by recourse to taqabbud. (312) Shatiibi further explains that qiyas means a search for an ilaha only insofar as it is ordinarily possible. Qiyas does not exhaust all the ilahah; it is rather based on the most probable (ghalbat al-zann) ilaha. On this basis ‘qadar bi’ta’addi’ (judicial decision by extension of the original ruling) is not contradictory to taqabbud 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 ijma’, nasr, ishara, munasa’aba etc., or through instances where none of these methods can be applied. The obligations of the latter kind are known only by wahy (revelation). In this category of obligation the absence of ilaha and ta’addi within command demands taqabbud only. This taqabbud means to stop at the point where the sharia has defined the limit; if the ilaha is not given, taqabbud demands that the command must not be extended by qiyas. (313)

"A maslahah is so from God in such a manner that it is verifiable (yaqitu) by human reason (qayl) and reassuring (tajma’inn) to the soul (nafs)." (315)

The takalifi can also be viewed as rights of God. In this sense they become taqabbudi. Shatiibi, however, regards taqabbud 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 ibadah. 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 maṣnā belong directly, and hence this category is not essentially taʿabbudī. (318-320).

Shāṭibī clarifies the distinction between taʿabbud and maṣlaḥa, and ḥusaynīya and ṣibādāt and ṣādāt from the point of view of huqūq (rights). He says that the right of God means a situation "where it is understood from Sharī'a (law) that the mukallaf has no option (khiyara), whether the maṣnā 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 ḥusaynīya essentially refer to the rights of God and ṣādāt to the rights of men. (318)
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 maqṣīd, takālif and ja走得 al-maṣāliḥ (to seek maṣlaḥa); maṣlaḥa and tabayyul (seeking legal devices to escape the severity of the law).

Niyya

Shaṭibī 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 Shaṭibī uses the terms niyya, qasīd, maqṣīd,
ibtighā interchangeably, all of which have the sense of English "intention".

The relationship of niyya and act: Šājiibi says that the maqasid make a distinction between ʿāda and ʿibāda. The same act, such as the act of prostration, is ʿibāda according to one intention, but it is not ʿibāda according to others. (324)

Thus acts are judged by the intention of their authors. Šājiibi, however, maintains a distinction at this point between al-ʿākām al-waḏiyya and al-ʿākām al-taklīfiyya. Al-Taklīfiyya are those rules of law which come into effect by the declaration of the lawgiver. They are declared to be ʿamr (command), or nasy (prohibition), etc. The five well-known values of obligatory, recommended, etc., belong to this category of rules. Since al-ʿākām al-taklīfiyya produce direct obligations, a necessary condition for their being fulfilled is the intention of the mukallaf to do so. Waḏiyya 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, Šājiibi says that if an act is connected with a qaḍ, ʿākām al-taklīfiyya become effective in connection with this act. If the act is performed without a definite intention, ʿākām 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) Shājiibi'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 \( \textit{ikhtiyar} \) and here the intention must correspond explicitly with the act, otherwise, the act is not valid. From the juridical standpoint, in cases other than \( \textit{ibadat} \), expression of intention and its correspondence with the said act is not a necessary requirement; an act is valid and subject to juridical consequences even in the absence of a corresponding \( \textit{niyya} \).

The source of confusion has been the question of consideration of \( \textit{niyya} \) in the above cases of duress and joke. The \( \textit{niyya} \), here, is not lacking in an absolute sense. Shātibi, therefore, begins his answer by explaining various senses of the considerations of \( \textit{niyya} \). In its general sense, \( \textit{niyya} \) (in the sense of volition) is a necessity ("\( \textit{darura} \)"") for the validity of an action. This is so because the doer of an action insofar as he is mukhtâr (one who has a choice, freedom of will), has intention implicitly 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 \( \textit{naif} \) (a person in sleep) or by a \( \textit{majnûn} \) (an insane person). Having no \( \textit{ikhtiyar} \), individuals in these states, are not mukalla'in. Those acts which are done with \( \textit{ikhtiyar} \), however, cannot be considered as lacking \( \textit{niyya} \).

Hence acts performed under duress or as jokes will be judged, juridically, by such intentions. This sense of the consideration of \( \textit{niyya} \) is from the standpoint of \( \textit{abkâm wasliyya} \). As has been explained earlier, from the standpoint of
waqtiyya, 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 'ibādāt. It is also necessary when one wants to transform all his acts, 'ibādāt or ṭādāt, into ta'abbudāt. Free actions (al-a'māl al-dakhila taht al-ikhtiyār) can be changed into ta'abbudāt, if the intention of obedience accompanies them. This sense of consideration of niyya is from the standpoint of āhkām taklīfīyya. As discussed earlier, from the standpoint of taklīfīyya an act becomes valid and the ījāzā becomes effective only if the act is accompanied by the intention to obey the Shārīʿ.

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 mašlaḥa 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 mašlaḥa and remove mafsada. A contrary intention with respect to these lawful things would be equivalent to seeking mafsada and preventing mašlaḥa which is contrary to human interest as well as to Shariʿa. (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 ibtidā (bid'a, innovation in religious matter). Bid'a as such is madhmūm according to Shātibi. He does not accept the judgment of bid'a made by some scholars. What is called bid'a muḥarrama or bid'a madhmūma is understood by Shātibi in reference to the second type of acts above where intention and act both are contrary to the objectives of the lawgiver. (340) In bid'a per se the intention conforms but the act does not. Shātibi, 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 (imtimā). (342)
Jalb al-Maṣlaḥa

It has been mentioned above that jalb al-маṣlaḥa within the limits of ṣarīʿa becomes a necessary requirement of niyya. 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-маṣlaḥa 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)

Shājbī divides 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 qāṭī (definite) ṭādir (rare) or fānnī (probable). A man will be prevented from striving for maṣlaḥa only if the harm done to others is qāṭī. (348)
The second question that needs to be considered in regard to jalb al-maslaha is that of seeking the maslahah of others. As a general rule Shafi'i states that if some one is obliged to seek his mas'ali, it is not obligatory for others also to seek his mas'ali. (364) This rule is similar to the rule of niyaba discussed earlier. The main points that Shafi'i brings forth in this discussion serve to show that no man is under obligation to fulfill the specific obligations of others. We are not concerned here with the obligation of 'ibadah, as was made clear earlier in reference to niyaba in that 'ibadah 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 fulfill them, although they are necessities for him. For instance, the following obligations which aim at striving for mas'ali of others, can be justified in terms of the above explanation: Zakat, 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) (kifaiya) and some which are specific (ta'li al-tasyin) and individual obligations. The specific obligation cannot be fulfilled by proxy. In such cases an individual is required to seek mas'ali for others, but only if his own mas'ali 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 mas'ali. If he cannot fulfill 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 maslahah 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 fulfills his duty. (364-368)

Shāṭibi's conclusions regarding the above two questions of striving for maslahā 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 maslahā, one may also actually do evil, i.e. to harm others. This would make shari'ā in some instances result in evil deeds. To rectify such a consequence, Shāṭibi 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 maslahā, 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 Shāṭibi'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, Shāṭibi even implies that by disregarding the social implications of the legal obligation, one's individual commitment to do good may result in evil.

Shāṭibi's view of legal obligation as also a social obligation is further explicated in his conclusions regarding the situation where one strives for the maslahā of others. If a person has devoted himself to look after maṣāliḥ of society it becomes a kind of societal obligation for others to look after maṣāliḥ of that individual. Shāṭibi 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 maṣālih, either because they are occupied with serving the maṣālih of others, as in case of wife, or they are simply incapable of doing so.

Tabayyul

Shāṭibī defines ḥila and tabayyul 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 ḥila or tabayyul". (379) These means are either apparently permitted in Sharīʿa or are not permitted. They work either by rendering a rule inapplicable or by transferring the consideration of the matter at issue. (378)

Tabayyul, 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 Sharīʿa, 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 ḥila. 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 Shāfiʿī regards tabayyul as unlawful on the whole. (380) He supports his argument from the Qurʾān 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)

Shāfiʿī stresses that legal acts are not intended (maṣūda) for their own sake, but for their maṣāni which are in maṣāliḥ. The maṣāliḥ gained in qibāḍa 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 masāliḥ are not sought, even the qibāḍa become unlawful. There is a clear instance in the case of ṣalāt done for the sake of rīḍa al-nās (to put up a show for the people). Such ṣalāt is not lawful. (385)

In view of the above explanation ḥiyal (p. ḥila) 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. Shāfiʿī, 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 maslaha dunaywyya. In the latter case, however, since the real intention is different from that of a ḥila, i.e. one confesses but does not believe in Islam, he is seeking a maslaha in the hereafter, and hence the use of the confession is not lawful. (387)

The third type of hiyal 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 hiyal agree with the intentions of the lawgiver nor can it be said that they oppose it. Hence it has been controversial. Shāṭibi illustrates this type with two cases; nikāh al-muḥallil (marriage of a divorcee with a person other than her husband in order to make remarriage with the husband lawful) and buyūʿ al-ajāl (sales on credit). Shāṭibi finds it impossible to decide in favour of or against the practice of those two hiyal. He is of the opinion that those who regard this type as forbidden, believe that it is against the maslaha, or in other words, is an international violation of Sharīʿa. He disagrees with this conclusion. (388) Shāṭibi only provides the arguments of those who are in favour of these two hiyal, but does not give his opinion in favour or against them. (391)

CONCLUDING REMARKS

Having investigated Shāṭibi’s doctrine of masāṣid 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 Shāṭibi’s concept of maslaha 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 Shāfi'ī's concept of _maslaha_ from his own statements presented above and their implications.

As must be evident from Shāfi'ī's definition of _maslaha_ and its various aspects, the essential element in his concept of _maslaha_ is the consideration for and protection of the necessities of human life. The five aspects of the _maqāsid_ serve further to establish this point. The first aspect reveals the necessary relation between human needs and _maslaha_ 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 _shari'a_. The third aspect discusses the doctrine that harmful things which impede the satisfaction of human needs are revokable. Contrary to the views of the _ṣūfis_ and some jurists the _maslaha_ 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 Shāfi'ī uses the term _ṣadāt_, are based on _maslaha_. 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 _ṣadāt_, but implies that obedience in matters of _ʿibādāt_ means _taʿābūd_ and in matters of _ṣadāt_ to follow _maslaha_, because these are the objectives of the lawgiver. This point is elaborated in detail in the fifth aspect of the _maqāsid_. The basic components
of Shātibī' 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 Shātibī had divided maṣlaḥa into ḍārūrī, ḥājī, and taḥsīnī types only to reject the latter two as less satisfactory bases of legal reasoning. Shātibī, in contrast, sees the latter two categories of maṣlaḥa as layers or zones that are meant to protect the ḍārūrī type; they complete and supplement ḍārūrī maṣlaḥa. The rejection of the ḥājī and taḥsīnī categories may not immediately affect ḍārūrī maṣlaḥa but, eventually, such a rejection may disrupt the ḍārūrī type as well. This structural approach to maṣlaḥa makes Shātibī' s conception more integral than that of others.

Shātibī, however, distinguishes between two conceptions of maṣlaḥa. Maṣlaḥa as conceived in cāda is essentially ṭabdīl maṣlaḥa ḍūnyawīyya, which does not look beyond this world.

Maṣlaḥa conceived in connection with sharīʿa takes into consideration ṭabdīl maṣlaḥa al-ṣukhrawīyya in addition to maṣlaḥa ḍūnyawīyya. Another factor that distinguishes the conception of maṣlaḥa in sharīʿa is its simple and abstract nature. Maṣlaḥa in cāda, although conceived as not-mixed, yet is found always to be mixed with maṣūṣa and non-maṣlaḥa. In cāda, the maṣlaḥa in an act is determined by weighing the elements of maṣlaḥa and maṣūṣa; whichever dominates gives its name to that act. Maṣlaḥa ṭabdīl sharīʿyya does not reject this process and the conclusion drawn from it, yet as maṣlaḥa sharīʿyya 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 maslaha in ṣāda and definition of maslaha sharī'ya in reference to dominating maslaha ṣadiyya is fundamentally important in Shāṭibi'ī's legal thinking. Such a conception of maslaha 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.

Shāṭibi'ī's conception of legal obligation which takes ṣāda into consideration along with Shari'a, making maslaha 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 ṣāda and Shari'a 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.
Shâtibî rejected this mode of thinking. He emphasized that there is Divine Will behind legal commands, but this Will is *tashrit* and, thus, distinguished from the type of Divine Will which is *takwini*. Man is not involved as an agent in the actualization of God's *takwini* Will, but he is involved in God's *tashri* Will. Since man is a *mukhtâr*, 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 *füfis*. The *füfis* 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 *'adât* as being *huzûz* pursued for the sake of *zuhd*. In relation to *'ibâdât* their view of obligation demanded much more than formal fulfilment of the requirements in law for the sake of *ikhlâs*. *Zuhd* and *ikhlâs* thus constituted the basic elements of the *füfî* concept of obligation which they termed *wara*.

In his analysis of *taqabbud* and *huzûz* Shâtibî shows the irrelevance of ethical determinism for legal obligation. *Taqabbud* 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.

Shâtibî's concept of *maslaha* 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 maslahah came from the denial of cause (illa) in legal reasoning. Shāṭibī tried to solve this problem by distinguishing between the afāl and the awāmir of God. He argued that ʾilla can be attributed to God's āhkām and His awāmir, if not to His afāl. Secondly he demonstrated that the Qurʾān even mentions ʾilla 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 maslahah.

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 ḍalāla asliyya, 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 maqāsid of the shariʿa 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 maslahah. By giving substance to the concept of maslahah 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 maslahah is based on istiqrāʾ rather than the method of analogy from particular to particular, Shāṭibī argued that maslahah 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 maslaha provided only zann. Using the same terms, Shātibi argued that the method of analogy led, at the most, to ghalbat al-zann, and not to yaqīn. A decision in favour of one qilla does not remove the doubt that there may be another qilla which is more valid. Secondly there is no way to ascertain that the qilla 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 Shātibi that permits adaptability. His understanding of maslaha 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 āda and shariqa and between ṣadat and sibādat. For a better understanding of Shātibi'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:
   Shājīb, Al-Muwāfaqāt, Vol. II (Kitāb al-maqāṣid), ed. and comments. Darāz, (Cairo: Muṣṭafā Muḥammad, n.d.)

2. See above Chap. IV, p. 191ff.


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-qād al-a`wāl should be translated as 'primarily', 'initially', or 'directly' instead of 'in the first intention'.

5. See p. 373ff.

6. See p. 349.
In Chapter V we noticed that in his fatwā, 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-ʿIṣlām.

In reference to Shāṭibī's terminology, this chapter will deal with the following concepts: Sharīʿa, ḍārah, bidʿāt, and ḫithād. An analysis of the term Sharīʿa
reveals Shāṭībī's concept of law in reference to change. The concept of ṣāda explicates the notion of social change and its relation to law. Bida' presents a concept of legal change which is generally linked with social change. The concept of ījtihād explains the interaction of social and legal change.

Sharī'a

Shāṭībī has defined most of the essential terms which he uses, but a definition of Sharī'a 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. Accordingly, we find that Shāṭībī's concept of Sharī'a is associated essentially with the notion of "revelation".

On the epistemological level the terms ʿaql (human reason) and ḥawa (desire) are used as terms opposed to Sharī'a. Ontologically Sharī'a is contrasted with kawn (being). This semantic opposition has significant implications for the concept of Sharī'a. Firstly, it indicates that law is not arbitrary and merely based on personal likings. Secondly, the values on which Sharī'a is based are not determined by human reason. Thirdly, it implies that being opposed to kawn which is changing, Sharī'a is eternal and abstract. Shāṭībī distinguishes between kawn and Sharī'a also as two different aspects of Divine Will. Kawn is the expression of the creative aspect of Divine Will, and Sharī'a 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 Sharī'ah is also used as synonymous with wāhi (revelation). Since wāhi is a process and sharī'ah is not, the synonymous use of the two makes sense only if we understand Sharī'ah as the substance of the process of wāhi. As for explanations of the term through synonyms or substitutes for it, the Qur'ān is equated with the Sharī'ah. The application of the term is also extended to Ḥadīth of the Prophet, the Sunna of the Prophet and that of his companions but whereas the rulings in the Qur'ān are certain (qāṭi'ī), in general and in details, the Sunna is certain only in general and is but probable (zāanni) in detail. The absolute and original Sharī'ah is Allāh only. The Prophet, muftis and mujtahids are also considered to be sharī'ah by Shāṭibī, but they function on God's behalf and not in their own right.

The characteristics of Sharī'ah that Shāṭibī has enumerated are the following: blessed (mubāraka), Arabic, general (ummiyya), universal (ṣāmma; kulliya), liberal (ṣamha), convenient (sahla), protected (maṣūma).

The other terms that are associated with the term "Islamic law" are figh and usūl al-figh.

The term figh is used by Shāṭibī more in its literal and essential meaning than in the technical sense. The phrase figh al-sharī'ah as used by Shāṭibī may mean "under-
standing of the shari'ah", "investigation of the shari'ah" or "establishing the meaning of shari'ah".

Shāṭībī, however, uses the term "usūl al-fiqh" more often and in a certain technical sense. In al-ίίτιsām, he defines it as follows: "Usūl al-fiqh" means "to infer, by method of induction, universal principles from the evidences of sharī'ah until the mujtahid finds them conspicuous (naṣb sayn), and the searcher finds them easy to apply".

The equations he uses to explain the term show that his concept of usūl al-fiqh is very closely connected with that of Sharī'ah. He argues that usūl al-fiqh have the same relationship to sharī'ah that the usūl al-dīn (the principles of religion; kalām) have. He explains that to Qāḍī ibn al-Ṭayyib usūl al-fiqh meant the principles of the science of sharī'ah (in the epistemological sense), whereas to Imām al-Juwaynī they were the proofs (adilla) of sharī'ah. Shāṭībī did not consider them either as proofs or directives for sharī'ah, but as the principles derived inductively from the underlying universal laws in sharī'ah.

A summary of Shāṭībī's view on the origins of sharī'ah also reflects his concept of sharī'ah as a "revelation". According to Shāṭībī, sharī'ah is the light of knowledge. In their pre-sharī'ah state, mankind sought their ends at random. Because of its inclination to passions and desires (hawa), the human reason was unable to discover the maṣūlih (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 (aqādar). Necessitarianist values (būkm al-īdthīrār) were attached to acquired acts (al-afkāl al-muktasaba). Men were in this plight, when God showed His Grace and sent prophets to every people with shārā' (pl. of shari'a). The Prophet explained to the peoples in their own languages what was the true, right path. 21

This account of the origin of shari'a is difficult to be interpreted in terms of time because Shāfī'ī on other occasions argues that there never was a time without shari'a. This account then can be understood either in a mythological sense or in the sense that Shāfī'ī was referring to what he calls the fatra, the period of interval in between periods of revelations of shari'a. 22

The last in these series of revelations was sent to Muḥammad b. `Abdullāh. God revealed to him His Book, the Qur'ān. This book established the criterion of distinguishing certitude from doubts. 22

The Qur'ān is the totality (kulliya) of shari'a, the fountain of wisdom. It is the source of shari'a. 23 The Qur'ān 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, sometimes in the Qurʾān 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, Shāfiʿī 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 the *shari'a* only. Legal change is, however, possible in individual cases. The question then is to ask which legal institution does Shāṭībī regard as responsible for the function of legal change?

As mentioned elsewhere, two legal institutions are involved in this matter, *futyā* and *qādā*. Shāṭībī considers *qādā* and *futyā* both as *wilāyāt* (administrative offices). Like the establishing of a government, they are also *kifā'iyā* (societal obligations). In Shāṭībī's structure of *maqāsid*, *kifā'iyā* in contradistinction to *ṣaynīyā* 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'iyā*, however, are still essential and necessary as they are among the maqāsid of *shari'a*. They are indeed complementary to *ṣaynīyā* because they make the fulfillment of the latter possible. *Kifā'iyā* aim at achieving the common good (*maqālih wāmma*) 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*, *qādā* and *futyā* came into being. They were recognized by *shari'a* in the public interest because were they to be abandoned, the social order would be destroyed.
This clarification was necessary to show that futyêi and qoçli being societal obligation are necessarily linked with society and hence with social change. Their being classified among . . . Kifâ'îya also implies that the mufti and the qoçli 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.

Shâtibi does not spell out the distinction between the functions of qoçli and mufti, but from his discussion of fatwâ and iqtidâ, which follows, it can be assumed that, properly speaking, the institution of futyê was regarded by Shâtibi as responsible for the interpretation of law and the adoption of legal changes.

Shâtibi believed the mufti to be the deputy and successor to the Prophet. Like the Prophet, a mufti relays the commands from God, interprets sharîa for the people and executes them. More important, Shâtibi regards the mufti to be a legislator in a certain sense. He explains this opinion in the following manner.

A mufti’s knowledge of sharîa 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 (inshâ’ al-ajkâm) which is the function of a shariq. This function qualifies the mufti as a true successor (Khalîfa) to the Prophet. 31

In regard to the question of authority (iqtidâ), Shâtibi divides the wielders of authority into three categories. First are those in whose actions freedom from error (qisma) 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 shari'a.

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 Shāṭibi does not admit their authority to command obedience in law. He, nevertheless, accepts the authority of a judge (hākim) in the application and execution of law.

Shāṭibi's concept of authority seems to be based on two notions: ʿismā and qaṣṣa. Though ʿismā implies freedom from error, yet it cannot be understood in the sense of infallibility in Shāṭibi's terminology. To him ʿismā is equivalent to ḥifẓ (safety, protection, assurance) from change or transformation; but not in a static sense. He explains that the ʿismā of the Qur'ān has been attained through its wider study, preservation and the development of sciences relating to the Qur'ān. The ʿismā of the shari'a in the hands of the generation succeeding Muḥammad came to be as they inferred the rules of shari'a by seeking its objectives from the Qur'ān and Sunna, sometimes literally, sometimes from its implications and sometimes by deducing the 'cause' (ṣilla) 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..." Shāṭibi's notion of qaṣṣa 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 Shātibī’s concept of law.

The institution of fūtayā, 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 Shātibī recognize the interaction of legal and social change? For the answer to this question we turn now to Shātibī’s view on ġāda.

Ğāda

Shātibī’s discussion of ġāda turns around three problems; the constancy of ġādat, the possibility of their change and their relationship with sharī'a. Even his definition of ġāda shows these predilections. According to Shātibī “Ğāda 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.”

Shātibī’s definition partially resembles the theory of determinism. This deterministic element is the constancy which Shātibī calls istiqār (persistence) and istimrār (continuity).

The continuity of ġādat 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 ġāda, as Shātibī says “the occurrence of ġāda in the world of existence is a known (mašlūm) matter not a conjecture (mažnūn).” Both elements are such that their absence makes any law impossible. “If a divergence (ikhtilāf)
is presumed in 'awā'id, it would necessitate a divergence in law-making (tashri'); in classification of law (tartīb) and in promulgation (khīṭāb), and the shari'ā would not be the same as it is now.

Shāfi'ī uses the term āda in various meanings; sometimes he means simply habits and human behaviour, on other occasions it is equivalent to custom. It is also contrasted with ibādāt so as to mean what the other jurists generally call mutāmalāt. In fact Shāfi'ī's use of the term is inclusive of all these senses. This interpretation is admissible if we recall that Shāfi'ī contrasts sharī'ā or 'amr with kawn. The āda, then, would be related to kawn or the physical world, as the counterpart of 'ahkām al-sharī'ā.

Shāfi'ī's concept of the continuity of āda 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 āda (Khawāria al-āda). This fact of actual occurrence supplements the above argument about the potential possibility of non-continuity of ādāt. How then can it be main-
tained that the occurrence of ġādāt is known with certainty?

Shāhībī replies that it is by tradition (samāʾ) 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-alāʾī), 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 (imtiḥān) refer to some external factor. Thus the latter cannot be contradictory to the former.

Second, the certainty and predictability in ġādāt do not concern each and every ġada. Essentially they concern the universals of being (kulliyat al-wujūd), not the individuals. Hence if an individual deviates, this does not destroy the universal.

The argument from khawāriq ġada refers to individuals. Furthermore, it is the occurrence of khawāriq ġada that assures our knowledge about the universal ġādāt and vice versa.45

From the above it can be seen that in a fashion similar to his views on shariʿa, Shāhībī believes in the continuity of only those ġawāʿid 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 ġawāʿid which accept change are more in number than those which are immutable. Khārq ġada is not a proper example of changing ġādāt; in fact khārq ġada is a breach of a universal ġāda, and hence it happens seldom. Shāhībī, therefore dismisses khārq ġada as a
serious objection to the continuity of ġadāt, as well as an example of change.

Shābūṭī classifies ġawā'id mustamirra, in reference to shārī'a into two kinds: shari'ya, which are introduced or sanctioned by shari'ā and ġawā'id jāriya bayn al-khalq, 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.

Sharī'a necessarily gives consideration to ġawā'id jāriya, because in fact Divine law (sunnat Allāh) corresponds with the ġawā'id in general; hence the shari'ā was instituted commensurate with the institution of ġawā'id. 47

Shābūṭī believes in the relationship of shari'ā to ġada more than in the relation between shari'ā and āqīl. As mentioned earlier, it was in the periods of ḥātra that the philosophers (ṣugālā') claimed to know good and evil by reason alone. 48

According to Shābūṭī, this was possible, in fact, only because the values of good and evil already existed as instituted in ġadāt, although they were confused. This is why Shābūṭī finds that the sharī'ic have not rejected ġadāt entirely. In the case of the shari'ā of Muḥammad, indeed, the shari'ā confirmed most of the ġadāt practiced by the people in the pre-Islamic period. Examples of such laws are the following ġadāt which were regarded as good in the pre-Islamic period and were adopted by Islam: diya (blood money), qasāma (compurgation), gathering on sarūba (the ancient Arabic name of Friday) for sermons, qirād (loan), etc. 49

Shābūṭī illustrates the relation of shari'ā and ġada by the case of kharṣ (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 sharī'a 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 sharī'a is that when an evil (mafsada) in a thing transgresses the good (maslahā), it will be evaluated as evil. The evils are prohibited, hence the reason for its prohibition is clear. In cases where the sharī'a 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 (sāda) remains in tact." 50

Shāfī‘ī’s discussion of the relationship of sharī'a and sāda implies the aspect of change as well. The sharī'a can change sāda in certain cases, and vice versa, but more important is the fact that when a change takes place within an sāda, it also effects a change in the sharī'a rule. A thing which was relatively good becomes evil or vice versa; the sharī'a has to adjust itself accordingly. This takes us to Shāfī‘ī’s view of legal change. First we will discuss the aspect of change in sāda; then the problem of legal change will be dealt with.

It should be noted here that in the usage of the term "change" Shāfī‘ī includes both 'horizontal' and 'vertical' senses of change. The former is the change which manifests itself in the differences in sādat among various societies, cities, countries, etc. The latter is the replacement of old sādat by new ones, or the development of these sādat by additions or modifications. For the 'horizontal' his term is ikhtilāf and for the 'vertical' he uses the terms "taghyīr" and "tablīl".

Beside al-rawā‘id sharīyya which do not change, Shāfī‘ī divides al-rawā‘id jāriyya into two: first, al-rawā‘id al-‘āmma, which do not change with time, place or
state and second, those which change. In the first category, Shābībī mentions the
′awā′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 the′awā′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 ′awā′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 be-
because of some external factor, not because of ′āda 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

Shābībī discusses five senses of this change. 52 The first is exemplified where the
change is from good (ḥusn) to evil (qubh) 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 (ʿumān), 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 muṣāmalāt (dealing with each other), like the ′āda (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 'awā'id which have become regular ʿadāt 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 Shābībī admitted change in ʿāda in both 'horizontal' and 'vertical' senses. This would then imply that sharī'a insofar as it is related to ʿāda must also admit change.

Shābībī's discussion of the problem of change in sharī'a can be analysed in at least six aspects. The first aspect is that of the universal principles on which the Sharī'a is based and which underlie the Meccan part of the Qur'ān. These principles are also called maqāsid al-sharī'a, 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 ʿawā'id sharī'yā. As mentioned earlier, they are the ʿawā'id introduced or sanctioned by sharī'a. In contrast to the universal principles, they are more specific and concrete rules of law. According to Shābībī they also do not change. "Because," Shābībī explains, "they are among the matters included in the rules of sharī'a. Hence they do not change. Even if the opinions of the mukallafin (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 ʿadāt, 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 (bâṭil)."  

The third aspect concerns those ʿawāʿid 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 ʿawāʿid 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."  

The problem then is to ask whether the rules of sharīʿa would change if this basis changed. Shāṭibi replied in the affirmative, saying "The rule of sharīʿa will always be in consonance with these ʿawāʿid."  

The fourth aspect is that of ʿawāʿid mutabaddila, the five senses of which have been mentioned above. Shāṭibi explicitly argues that the rules of sharīʿa must be in accordance with the changes in this category of ʿawāʿid.  

The fifth aspect concerns the legal changes which imply that certain matters are not covered by sharīʿa so that additional rules are required. Shāṭibi regards this aspect as requiring further investigation. A certain hadīth lays down the rule that 'the matters on which the lawgiver is silent, are forgiven (ṣafw).'. This hadīth admits that sharīʿa does not cover everything. The hadīth, however, renders the position of those jurists questionable who maintain that there is nothing maskūt ʿanhu (where lawgiver is silent), because they claim that every case is either covered by the text (mansūṣ) or is coverable by analogy with the text. To avoid
the conflict with the above hadīth, they explain that the Shāri'ī's silence can be removed in a number of ways; for instance, by way of istīṣāb, or by referring to the Shāri'ī'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.

Shātibi 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 bid'a.

The first type is what can be properly called "silence". Because of its obvious significance, Shātibi's explanation on this point needs to be quoted in his own words.

One of them is, that he keeps silent because there is no motive (dā'īya) that necessitates it. 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 Sharī'a 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 majālis mursala such as the collection of the Qur'ān etc. These are some of those things that were not discussed in the 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.
As a second instance, we may cite the category of *<<<< which according to Shāṭibī falls between the *halāl* (lawful) and the *harām* (forbidden). This category also proves that he not only admitted the possibility of matters not covered by *sharī'a*, but also that they fall under the category of *ṣafw* (silence or indifference of the lawgiver). 58

The sixth aspect of change is what Shāṭibī calls *iḥdāth al-sharī'a* (innovation). Shāṭibī does not believe in the legitimacy of *iḥdāth*. He argues that *iḥdāth* occurs in *sharī'a* 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-zann bi'l 'aql*, 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

*Bid'a* is one aspect of this *iḥdāth*. *Iḥdāth* can occur in all subject matters of *sharī'a*, while *bid'a*, according to Shāṭibī, is limited to certain aspects. This distinction requires a rather detailed analysis of Shāṭibī's concept of *bid'a*.

*Bid'a*

Shāṭibī's book *al-İtdāsām* is specifically designed to discuss the problem of *bid'a*.

We need not go into the details of his arguments; what concerns us here is to discuss
bid'a as a legal change and the problem of its legitimacy.

Shâṭibi vehemently condemns bid'a on at least nine grounds. His reasons for condemnation can be summed up by saying that since shar'ī 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 bid'a implies that the innovator knows more than God about shar'ī. Second, he relies more on human reason and desires than on the intentions of the lawgiver.

Shâṭibi's condemnation of bid'a 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 Shâṭibi's understanding of the concepts of bid'a and ijtihād.

Shâṭibi explains that etymologically bid'a comes from bādafa 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 shar'ī. In reference to shar'ī 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 shar'ī. It is the latter consideration to which the technical sense of bid'a pertains.

Shâṭibi gives two definitions of bid'a. The first is a definition that does not include ādāt; the second includes both fiqīdāt and ādāt. The first definition is as
follows: "A way (tarīqa) of innovation in religion (din) that resembles the
way of sharī'a (tadhīb al-tarīqat al-shar'iyya) and which is intended to be followed
in order to strive in the utmost toward obedience (ta'abbud) to Allāh." The
second definition replaces the phrase 'in order to strive...' with the following
"with the same intentions that Sharī'a aims for." Shā'ibī even goes further to clarify the qualifications included in the definition.

It is relevant to note some of these qualifications. The qualification of 'religion'
(din) is significant because according to Shā'ibī "if this way of innovation belongs
to duniya (mundane matters) exclusively, it would not be a bidʿa. Examples cited are innovations in crafts, in plans of cities, etc." The qualification of 'innovation' excludes those matters which have their bases in sharī'a.

The qualification of 'intention of similarity with Sharī'a' is also very important.
Shā'ibī is admitting that the intentions of the innovators are not bad in themselves,
but he implies that they misunderstood the purpose of Sharī'a. Shā'ibī 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 Sharī'a.' How
is this right understanding to be judged?

In one respect right understanding means correspondence of both intention and acts
with the purpose of Sharī'a. Shā'ibī elaborates the relationship of intention and
act to the purpose of Sharī'a, by describing four situations. First, if the intention
of an act and the act itself conform with the purpose of Sharī'a, the act certainly
is valid. Second, the act is not valid if the act and the intention do not conform
with Shari'a. Third and fourth are the cases where one of them (the intention or
the act) conforms and the other does not; Shāfi‘ī makes a distinction; if the
intention conforms and the act does not, it is to be called bid'a. If the act conforms
but the intention does not, the act belongs to the category of ri'ā and hypocrisy.67

AtMaṣūlīḥ mursala illustrate the type of new things where the intention and the act
both conform to the purpose of Shari'a.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 Shari'a and the intention in this case show right understanding
of Shari'a, and, further, the intention does not conflict with the objectives of
Shari'a.

In the case of ḥibādāt this intention leads to an exaggeration in ta'abbud. For
instance, in Shāfi‘ī's period the practice of chanting the names of God (al-dhikr)
in congregation was considered obligatory.69 This intention is absent in ṣadāt.
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
bid'a.70 Shāfi‘ī 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 build-
ings, etc.71

Lack of such distinctions as above, in various types of 'new things' in Islamic law,
had made the concept of bid'a both confusing and controversial. The jurists who
would accept nothing new in Islamic law rejected bid'a in any sense. Some jurists
maintained a broad distinction between good and bad bid'a. Scholars such as Ibn Ṣād al-Salām and Qarafi have even divided bid'a into five categories corresponding to the five categories of legal valuation: obligatory, recommended, indifferent, reprehensible and forbidden. Shābibi regards such a division as meaningless and irrelevant. With the exception of those bid'a mentioned by these scholars in the categories of 'reprehensible' and 'forbidden' the others are not bid'a at all.

Shābibi refined the meaning of the concept of bid'a and made it more precise by clarifying his terminology and fitting it into a proper framework of legal philosophy. He showed that the bid'a are of two kinds only, ḥaqiqiyah (absolute), 'idāfiyyah (relative). Bid'a ḥaqiqiyah is that which is not proven by any shar'i evidence like the Qur'an, Sunna, ijmā' or a reliable basis of reasoning, neither in general nor in particular. Bid'a 'idāfiyyah is that which mingles both aspects. In one aspect it is connected with shar'i evidence; in the other it is not. It is only in the latter aspect that it is bid'a.

The common point in the two definitions of bid'a given by Shābibi, is the intention of the innovator to equal the lawgiver, and this is possible in ṣadāt as well. Obviously this common point can be taken as the essence in Shābibi's concept of bid'a.

Real bid'a, according to Shābibi, however, are only those which belong to 'ibādah. Shābibi argues this point in two ways. First he refutes the thesis of his opponents who maintain that were innovation possible in 'ibādah, it would also be possible in ṣadāt. Furthermore, there are a large number of ahādīth which predict the occurrence
of new things in later periods.

Shāṭībī dispels this objection by saying that the controversy is not about the possibility but about the actual occurrence of bidʿa in ʿadāt; hence the argument of 'possibility' is not valid. As for predictions of changes in ʿahādīth, the argument is misleading. These particular ʿahādīth do not call all of these changes bidʿa, and moreover, these matters are not condemned there because they are innovations. Shāṭībī continues by saying that were every new thing in ʿadāt regarded as bidʿa, then every change in matters such as eating, clothing, speaking, etc., would stand condemned. He sums up his argument in the following fashion:

There are ʿawāʿid 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.

The implications of the above statement are fundamentally important for the question of legal change. Shāṭībī, 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.

Shāṭībī's second manner of argument against including ʿadāt among bidʿāt is the consideration of taʿabbud. As mentioned earlier, from the viewpoint of sharīʿa, acts of the mukallafūn are of two kinds; ʿadāt and ʿibādāt. It is generally agreed that ʿibādāt are taʿabbūdī, but there is disagreement whether ʿadāt are also taʿabbūdī.
Shatibi defines taqabbud 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 taqabbud. Matters such as whose meanings can be rationally understood and whose goodness or badness can be known are adat. Examples may be seen in the acts relating to sale, marriage, lease and punishment for crimes. It is in this sense that adat are not taqabbud, and hence the term bid'a is not applicable.

In the light of what has been said so far, it is possible to reconstruct Shatibi’s theory of social and legal change as follows.

One finds a significantly elaborate conception of social as well as legal system in Shatibi’s thought. The conceptions of these systems emerge from Shatibi’s analyses of awā’id and Shari’a. It must, however, be noted that Shatibi 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. Ada represents the level of ḥirāda takwīn, where man has no choice but to obey the rules. In Shari’a, obedience depends on man’s choice. Human acts insofar as they belong to ḥirāda takwīnvy obey the laws of takwīn necessarily, but those acts which belong to ḥirāda al-tashrīvy necessarily need man’s intention and volition for obedience. Awā’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 (kulliyat 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 awā’id, but these deviations establish (rather
than destroy) the factor of stability. Such *awa'id* which continue are called *al-*
*awa'id* mustamirra and the rules of *shari'a* have their basis in this type of *awa'id*.

The connection of *shari'a* with the recurring *awa'id* makes possible for *shari'a* to be eternal and continuing. The eternity of *shari'a* does not originate from the continuity of *awa'id*, in the sense that the concepts and rules of *shari'a* become eternal because of these *awa'id*. In fact *shari'a* forms the ultimate basis which are abstract, universal and general and, thus, is believed to be unchanging. The continuity of *awa'id* makes the actualization of these ultimate bases possible.

*Shatibi* 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 *awa'id*, and on the other, it was revealed through *shari'a*. Human reason was led either to total laxity or to sheer determinism in its attempt to discover these ultimate bases from *awa'id*. Consequently revelation of *shari'a* was necessary to save man from both extremes of legal attitudes. Leaving aside the discussion of how the revelation of *shari'a* 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 *Shatibi*'s attempt to explain that *shari'a* aims at the good of mankind. This good is judged in relation to and on the basis of *awa'id*.

With the exception of universal principles, the *awa'id* are, however, subject to change. *Shari'a* is based on the unchanging principles of *awa'id*, which are thus called *awā'id* *sharī'ya*. Nevertheless the *awa'id* which belong to human beings (*awā'id* *āliya bayn al-khalq*) may change. Since *shari'a* governs these *awa'id*
as well, it must respond to these changes. The mechanism of this response gives
birth to a legal system.

Shājībī 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 ṭawārid on which Shari‘a 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 Shājībī since human reason alone cannot achieve such
organization, Shari‘a 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 *ṣibādāt* and they are to be obeyed as such. Of those which can be tested and which are rationally intelligible - they are *ṣādāt*. The latter constitute the major area of human acts. Since it is possible to rationally organize the *ṣādāt*, Shari'a 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'an. Ṣāḥibī divides the injunctions of the Qur'an into three categories: First the injunctions declaring lawfulness of things, second the declaration of prohibition and the third category is *ṣafw* which refers to those situations that are not covered by Shari'a. Such situations will be decided by legal reasoning, the guidelines for which are provided in the other two categories.

The decision about the situations not covered by Shari'a may mean application of established rules or it may mean extension of these rules. Ṣāḥibī does not accept extension in the case of *ṣibādāt*, but only in *ṣādāt*. The reason is that in *ṣibādāt* it is only God who can decide what is good for men. Consequently, the Qur'an being the last and complete revelation, contains all that man needs. Hence there is no need of extension of *ṣibādāt* beyond what the Qur'an prescribes. Ṣāḥibī regards such an extension as *bid'a* which is to be condemned.

While *ṣibādāt* are not rationally intelligible, the *ṣādāt* are. Moreover, often in the Qur'an, an *ṣilla* is mentioned in case of *ṣādāt* which means that Shari'a not only considers them intelligible, but also extendible.

Since the human reason is considered incapable of discovering the *maṣūlih*, yet as
there will be no more revelation of Shari'ah after the Qur'an, 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 Shafi'i this is achieved through the institution of futuwa and qadha. A mufti is a successor of the Prophet both in communicating the previous rules of law and in making new laws. A qadi 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 mufti, 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 qadi may often feel the rules of law to be insufficient in a particular case. In such an event, they are supposed to refer to muftis. 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 mufti responds to a social change in the framework of the legal system is called ijtihad. Ijtihad 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.


For a better understanding of Shāfi'ī’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.

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 exercised by demonstrating the correspondence of the essential elements in the new case with the basis of the legal provision. These bases which are called *manāj*, may be explicitly known, or can be known by further *ijtihād*.

Shāfi'ī divides *ijtihād* in reference to these *manāj*, into four types: 1) *Tabqa* al-*manāj* al-*āmm*: General verification of the basis of the rules of *Shari'ā*. In this case, the rule (ḥukm) in its *shari'ā* 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.

In other words the basis of the legal provisions are examined so as to be applicable
to all the mukallafin. The generality, here, is further explained by Shâ!îbi to mean that this type concerns anwâqe (species, types) of mukallafin, and not the ashkhâqs (persons, individuals). It is called 'general' to distinguish it from the second type of ijtihâd, which is specific. Shâ!îbi illustrates this point with the Sharîr ruling that requires a witness to be sadl (just). The general and broad meaning of sadl is known, but to determine the characteristics and qualifications on the basis of which a witness can be universally described as sadl is the function of a mujtahid. In order to verify this qualification in case of a particular witness ijtihâd is required. Taqlid cannot solve this problem, because this process of verification can never end. Every new case is unique in itself in this respect. Furthermore, Sharîr does not pronounce its rulings to cover all particular cases individually. The rulings of Sharîr are general and abstract so that they can cover any new cases which are infinite.

This is because of the above reasons that Shâ!îbi regards this type of ijtihâd as ever-continuing. If one admits the discontinuity of this ijtihâd, one makes the application and extension of the rules of sharîr impossible. Human acts never happen in the abstract, they always happen concretely and as individual cases. If this type of ijtihâd discontinues, the obligations of Sharîr will exist only in man's minds, and not in practice.

2) Taḥqîq al-manâq al-khâqs: This type is different from the first one, as it concerns ashkhâqs (individuals). This is more detailed and specific. For this a mujtahid relies more on taqwâ (piety, prudence) and ḥikma (wisdom, inner reason).

3) Tanqîh al-manâq (the refinement of the basis of the rule). The proper quali-
fication (wasf) 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 ijtihad. Shāṭibi further explains that this type does not concern with the method of qiyyas, but is rather a type of ta’wil al-zawahir (interpretation of the literal sense). In a certain sense it also belongs to what Shāṭibi calls al-ijtiḥād bi-al-istinbāṭ (reasoning by inference).

4) Takhrīj al-manāt (deduction of the basis of the rules). This type refers to a text of a ruling where manāt are not mentioned. The manāt are found through the process of deduction. The method is also called al-ijtiḥād al-qiyyāsī or reasoning by analogy.

Shāṭibi maintains that among these four types, the first is ever continuing, but the continuity of the other three depends on their need. The reasons for the continuity of the first type have already been noted. Shāṭibi 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 Shari'ah. The need for ijtihad was often justified by the jurists by arguing on the basis of khilaf. In other words if the opinion of scholars differed on a certain point, the case was considered open for ijtihad. For Shāṭibi this implied khilaf in Shari'ah, which he vehemently rejected. He maintained that in its basis Shari'ah is a unity; khilaf is neither intended to exist nor to be perpetuated. Hence khilaf in this technical sense is not sufficient to justify continuity of ijtihad. What justifies ijtihad is the absence of rules to cover new cases.
In reference to legal material required for *ijtihād*, Shāfiʿī 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. Shāfiʿī clarifies that he does not mean the knowledge of grammar, syntax, etc., but rather a knowledge of Arab usage. 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 *ilm maqāsid al-Sharʿ* (the knowledge of the purpose of law). In reference to the above-mentioned four types of *ijtihād*, the present process is particularly relevant to *tabaqq al-manāt* and *takhkīj al-manāt*.

The third relates to deductions which require neither of the above types of knowledge. This process is, in fact, the application of the verified manāt to specific cases. Consequently in this type of reasoning, two premises are involved; first *tabaqquq al-manāt* (certitude of the basis of ruling) and second *tabakkum* (decision). Shāfiʿī 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 *faks* (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 *qiyyās iqtirānī* (syllogism by coupling or combining two propositions) or *istīthnārī* (syllogism by exclusion). Shāfiʿī quotes Mālikī jurist Abū’l-Walīd al-Bāji (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 Shājībī rejects the requirement of a knowledge of the rules of logic for sharī'ī purpose, 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 kalam, 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 Shājībī 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. Taqīlīd 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-Muwafaqa, comm. 'Abd Allâh Darâz (Cairo, n.d.), Vol. II, 169. Shâti, here, argues that the Qur'an uses wahy (revelation), which is opposite to hawâ. Ibid., Vol. I, 35, he contrasts the terms qâliyya and sharîyya.

3. Ibid., Vol. III, 121.

4. See above n. 1.


6. Ibid., Vol. I, 46-47. To illustrate what is Sharî'a on a certain point, Shâti quotes from the Qur'an, hadith 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 Sharî'a 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.


19. Ibid.

20. Ibid.


22. Ibid.


24. Ibid., 103-104.

25. Shâtibi’s statement that "God revealed all that they needed", may be understood as that nothing outside the Qur‘an belongs to Shari‘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 Shâtibi’s distinction between ṭâdât and ṣibādât. Thus totality and completion in reference to ṣibādât have been revealed and that nothing else by way of ṣibādât is further needed. The totality, in reference to ṭâdât, means that the totality of basic principles or universals have been revealed, the particulars of which will always require ijtihād.


27. Ibid., 236.


29. Ibid., 180.

30. Ibid., 177-79.

31. Ibid., Vol. IV, 244-46.

32. Ibid., 272ff.

33. Ibid., 274, 276.

34. Ibid., 281.


37. Ibid., 279ff.

38. Ibid.

39. Shâtibi uses both ṭâdât and ṣawâid as plurals of ḍado. Etymologically, some
linguists claim that āwā'īd is the plural of ā'id and ā'ida (something that re-occurs), and ādāt is plural of āda. This distinction is, however, generally disregarded. In Shāfi'ī's use of āwā'īd there is some indication that he uses ādāt for those legal acts which are opposite to ībādat, and āwā'īd for habits, customs, etc. But this distinction is not consistently maintained by him.

40. Ibid., Vol.II, 280.

41. Ibid., Vol.II, 297. The examples of eating, drinking, etc., are given to illustrate āda.

42. Ibid., Shāfi'ī gives the examples of variety of āda in different forms of dwellings; on p. 307, he gives the examples of customs in pre-Islamic period to illustrate āda.

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.


49. Ibid.


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.

60. Ibid., Vol.I, 26-111.
61. Ibid., 82.
62. Ibid., 18f.
63. Ibid., 18.
64. Ibid., 19.
65. Ibid.
66. Ibid.
68. Ibid., pp.341-42.
70. Ibid., Vol.I, 22. "Fa kullu mā 'ukhturiṣa fi 'l-dīnī mimma yuḍāḥi al-mashrūṣ wa' lam yuqadd bihi al-taṣabbud, faqad kharaja 'an hādihi al-tasmiyya".
71. Ibid., pp.22-23.
72. Ibid., 147ff.
73. Ibid., 232ff.
75. Ibid., 67.
76. Ibid., 68.
77. Al-Muwafaqāt, 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.
100. Ibid.
101. Ibid., pp. 110-111.
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.

Sultan Muhammad V'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 Sultan secured his independence by weakening the political power of the offices of Shaykh al-Ghuzat, Wazir and Qadi al-Jam'a.

The weakening of the office of the Qadi al-Jam'a affected the political power of the fuqaha in general. The fuqaha 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 fuqaha began with the Sultan's skillful manoeuvres to become independent of the fuqaha. There were a number of factors which facilitated the Sultan's success. One of these was the introduction of the
state-controlled madrasa system of learning in the days of the Sultan's father. Despite the opposition of the fugahö the madrasa system had succeeded and had been gradually making the fugahö dependent on the Sultan.

The second factor was the penetration of tasawwuf and of Sufi tariqas into Granadian society. The Sultan had bestowed his favours on the Sufi shaykhs because the Berber mercenaries who constituted the armies of the Sultan were followers of the Sufi shaykhs. To weaken the power of the shaykh al-ghuzot and of the fugahö and to raise his prestige among these mercenaries the Sultan would eagerly patronize tasawwuf. Furthermore, the Sufi life, being simple and pious, appealed to the people at large, who compared Sufi life with that of the fugahö who lived in an aristocratic style. The rise of the tariqas which undermined the religious and legal authority of the shari'ia was a real threat to the fugahö.

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 dinar 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 effects 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 mufti and the qadi.

Such was the milieu in which Shāṭībī (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 arising 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 fuqaha' had used to adapt Mālikī legal theory to accommodate social changes. One such device was that of muraqqa'at al-khilāf. By accepting a diversity of laws as fact, the Mālikī fuqaha' came into possession of a legal device to accommodate new social practices. For Shāṭībī, 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 maqāsid al-sharī'a. He examined the traditional legal theory in the light of this doctrine. The result was his book al-Muwafaqāt in four volumes.

As Shāṭībī had expected, al-Muwafaqāt was not welcomed. He was called a heretic. Alluding to a number of Shāṭībī'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-Ijtihād in which he defined the concept of bid'a.

In preparing his fatwa, Shāṭībī 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. Shāfiʿī found that the methods of analogy and of borrowing from other schools of law in the name of murātāt 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 fujahāt 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 fiʿl-zarās 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 fujahāt 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 fujahāt were forced to fall back on the original Mālikī general legal principle of maslahā.

Shāfiʿī also had the same experience in preparing his fatāwā. He too had to refer to principles such as tashīh, maslahā and ṭadam ḥaraq. He, however, realized that he could not apply these principles indiscriminately to all areas of social and legal change. Under the influence of ṭawwuf, 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.

Shāṭībī found the principle of muṣlaḥa 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 muṣlaḥa, as a legal concept, however, has not been a simple concept in usūl al-fiqh. Various theological, moral, methodological and more recently ṣūfī conceptions of muṣlaḥa had posed serious difficulties for the use of muṣlaḥa as a principle of adaptability. The Ashʿarī denial of causality in God’s actions made it impossible to analyze sharīʿ commands on the basis of an ʾilla.

The ṣūfīs denied anything that implied any pleasure for the lower soul. Their emphasis on ṭaḥārā, ṭuhūt and ṭabāsir rendered muṣlaḥa simply into an indulgence in personal desires.

Methodologically, according to traditional jurists, muṣlaḥa provided only a probable basis of reasoning if it was not supported by a specific legal Text. Traditionally, muṣlaḥa was classified from two perspectives. From one viewpoint it was divided into ʿdarūṭ, ḫarīt and ṭabāsirī with the last two being rejected. From the other angle muṣlaḥa was divided into muṣṭabara, muṣlīhī and muṣrūṣa; as the first two were in fact covered by the legal Text, it was only muṣlaḥa muṣrūṣa which remained to be discussed. Consequently the discussion of muṣlaḥa was reduced to
a consideration of maslaha mursala. It is evident that Shâtibî's analysis of maslaha keeps the traditional criticism of maslaha 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 Shâtibî's definition of maslaha and its characteristics and from his discussion of its five aspects, it becomes clear that the essential element in the concept of maslaha is consideration for and protection of the necessities of human life in this world and in the hereafter.

Shâtibî accepts the traditional division of maslaha but rejects the limitations on their validity. He finds ḥāṭî and taḥṣīn types of maslaha to be complementary and to act as protective zones for the darūrî type. The two are indispensible in this sense. He does not seem to accept the other division, however. The term maslaha mursala is seldom used in his discussion of maslaha, and when it is used, it does not differ in meaning from maslaha.

In his analysis of the concept of maslaha, Shâtibî established certain distinctions to clarify the confusions that had gathered around this concept. He analyzed the implications of taqabbud, ḥuzūz, and mashagqa in order to elucidate the concept of legal obligation. He refuted the suff conclusion that abandoning of the ḥuzūz was an essential meaning of taqabbud. He explained that taqabbud 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. Shâtibî concluded that the first sense of taqabbud is applicable only to the ṣibādāt which he distinguished from ṣādāt.
The other sense was applicable to the entire body of legal obligations. Obeying the intent of the law-giver meant to regard the 
\textit{maslaha} or ma'\textsuperscript{\textdegree}an\textsuperscript{i} in \textit{\textdegree}dd\textsuperscript{\textdegree}t and ta'\textsuperscript{\textdegree}abbud in the second sense or to obey the explicit meaning, in \textit{\textdegree}bad\textsuperscript{\textdegree}t. He further explained that ta'\textsuperscript{\textdegree}abbud in the technical legal framework means that the area of \textit{\textdegree}bad\textsuperscript{\textdegree}t cannot be extended further than what has been revealed by the law-giver.

Sh\textsuperscript{i}ib\textsuperscript{i} answers the theological objections to \textit{maslaha} 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 \textit{silla}, so that they can be understood, generalized and extended to like situations. Ash\textsuperscript{\textdegree}ar\textsuperscript{i} jurists, in order to defend God's Omnipotence, were forced not only to deny \textit{silla} in Divine Commands, but were also compelled to say that a Divine Command does not necessitate the Divine Will. Sh\textsuperscript{i}ib\textsuperscript{i} differentiated between two Will; the Creative Will which is to desire someone to produce a certain act. Thus, contrary to Ash\textsuperscript{\textdegree}ar\textsuperscript{i}s, Sh\textsuperscript{i}ib\textsuperscript{i} 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 Shâtibi’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.

Shâtibi, however, distinguishes maṣlaḥa sharī'yya 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 mafṣada. Ordinary maṣlaḥa is known by weighing the aspects of good and evil in an action; whichever dominates characterizes the thing in question. Maṣlaḥa sharī'yya as a legal obligation takes into account only the dominating aspect which is pure and simple, unmixed with mafṣada.

In Shâtibi’s understanding, ḍa’da and sharī’ā 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 ḍa’da is unlimited but sharī’ā is limited. Except for certain fundamental laws ḍa’da may undergo changes, whereas sharī’ā insofar as it reflects the Divine Will cannot change. To find rules for new situations occurring because of changes in ḍa’da one needs to know the exact rule or the intent of the law. This intent can be known through studying ḍa’da in combination with the principles inductively derived from sharī’ā.

The above-described concept of maṣlaḥa was admirably suited to Shâtibi’s under-
standing of social change and to his views on legal change. According to Šāṭibi, the āwāḍ 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 mujtaḥid 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. Šāṭibi divides ijtihād into four types. Although the 'gate' of ijtihād is closed in none of the types, yet Šāṭibi was of the opinion that because of cumulative growth of fatāwā and judicial decisions, ijtihād may not be needed in many areas. For Šāṭibi ijtihād and taqālīd are legal necessities and not theological obligations. Thus Šāṭibi 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 Šāṭibi'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 Šāṭibi admits that changes take place in society and that the legal changes in the area of ādāb accord with social needs. We have also found
Shātibī to believe that although its general and universal principles remain un-
changed, yet Islamic law does accommodate itself to changes and that it favours
the consideration of social needs in making its accommodations. According to
Shātibī, ḥijjah provides a method and process for legal change; maslaḥa 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 maslaḥa as the purpose of Islamic law, Shātibī 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 maslaḥa 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,
maslaḥa is neither a totally relative and arbitrary principle nor is it strictly tied
to qiyās or to specific legal texts of shariʿa. It is connected with social needs at
one end, and on the other it is inductively supported by shariʿa. 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 Shātibī, maslaḥa is an integral principle that unifies shariʿa, provides
stability and gives direction to legal changes.

It can be seen that Shātibī had considerably improved upon the traditional philo-
sophy of Islamic law by refining and clarifying certain basic legal-philosophic
concepts, particularly the concept of maslaḥa. 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 activities which continued through the sixteenth century later helped in the development of modern philosophies of law. In Muslim Spain, despite the fact that Shāṭibi'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 Shāṭibi's philosophy fail?

To explain the failure of Shāṭibi'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 Shāṭibi'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 Shāṭibi'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 Shāṭibi'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, Şâţibî’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 Şâţibî’s philosophy in the same framework. Consequently, it was possible for scholars such as Rashîd Riḍa to blunt the thrust of Şâţibî’s philosophy by giving Şâţibî 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 Şâţibî’s legal thought towards a positive Islamic law. His emphasis on maqâla 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 cibădat, whereas in ādāt changes are possible. The element of positivism lies in his theoretical justification of the above conclusion. He explains that cibădat belong to that area of maqālih which is known only to God. Generally cibădat 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 ādāt is different, however. Not only are ādāt based on maqālih, but the commands in sharī‘a relating to ādāt usually provide the reason indicating that these maqālih can be grasped by human reason. Further, ādāt 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 Shârî'î to positivism in his legal philosophy; yet there are no explicit statements by Shârî'î showing such a tendency.

The implicit positivism in Shârî'î's legal philosophy may be further noted in his attempt to separate law (fiqh) from theology and from sufî 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 taâbûd. His illustrations of sîbâdāt refer to the well-known Islamic rituals and other such acts which, according to him, should be accepted without rational explanation in contrast to ādāt 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 sîbâdāt such as those governing family relations, should also be accepted without rational explanation. Does he mean that he extends the definition of taâbûd in the sense of sîbâdāt to all the commands in the Qur'ān?

In the light of Shârî'î's philosophy as a whole, it is difficult to explain such departures. Most probably these departures result from Shârî'î'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 muftî from that of the qādi. Furthermore, the muftî 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 muftî derived his authority from the metaphysical principle of continuity of Divine guidance through prophets, and after Muḥammad through muftîs.

The qādi did not enjoy independence in the legal system; he had to rely on the muftî, 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.

In spite of his attempts to define legal obligation, Shāṭibī did not uphold the independence of the qādi from the muftî. 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 usūl 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 Shāṭībī'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-Muwafaqát

Al-Muwafaqát is divided into five books:

FIRST BOOK: "muqaddimât" (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 qātî (definite), not zannî (probable) as had been held by most of the mutakallimûn jurists, especially by Ghazâlî and Râzî.

(ii) These principles must relate to furūû (the details of applied law) and to âfîmû (actions). This position was again taken in order to refute the mutakallimûn 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 ta'âbbud (bondage to God).

(c) it must lay stress on a necessary relationship between knowledge and action.

At this point Shâṭibî goes into a detailed discussion about al-fi'lm (the knowledge).

This entails the following problems:

1. Definition of the proper (mustabar) sharî knowledge.

2. Division of knowledge: (i) surb (solid), (ii) mulaḥ (salty, to add flavour), (iii) neither of these. Surb is the goal, and uṣūl al-fiqh belong to this category.
3. The role of reason: human reason (qa'l) follows, does not take precedence over the transmitted knowledge (naql).

4. Al-Adilla al-shar'iyya (legal evidences) are the only basis for a proper shar'i knowledge.

5. The method of learning: of the two methods of learning, i.e. al-Mushafaha (direct from the teacher) and mutala'a kutub al-musannifin (indirect, by studying from books of authors), the former is better, yet the latter must supplement the former.

6. The signs (amârât) 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: Abkâm (legal values), deals with forty-two problems. The discussion is divided according to the two major categories of legal values, khijab al-taklif, concerning the values that result directly from a Divine command, and khijab al-wad', concerns the values that are the indirect result of that command.

Khijab al-taklif creates five legal values: Nadb (recommendation), wujûb (obligation), ibâha (freedom), karâha (reprehensibility) and mence (prohibition). Shâhîbî considered ibâha as a middle value in this structure, hence a major part of his discussion on this category of values is devoted to ibâha. The main points of discussion are the following:
1. The definition and essence of *ibâha*, the mode of expression of the value and its various aspects.

2. Relationship of *ibâha* to other values.

3. Relationship of *ibâha* to the *maqāsid* (objectives of law).

4. Relationship of *ibâha* to the problem of Rights and Obligations (*huqūq*).

5. *Ibâha* and *'afw* (forgiveness), a new category suggested by Shāfi'ī as a middle value between the Qur'ānic values of *ḥalâl* (permissible) and *ḥaram* (forbidden).

Khīṣb al-wadā' 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 khīṣb al-wadā' creates values by instituting the requirement through one of the following five values:

(1) *Sabab* (mediate cause).
(2) *Shart* (qualification).
(3) *Māni* (preventive cause).
(4) *Ṣibha*/*buatlān* (soundness/unsoundness).
(5) *Ṣāzīma*/*rukhša* (regularity or allowance in the requirement).

In these discussions Shāfi'ī defines these sharī' values and establishes distinctions among them. His main concern is to know whether they are intended by the lawgiver 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 (wadā') them the lawgiver's intention embraced both.
Shātibī'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-maqāsid al-sharīyya fī al-sharī‘a" (the legal objectives of shari‘a), Shātibī 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. Shātibī 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 maṣlaha constitutes the central theme in shari‘a.

(b) the objectives of the lawgiver regarding the intelligibility of shari‘a. Here Shātibī maintains that shari‘a aims to reach all people; hence it must be intelligible to all of them. In this respect he discusses two notions:

(i) `umūmiyya, generality in the use of terms and (ii) `ummiyya, 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 shari‘a 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 ǧāda, the common practice; if something is considered impossible in common practice, it cannot be regarded as a requirement by shari‘a.
(d) the objectives of the lawgiver in admitting the mukallaf (one under obligation) as a subject of obligation. Shā'ībī 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 (ḥazz) of the mukallaf and concludes that his participation is exclusively conditioned by the objectives of the lawgiver.

Shā'ībī, 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 ṣibāḍāt and ẓādāt.

Considerable space is devoted to the discussion of ṣāda, its characteristics, and its various types from the legal point of view. The question of Kharq ṣāda is also dealt with in detail.

The second level of discussion of the objectives has to do with the intentions of the mukallaf.

Here Shā'ībī deals with the questions of niyya (intent) and ṣayniyya (particularity). The main theme is that the intentions of the mukallaf must correspond with the intentions of the lawgiver. This is the reason why Shā'ībī condemns ḥiyal (devices to evade law) and bidq (innovations).
FOURTH BOOK: Al-Adilla Al-Shariya (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:
   Qadiya (Definiteness), Zanniya (probability), supplemented by other factors so as to make them definite.

3. These evidences do not contradict Qadiyaa Uqul (rational propositions).

4. Every evidence consists of two premises; since they are definite, so also is the conclusion.

5. The evidences relating to Caddat are simple (mutlaq) while those relating to Cibadat are munqabita (stipulative).

6. The evidences are general in application.

7. The evidences are either burhani (offering a logical proof) or taklifi (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 Shātibī deals with the following:

1. Tashābuh (equivocations)
2. Naskh (abrogation)
3. 'Awāmir - Nawāhi (commands and prohibitions)
4. Umūm - Khuşūs (general and particular)
5. Bayān - ijmāl (explanation and conciseness)

II. The evidences in detail

Specific legal evidences are four: The Qur'ān, the Sunna, ijmāl (consensus) and Qiyās (analogy). Shātibī dismisses the latter two, contending that only Qur'ān and Sunna are essential evidences.

A) Al-Kitāb:

The main points of this discussion are as follows:

1. Al-Kitāb is the whole (kulliyya) or the Sharī'a.
2. Almost all the commands in the Qur'ān are "universal".
3. The Qur'ān contains an explanation for each of its concise commands.
4. The knowledge of the historical context of the Qur'ān 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-Dhara'i (to block the ways possibly leading to an undesired action)
   b) Istihsān (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), fiqīl (action) and taqrīr (confirmation).

3. The qualifications of a muftī.

4. The problem of rukhā (allowance) and fatwā.

III. Iqtidā' (Imitation)

1. The meaning and nature of "imitation", the definition of muqallid (one who imitates)

2. muqallid and istīfā (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. Tafārud (conflict) and Tarjīh (preponderance)

The problem of choosing between contradictory or conflicting evidences and its various aspects.

V. Su'āl/ 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 munāzir (debator).

4. The method of argument: conclusion from two premises.
APPENDIX B

A Summary-view of Al-`Itṣām

This book deals with the question of ḏiǧa in ten chapters.

Chapter One: The definition of ḏiǧa

Chapter Two: Condemnation of ḏiǧa

Chapter Three: The condemnation of ḏiǧa is general; the condemnation applies to all kinds of ḏiǧa. In this chapter Shatibi criticizes scholars such as Ibn `Abd al-Salām and Qarāfī who divided ḏiǧa into five categories like the five legal values. According to them some categories of ḏiǧa 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 ḏiǧa.

Chapter Five: Two levels of ḏiǧa; ḏiǧa ḥaqqī (real innovation) and ḏiǧa `idāfī (relative innovation)

Chapter Six: The legal value (ḥukm) of ḏiǧa

Chapter Seven: The question of ḏiǧa in reference to tā`ṣabbudāt and āḏāt.

According to Shatibi, legally, the value of ḏiǧa applies only to the former.

Chapter Eight: ḏiǧa and Maṣāliḥ Mursala (The juristic consideration of the public interest against strict analogy) and istiḥsān (juristic preference against analogy). Are they ḏiǧa?
Chapter Nine:  **Bid'a as heresy: the heretical sects; Schism in the Community -**

The problem of the one Saved (nājiya) Sect.

Chapter Ten:  **Sirāt Mustaqīm (The Right Path) and Ibtidā (Committing innovation)**

1. Types of acts which introduce bid'a

2. The causes of bid'a

   a) Ignorance of the tools (adwāt) for knowing the objectives of  Sharī'a. 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 (Ibtidā al-hawā).
BIBLIOGRAPHY

I - THE WRITINGS OF SHĀṬĪBĪ


Shāṭībī’s Fatāwā. See Wanshariṣī.

II - PRIMARY SOURCES


Sharḥ matn al-hikam ʿil-i mām Abī l-Faḍl Aḥmad b. ʿAṭā Allāh al-Iskandārī. Cairo: Muṣṭafā Afandi, 1320 A.H.


Ibn ʿAṣīm. Tuḥfat al-ḥukkām. See Bercher.


Ibn Ḥājīb. Muktāṣar muntahā al-ṣūlī. Cairo: Būlāq, 1317 A.H.


Ibn ʿAbīlīs. Muqaddima. Cairo: Amīrīyya, 1320 A.H.


Ibn Taymiyya. Qāʾida fi'l - muṣājzaẗ wa'l karāmāt was anwās khawāriq al-ṣādaẗ, in Majmūʿ al-rasāʾîl wa'-masāʾîl. Vol. V. Cairo: Maṭbaʿa Maṯār, 1349 A.H.


Murtādā, Muḥammad al-Zaḥālī. ʿIthāf sādaṭ al-muttaqīn. Cairo: Maṭbaʿa Maymanīyya, 1893.


Qarāḍī, Shihāb al-Dīn. Al-Furūq. Cairo: Dār Iḥyā Kūtub al-ʿArabiyya, 1346 A.H.


Taftāzānī, Saʿd al-Dīn. Sharh al-tawqīḥ wa l-tanqīḥ. See Muḥbūbi.


III - SECONDARY SOURCES


Darāz, Muḥammad ʿAbd Allāh. Introduction to Shāṭibī's al-Muwāfaqāt. Cairo: Muṣṭafā Muḥammad; Raḥmāniyya, n.d.


Cherbonneau, M. A. "Lettre à M. Defrémery sur Ahmad Bâbâ le tombouctien, auteur du Tekmilîet ed-Dîbâdi", Journal Asiatique, 5e Série, 1 (1853), 93-100.


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


Linant de Bellefonds, Y. "Immutabilité du droit musulman et réformes législatives en Egypte", Revue international de droit comparé, VII (1955), 5-34.

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


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