

Introduction to Islamic Law

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COURSE INFORMATION

COURSE NAME/SEMESTER: Spring 2015
Section # 22657
Course 5397 Introduction to Islamic Law
Course Area: *International Law*

PROFESSOR: SHAHZADO SHAIKH (Adjunct)
 Contact: 832-908-0635
 shahzado@hotmail.com

Credits: 3

Time: 7:30p-9:00p MW

Room:

Exam: 05/09/15 9am-12pm

Prerequisites/Skills/Course Requirement: *No prior course work is required.*

First Day Assignments: No

Senior Upper Level Writing Requirement: *No*

Students may **meet:** 6:30p-7:30p MW

Students can also contact to set up appointment.

Location: UH LC

Course Outline:

Based on a belief system of a divine origin, *Shariah* envisages, both, a religion and a social order. The course seeks to introduce core textual (as the basic source), theological (belief system), and legal components, along with historical impact, while examining different phases, through its sources and methodologies, leading to development of schools of opinions and legal theories.

The course will examine texts, history and current issues in Islamic Law and its enforcement.

It will also study principles, concepts and terminology of Islamic Jurisprudence and Muslim Law,

It will introduce some aspects of Islamic law pertaining to substantive areas, like constitutional, commercial, international, and criminal laws; and some specific areas like marriage, divorce, child custody; succession and wills. These areas will be examined with reference to the law of the land and some cases discussed in US courts in the context of Islamic Law.

Some important issues, will also come under debate, including, Human Rights, Terrorism, Political Islam, Women's Rights, Rights of religious minorities, Punishments, and Finance preferences (e.g., Islamic Banking, Trade and Finance).

Growing fundamentalism in approaches to Islamic Law and its relevance in today's world, is bound to be contested. Islamic law and its relation to modern historical and political developments will be discussed, including divergent conceptions of violence and political interest and authority.

Book Information: The list is given at the end.

Books may not necessarily be purchased for this course.

Digital copies of the suggested and supplemental Books have been provided. Students can photocopy/e-copy them.

In addition, topic-wise Brief Points and Course Short Notes have also been provided, which can also be copied/downloaded.

Furthermore, lectures will be supported by Power Point Presentations/Slides.

Grading: UH LC Policy

Assessment:

1. Attendance, Class Participation, & Presentations (5-10 minutes): 10%

2. Knowledge of topics, texts, and writings:

Examination: 70%

Engagement with the subject will be in a format:

-Intro, Brief and General Summary, along with overarching assessment.

-Citation,

-Conclusion.

Course materials and Books can be used during examination.

Personal Computers can be used in classroom and during examination.

Assignment/Project/Case Study: 20%

i. 1-2 page memo on some selected Project,

ii. Selected rule of Muslim Law of any Muslim country to write a 1-2-page analysis or review,
and

iii. Case Study.

Style: Options:

i. Persuasive (argue a thesis, attempt to prove a point),

ii. Comparative (compare more than one perspectives)

iii. Interpretive,

iv. Explanatory.

**Syllabus:
ISLAMIC JURISPRUDENCE**

1. Short Introductions:

1.i. Pre-Islamic Arabia

- social and economic conditions,*
- beliefs and customs,*
- Istis-hab (Presumption of Continuity),*
- Stare Decisis.*
- influence on Islamic law*

1.ii. Five Pillars of Islam

1.iii. The Articles of Faith

1.iv. The Moral Basis of Islamic Law

- Enjoin Good and Prohibit Wrong*

1.v. The Grundnorm of Islamic Law

1.vi. Islam

1.vii. Political Islam

1.viii. Politico-Notional Differences

2. Islamic Law as a Divine Law and its Sources.

Sources of Islamic Law

2.i The Quran,

- 2.i.a. The Basic Source of Law,*
- 2.i.b. Approaches to understanding the texts: Selected Verses,*
- 2.i.c. Concept of Naskh (abrogation, amendment)*

2.ii The Revelation and the Reason:

- 2.ii.a. Divine Law: based on Revelation:*
- 2.ii.b. Man-made Law: based on Reason*

2.iii. Mutazilah

3. The Sunnah

- 3.i. The Primary Source*
- Its relationship to the Quran*

- 3.ii. *Approaches to understanding*
 - 3.ii.a. *the texts: Selected Traditions*
 - 3.ii.b. *Athar (Impact) and Amal (Practice)*
 - 3.ii.c. *Practice and Transmission*
- 3.iii. *Sunnah and Hadith*
- 3.iv. *Hadith*
- 3.v. *Difficulties In Acceptance Of Hadith*

4. Qiyas (Analogy)

5. Ijma (Consensus)

- 5.i. *Ijma (Consensus)*
- 5.ii. *Qiyas-Ijma-Qiyas....*

6. Historical Development of Islamic Law:

- 6.i. *Early development of Islamic Law*
- 6.ii. *Legal schools: opinions and methodology*
- 6.iii. *Hanafi Interpretation or Methodology*
- 6.iv. *Maliki Interpretation or Methodology*
- 6.v. *Shafai Interpretation or Methodology*
- 6.vi. *Hanbali Interpretation or Methodology*
- 6.vii. *Perspective to Shia Law*
- 6.viii. *Kulayni*
- 6.ix. *Important factors in development of fiqh*
- 6.x. *Authority according to Sunni and Shia*
- 6.xi. *Umayyads (661-750 CE)*
- 6.xii. *Abbasids (750-800 CE)*
- 6.xiii. *Development of Judge-made Law and Administration*
- 6.xiv. *Some Reasons of Disagreement*
- 6. xv. *Schools of Islamic Law and Sects*
- 6.xvi. *Spatial Development*
- 6.xvii. *Application of Raay-i and availability of Hadith*
- 6.xviii. *Academic Impetus*
- 6.xix. *Ottoman World and Turkey*
- 6.xx. *From Ottoman to Muslim World:*
 - Shariah in secular Muslim states,
 - Muslim states and some other states with blended sources of law,
 - Muslim states applying Shariah
- 6.xxi. *Learning From Lessons*
- 6.xxii. *Research and Reform*
- 6.xxiii. *Some Serious Issues Involved:*

7. Short Introduction to the Terminology

7. *Fiqh*

8. Usul ul Fiqh

8.i. *Usul ul Fiqh*

8.ii. *Khilaf*

9. Important Terminology

9.i. *Ijtihad*

9.ii. *Istihsan (Juristic Equity)*

9.iii. *Istidlal*

9.iv. *Istislah*

9.v. *Takbayyur*

(selective choice from alternate opinions)

9.vi. *Ellah*

9.vii. *Fatwa*

9.viii. *Mujtahid, Mufti, Faqih, Mufti, Muqallid*

9.ix. *Taqlid*

10. Concepts and Practices of Islamic Law

10.i. *Deen*

10.i.a. Purposes of *Deen*

10.i.b. Principles (Maxims) of *Deen*

10.ii. *Mazhab*

10.iii. *Millah*

10.iv. *Shariah*

10.v. *Minhaj*

10.vi. *Nusk*

10.vii. *Shariah Law*

10.viii. *Shariah and Law*

10.ix. *Shariah Based Law*

10.x. *Muhammadan Law*

10. xi. *Muslim Personal Law*

10.xii. *Muslim Law*

11. Legal System of Islam

11.i. *Legal Institutions and Practices:*

11.i.a. *Qadi*

11.i.b. *Court System*

11.i.c. *Procedure*

11.i.d. *Shahadah (Evidence)*

11.i.e. *Hearing*

11.i.f. *Decree*

11.i.g. *Agency (Wakalah)*

11.i.h. *Justice*

11.i.j. *Jurisdiction*

11.i.k. *Punishments:*

-*Hadd (standard):*

--*Concept of Deterrence*

-*Tazir (discretionary)*

11.ii. *Muamilat (Civil Matters):*

11.ii.a. *Ownership ('Milk')*

11.ii.b. *Possession*

11.ii.c. *Contract*

11.ii.d. *Claim (da'wa)*

11.iii. *System of Rights and Obligations:*

-*Rights*

-*Obligations*

11.iv. *Acts (mahkoom fih)*

11.v. *Person (mahkoom alayh)*

11.v.a. *Legal Capacity (ahliyah),*

11.v.b. *Fictitious Person*

11.vi. *Hukm:*

-*Primary Rules (Hukm Taklifi)*

-*Secondary Rules (Hukm Wad'i)*

**Syllabus:
MUSLIM LAW**

1. Contemporary Development of Muslim Law

2. Muslim Personal Law:

1. Marriage
2. Dower
3. Divorce
4. *Khula*
5. Polygamy
6. Maintenance.
7. Child Custody
8. Guardianship
9. Succession
10. Will
11. *Iddat*
12. Paternity: Legitimacy & Acknowledgement
13. Guardianship of Person and Property
14. Gift
15. *Wakf*
16. *Marzul- Maut*
17. Pre-emption
18. Administration of Estate of deceased
19. Inheritance
 - Inheritance-General Rules
 - Hanfi & Shia* Law of Inheritance

Study of Selected Sections of the Enactments in Some Muslim Countries, such as:

The Dissolution of Muslim Marriages,
The Muslim Family Laws,
Muslim Personal Law (*Shariat*) Application Acts,
The Guardian and Wards Act,
The Child Marriage Restraint Act,
Marriage and Divorce (Registration) Act,
Dowry Prohibition Act,
Family Court Laws.

3. Muslim Family Laws (*Enactments*)

3.i. Marriage:

3.ii. Dower (Mahr)

3.iii. Dissolution of Marriage,

3.iv. Repudiation (Talaq) by husband:

3.v. Dissolution of marriage by wife:

4. Human Rights:

-Rights of God (Huqooqallah):

Individual and Public Rights for greater good

-Rights of human beings (Huqooqal-ibaad)

5. Broader Principles of Human Rights and Fundamental Rights

6. Universalization:

Da'wah (invitation)

Inter-Faith

Rights of Religious Minorities

Rights of non-Muslims

7. Women's Rights and Status:

8. Terrorism

9. Jihad

10 Torts and Crimes

Ta'zir (chastisement)

Hadd: (measure, limit)

Hudood (plural): *Hudoodallah:*

Qisas: punishment by similar hurt

Diyat: specified compensation payable to heirs of victim

11. Doctrine and Process of *Siyasah*

12. Constitutional and Administrative Laws

13 Commercial Laws

13.i. Principles of Economic System

13.ii. Riba (unlawful advantage by way of excess or deferment);

13.iii. Islamic Banking

13.iv. Features of Islamic Trading

13.v. Principles of Financial Dealings and Distribution Of Wealth

14. International Law:

-Islamic law of nations; treaties, concept of just war:

-Relations between Muslims and Non-Muslims

15. Islamization

Gradual Unfolding of Legal System of Islam

-Case of Liquor

Course Material/Brief Points:

ISLAMIC JURISPRUDENCE

1.Short Introductions:

1.i. Pre-Islamic Arabia

-*social and economic conditions,*

-*beliefs and customs,*

- *Istis-hab*

- *Stare Decisis*

--*its influence on Islamic law:*

Arab society was tribal.

Customary law of property, contract, inheritance, and obligations.

Elementary forms of land tenure.

Elementary legal system mostly through arbiters (*hakam*).

Islam reformed some pre-Islamic customs and adapted them to *internal consistency* of the Quranic and the Prophetic sanction.

Stare Decisis (Latin): Let the decision stand, abide or adhere to decided cases, *the policy of courts to adhere to principles established in earlier cases.*

Istis-hab (PRESUMPTION OF CONTINUITY)

General principles:

1.ii. Five Pillars of Islam:

(i) Declaration of Faith (*Shahadah: testify*):

“*There is no god save Allah, Muhammad is the Messenger of Allah*”.

(ii) Prayer (*Salat*): *inculcate* and sustain *ad-deen* as a system,

(iii) Poor Welfare Tax (*Zakat*: system for *enhancing* and *extending* economic welfare, at the base level)

(iv) Fasting (*Sawm*): (exercise for fitness and *physical capacity*).

(v) Pilgrimage (*Hajj*): *Hajj* (*summit for universalization and integration through wider dialogue and interaction.*

1.iii. The Articles of Faith:

Allah, the only one Lord,

Angels,

Books,

Prophets,

Resurrection, and the Day of Judgment;
Al-Qadar (deterministic regulation, e.g., cause and effect)

1.iv. The Moral Basis of Islamic Law:

Enjoin Good and Prohibit Wrong: (7:157)

1.v. The Grundnorm of Islamic Law:

The Grundnorm is the doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority is exercisable by people within the limits prescribed by Him, as a sacred trust.

1.vi. *Islam*

The term *Islam* means total submission to the Will of Allah. Incomplete or partial 'surrenders' or 'submissions' creates a patch work of contradictions and conflicts, because the numbers of 'non-compliances', in that case, could be any.

1.vii. *Political Islam*

Confusion exists for not differentiating the following:

Ummah is sans borders

Muslim state has geo-political dimensions,

Muslim Community has a locus.

Muslim community has internal goals that form its subsystems:

- protection of *Deen*,
- preservation and protection of life,
- maintenance of family unit and its values,
- development of personality and intellect,
- economic well-being,

Though *Khilafat* had practically ceased to have any significance, jurists, before Ibn Taymiyah, still clung to its concept, and even after it was demolished by Mongols.

Ibn Taymiyah did not "presuppose the existence of a state" and denied that a state as implied in the concept of *khilafah* had ever been established by the Prophet. He said that the period of the Prophet was *nubuwwah*; he wielded authority, primarily as Prophet and not as head of state. Supremacy of *Shariah* could be the principle in *khilafat* or *mulk* (state). *Imamate* (spiritual authority) on the basis of descentence could also never afford a long term alternate. He also rejected concept of rule of clergy. Ibn Taymiyah denied concept of *khalifat Allah*, with divine rights, above *Shariah*. Idea of universal caliphate was a fiction. He advocated legality of multiplicity of states..

Supremacy of *Shariah* means implementation of purposes of *Shariah*, implying that form of government does not affect it. *Shariah* supremacy can itself ensure that justice is maintained and rights of each individual and group are secured through due process of law.

'Democratic' principles are upheld by Islamic law as means of good governance.

1.viii. *Politico-Notional Differences:*

Imamate and *Caliphate* form the basis of two major approaches or schools, that are politico-notional in nature.

Khalifa (caliph) is idealized in *Shariah compliance and in his character*.

In concept of *Imam* (leader), temporal affairs occupy secondary position. Imam is idealized in his infallibility as final interpreter of law.

Concepts of *Imamate* and *Caliphate*, basically political in nature, have been sealed in faith; not allowed to be open to notions of sovereign modern-state craft.

2. Islamic law as a Divine Law and its sources.

Sources of Islamic Law

2.i The Quran,

2.i.a. The Basic Source of Law,

2.i.b. Approaches to understanding the texts: Selected Verses,

Approach 1:

Lexicography,
Linguistics,
Semantics,
Philology,
Lughah and *Lisan*,

Approach 2:

Culture,
Biblical basis,
Time-line,

Approach 3:

Word,
Verse,
Ruku (group of verses),
Surah (Chapter)
Text and Total Context.

Approach 4:

Quran in the light of?
-its own Text (*Quranic Nass*),
-*Sunnah* Text (*Sunnah Nass*),
-Bible,
-History,
-Sciences,

Approach 5:

Interpreters individual approaches from the Companions to-date.

2.i.c. Concept of Naskh (abrogation, amendment)

2.i. The Quran

2.i.a. The Basic Source of Law,

The Quran is unanimously accepted as *the fundamental source of law* from which positive law, and primary and secondary rules can be *deduced*. An ordainment in the text (*nass*) of the Quran is accepted as *the law (sharaee hukm)*, where evidently manifest.

The Quran regulates *relationship of man with man as extension of his relationship with God*. *Huqooq-ul ibaad* (human rights) are protected by *huqooq-ul-Allah* (rights of Allah) and His parameters (*hudood-Allah*). The Quranic legislation is not drafted in purely legal terms. It is, inter alia, amalgam of law and ethics, occasionally instilling His fear, for careful compliance.

The Quran is not 'pan-legistic', i.e. does not lay down all details once and for all. The Quran principally sets norms for law, and rules by which Islamic system of justice is to be structured. The legislative content of the Quran provides basis for detailed legislation and legal formulation and does not constitute a legal code by itself.

The injunctions were not revealed in vacuum, but as practical guide to the Prophet, leading through the medium of human society. *The Quran does not give minutiae, but indicates basic principles that lead to find answer by one's own effort*. It presents ideology in general terms, as steering force, in changing circumstances. It highlights boundaries of various aspects of life, in which the Prophet presented the practical model, primarily exemplifying the teachings of the Quran, so that it is not simply a compendium of ethics.

2.i.c. Concept of Naskh (abrogation, amendment, annulment)

Naskh: In classical *Fiqh*, it has different connotations:

- the Quran abrogated the laws enunciated in earlier Divine Scriptures,
- abrogation of some of earlier commandments of the Quran by the later, while texts of those earlier commandments remain embodied,
- clarification of some earlier commandments of the Quran by the later, while texts of those earlier commandments also remain,
- Explanatory verses were considered as *nasikh*. It did not mean that latter abrogated the former,
- Some pronouncements are general while others explain their meaning; the Quran explains itself.

Classical theory of naskh does not trace back to the Prophet. If any passages were abrogated, he would have definitely informed. Concept of abrogation was not there in the lifetime of the Prophet. *Almost every passage held abrogated, is disputed. Differences of Companions imply that there was no instruction from the Prophet, in this regard*. It emerged later for reasons of legal exigency or consistency.

2.ii The Revelation and the Reason:

2.ii.a. Divine law: based on Revelation:

In a Divine system the superiority is claimed for the Divine Laws and that these are immutable.

2.ii.b. Man-made law: Based on Reason

The *Quran* stated general principles which were developed, construed, interpreted and applied by the Prophet (Peace be upon him). The *Quran* prescribes to refer back to the source (the *Quran* and the *Sunnah*) in case of differences or discord. It exhorts not to follow it blindly. A person is not a true believer unless he understands his religion and is convinced by it.

Process of *revelation* was validated as the true *source*, in precept and practice of *the prophets*, in a living society. The Prophet was not to preach his own desires: 53:2 to 4

In *Fiqh*, *Reason is not a separate source of law*. In the *Quranic* context, the *Fiqh* requires application of knowledge in a well coordinated and utmost exertion of human faculties; the process known as *Ijtihad*, leading to *continuous process of Qiyas-Ijma-Qiyas-Ijma...*

2.iii. Mutazilah

According to Mutazilah, human intellect can guide man to know God, His attributes, and the very basics of morality. They believed that the injunctions of God are accessible to rational inquiry, and that knowledge, which distinguishes right from wrong, can be derived from reason. They believed in synthesis between reason and revelation. Both reason and revelation can come together as source of guidance and knowledge.

Mutazilah believed that source of all laws is Allah. They also maintained that reason can discover laws of Allah, even in absence of revelation.

3. The Sunnah

3.i. The Primary Source

Its relationship to the Quran

3.ii. Approaches to understanding

3.ii.a. the texts: Selected Traditions

3.ii.b. Athar and Amal

3.ii.c. Practice and Transmission

3.iii. Sunnah and Hadith

3.iv. Hadith

3.v. Difficulties In Acceptance Of Hadith

3.i. The Primary Source

Its relationship to the Quran

The Sunnah refers to normative practice set up by the Prophet as a model, under instruction from God. The *Quran* enjoins to follow the conduct of the Prophet, as 'ideal'.

Sunnah, as institution of Islamic Jurisprudence, with the progress of revelation, underwent evolution. The *Sunnah* developed in response to actual situations.

3.ii.b. Athar (Impression, Impact) and Amal (Practice)

Athar (impression) and *Amal (practice)* of Companions, elaborate the *Sunnah*, as next (add-on) source. Companions were immediate observers and followers of the

Sunnah, acquainted not only with Prophet's word, conduct, and wisdom in silence, but also their spirit and ideal.

3.ii.c. Practice and Transmission

Continuity of the established practice was proof by itself. Companions settled in different regions. They were interpreters and elaborators of the *Sunnah* of the Prophet.

Practical aspect of Companions' life had far-reaching effect on conduct of Successors. People accepted their *Ijtihad* as authoritative, which ultimately tended to become *Ijma* of the Community. However, *sunnah* of the Companions (*Sunnat al-Sahabah*), in many cases was based on personal opinions, giving rise to controversies among jurists of second century Hijrah.

3.iii. Sunnah and Hadith

Hadith is narration of precept and practice of the Prophet. *Sunnah presents the law deduced from this narration.* *Hadith* is carrier of the *Sunnah*. *Sunnah* is found in well-known traditions, established practice and agreed usages. One *Hadith* may contain more than one *Sunnahs*. The term *sunnah* was also used for established practice of Muslims coming down from the time of the Prophet.

3.iv. Hadith

Initially narration of the behavior of the Prophet by the Companions was known as *Hadith*, conforming to the established practice continued since time of the Prophet. *Hadith* is index and vehicle of the *Sunnah*.

Free narration of *Hadith* resulted in fabrication also. Differences arose as a result of conflicting *Hadith* in circulation. Shia relied on their narrators of *Hadith* (*ahl-e-bayt:members of the house*) and differed from *Ahl al-Sunnah*.

Established practice of Medina was considered to be the channel to judge the real *Sunnah*.

3.v. Difficulties In Acceptance Of Hadith

Sometimes a *Hadith* was available but the reporter himself could not understand its real import.

Flexibility and leeway provided by different descriptions, decisions and interpretations of *Hadith*, depending upon reporting of different aspects of situations variously, and scope and prospects of interpretations of the Quran, with unfolding information provided a spectrum of opinions.

If some *Hadith* did not conform to a verse in the Quran, it gave rise to different opinions among Companions. If reporting contained contradiction, Companions and Successors followed it differently.

4. Qiyas (Analogy)

Qiyas is a method of discovering a law laid down in the Quran and the *Sunnah*. Law on a point not expressly dealt with by the texts or by the concurrent decision of the learned is regarded as uncertain. Laws based on analogy, have to be proved from these two primary sources.

Qiyas is to find out essential common factor (*ellah*) between two similar cases, to apply the rule of one to the other, i.e., comparison between two parallels because of their resemblance, technically known as *ellah (shariah value)*.

5..Ijma (Consensus)

5.i. Ijma (Consensus)

5.ii. Qiyas-Ijma-Qiyas....

5.i. Ijma (Consensus)

Ijma ensures veracity of new legal content emerging from *Qiyas* and *Ijtihad*, as check against its fallibility. Universal agreement of entire Community (*Ijma* of Community) is generally confined to obligatory duties (*faraid*).

Generally *Ijma* represents average general opinion of a region, setting aside stray opinions.

5.ii. Qiyas-Ijma-Qiyas.... A Continuous Process

Early schools placed *Qiyas* before *Ijma*. Conflicts over reducing importance by way of preference of one over the other, undermined the cause of *ijtihad*, process of *Qiyas* and achievement of *Ijma* (consensus). Then there were severing debates on kinds of consensus and *Qiyas*. In fact, *Qiyas* and *Ijma*, both are complementary and supportive of each other in continuous process.

Those who subscribe to the view that *Qiyas* precedes *Ijma*, argue that perpetual human dynamics continuously evolve new situations which can be responded with different options through *Qiyas* based on *Ijtihad*.

6. Historical Development of Islamic Law:

6.i. Early development of Islamic Law:

6.ii. Legal schools: opinions and methods:

6.ii.a. Kufah: Abu Hanifah and his students

6.iii. Hanafi Interpretation or Methodology

6.iv. Maliki Interpretation or Methodology

6.v. Shafai Interpretation or Methodology

6.vi. Hanbali Interpretation or Methodology

6.vii. Perspective to Shia Law

6.viii. Kulayni

6.ix. Important factors in development of fiqh

6.x. Authority according to Sunni and Shia

6.xi. Umayyads (661-750 CE)

6.xii. Abbasids (750-800 CE)

6.xiii. Development of Judge-made Law

and Administration

6.xiv. Some Reasons of Disagreement:

6. xv. Schools of Islamic Law and Sects

6.xvi. Spatial Development

6.xvii. Application of Raay-i and availability of Hadith

6.xviii. Academic Impetus

6.xix. Ottoman World and Turkey,

6.xx. From Ottoman to Muslim World

-Shariah in secular Muslim states:

-Muslim states and some other states
with blended sources of law:

-Muslim states applying Shariah:

6.xxi. Learning From Lessons:

6.xxii. Research and Reform

6.xxiii. Some of Serious Issues Involved:

6.i. Early development of Islamic Law:

Growth and Compilation:

Written *manuals of fiqh* go back to second century Hijrah.

By *early schools of law* is meant traditions prevalent in different regions before Shafai, against whom he argues.

Subsequent sources present medieval picture.

Malik composed first systematic work (*Muwatta*) on *Fiqh*,

Shafai systematized,

Juwayni (*al-ashbah wa al-naza'ir*) laid down general principles,

Qarafi is credited for *al-furuq* (art of distinguishing cases), and

Ghazali (d. 505 A.H.) for reconciling principles of various schools, and new theory of purposes of law (jurisprudential interests).

The Prophet laid down regulations, and jurists, later, elaborated them in detail. The Prophet himself had made allowances in his commands, and left a lot to the Community to decide according to emerging situations.

During the time of the Successors, in geographical divisions, independent legal activity was going on. The regional schools were engaged in intense legal activity, which in modern terms may be called '*legal activism*', which generates controversy also. Local elements were very powerful.

6.ii. Legal schools: opinions and methods:

Opinions in Islamic law, grouped together systematically, are known as school of law. Schools of Islamic law differ due to systems of interpretation, influenced by methodology.

There was no concept of organized political parties. Opposition *groups* gathered around jurists. Separation between theory and practice or *separation between theory of jurists and practice of Muslim rulers (state)* starting immediately after first four caliphs, continued

throughout centuries, so that the gap increasingly became wider and deeper. Schacht perceived untidy relationship between ideal theory of Islamic law and actual practice by Muslims. Therefore, common unified legal system and one corpus of law did not develop in institutionalized consultative frame of a society or state.

6.iii. Hanafi Interpretation or Methodology:

Hanafi legal theory revolves around use of general principles:

Proof by the Quran and by the *Sunnah*, *Ijma* and the Opinion of a Companion.

Abu Hanifah accepted *qiyas* (analogy) and acted upon it, but with narrower scope.

6.iv. Maliki Interpretation or Methodology

Malik accepted *istihsan* and opinion of Companion. Malik's modes of *ijtihad* had following features:

1. *Practice of the people* of Madinah preferred over *qiyas*,
2. *Maslahah Mursalah*, i.e. interest that has neither been expressly confirmed by the Lawgiver nor has it been rejected.
3. *Opinions of Companions* as valid proof for purposes of *ahkam*, should be preferred over *qiyas*, when there is no tradition from the Prophet in the case.
4. If an individual narration is contradicting the *practice* then it is not a legally valid proof (*hujjah*).
5. Malik upheld *istihsan*.

6.v. Shafai Interpretation or Methodology

Shafai's method of interpretation was against use of general principles, in order to stay as close to revelation as possible. However, he accepted the four sources of law, in the order: the Quran, the *Sunnah*, *ijma* and *qiyas*.

Shafai was the first jurist to write about rules of literal construction and then raise *fiqh* on them. He laid down conditions for the acceptance of the traditions. He opposed principle of *istihsan*. He accepts principle of *ijma* but not exactly in form laid down by classical definition. He does not mention *maslahah mursalah* in his principles.

6.vi. Hanbali Interpretation or Methodology

Hanbali school accepted *mursal* traditions, preferred them over general principles and on analogy constructed on them. Ibn Qayyim states that these principles are:

1. The Texts (*Nusus*): The Quran and those traditions whose chains are complete,
2. Opinions of Companions:
 - (i) Opinion of Companion not opposed by other Companions, is accepted,
 - (ii) If opinions are more than one, the closest is to be accepted.
3. *Qiyas* is source of law of last resort.

6.vii. Perspective to Shia Law

Shia (*Shiatu Ali*: followers or faction of Ali), believed Ali as Muhammad's successor as Caliph. Sunnis held that political leader was to be from Quraysh (tribe of Muhammad).

Followers of the Imams assert that at any given time, whether in power or not, a male descendant of Ali and Fatimah was the divinely appointed imam and sole authority in matters of faith and law. Imam is considered infallible, free from error and sin, who rules over community

with justice and is able to interpret the divine law. Some give importance to the Imam of the Age, who defines jurisprudence, and his guidance may differ from previous Imams because of different times and circumstances.

6.viii. Kulayni

Kulayni (d. 329/941) was the foremost compiler of *Hadith* following *Ahl al-Bayt*, and *Mujaddid* (reviver) of 3rd century.

Among Kulayni's books, *Kitab al-Kafi* (source book of *ahadith*), is considered important on responsibilities of human beings prescribed by *Shariah*. He presents a rationalist approach that God does not burden man with impossible duties.

6.ix. Important factors in development of fiqh

- (a) Quran maintained continuity of the Revealed Scripture,
- (b) practical modeling (the Sunnah),
- (c) prevalent practice (*sunnah* and *ijma*),
- (d) sustainability through justice, equity and morality, within over all frame of monotheism, social reference in time and place.

Monotonic unity of *ummah* in specific terms, and *unity* of mankind in general, is not possible through one-piece jurisprudence (*fiqh* or even *Shariah*). Not only because of variations of features in geographical span, but also because of cultural and racial mix, there could not be one-piece *legislation* for all variety of human behaviors in different local settings.

6.x. Authority according to Sunni and Shia

Dispute over *Imamate* or Caliphate, continues to divide Muslims. Dissident party (*Shia*) asserted that *Imamate* should have continued in the family of Prophet, although Ali himself did not openly put forward such claim.. The other party (*jama-at*) 'elected' Abu Bakr.

Ulil-amr (those in command) have to be qualified and able to interpret law, i.e., one of necessary qualifications for *imam* (leader) is to be *mujtahid*.

6.xi. Umayyads (661-750 CE)

During Umayyad period (41 A.H. till beginning of second century Hijrah), public law, e.g., laws pertaining to fiscal matters, regulation of non-Muslim subjects, in the scenario of expanding territories, etc., developed.

Qadi gave effect to legal directives issued by central authority or local governors. Matters of private law, were left largely to individual *qadis*, who, consequently, made their contribution to development of law, in this sphere. *Qadis* made effort to adapt customary law under Quranic regulation.

Recognition of local norms, standards, and elements of Roman Byzantine and Persian Sassanian law were also absorbed into Islamic legal practice in the conquered territories. Local customary laws and legal concepts were modified under Quranic code, and precept of the Prophet (Peace be upon him). Later, these were systematized (codified) and compiled as juristic verdicts and administrative ordinances of political authorities.

6.xii. Abbasids (750-800 CE)

Abbasids established power in the name of religion.

For integrating law schools and courts, scholars were appointed to judiciary and as legal advisors.

Usul ul fiqh was not developed or dictated by the state. State did not prescribe law or lay down rules for *mujtahids* for deriving rules, except conditions necessary for attaining this rank. State did not prescribe a legal school for judges to decide cases according to it. Jurists, judges and jurisconsults had freedom of *ijtihad*, without restricting it to a legal school or a doctrine (*madhhab*) of a jurist or a *mujtahid*. School bias appeared afterwards, deepening with increasingly blind *taqlid*.

Freedom of reasoning and flexibility, within the *texts*, to deal with evolving situations in time and space, allowed difference in modes of *ijtihad*, i.e., different methods of derivation of rules for deducing subsidiary statutes and formulations for rulings.

6.xiii. Development of Judge-made Law and Administration

Growth of *fiqh* gained momentum when *qadis* (judges) came in place of *hakams* (arbitrator-judges), and compilations and translations appeared. *Fiqh* became independent science. *Usul-al fiqh* as science became systematic. Well-known traditions in authoritative collections appeared in second-third century A.H. Later, *law* expanded greatly, and became a specialization. It was, thus, claimed to be the preserve of specialists (*fuqaha: jurists*), who endeavored to bring ancient usage under Islamic teaching, more than dealing with developing new dimensions and issues in current perspective.

Traditionally, *Sharīah* (law) was administered by court of a single *qadi*, who was judge of facts as well as law. He could seek advice of a expert jurist (mufti). There was no hierarchy of courts and no organized system of appeals, revisions, reviews, and petitions. With the assistance of a clerk (*kaatib*).

6.xiv. Some Reasons of Disagreement:

1. Disagreement on meanings of words of the Quran and the *Sunnah*,
2. Similarities in the Texts.
3. Adherence to the texts, by their outward meaning.
4. Personal opinion and judgment.
5. Difference in level of knowledge,
6. Variety of methods of argumentation.

6. xv. Schools of Islamic Law and Sects

A school of Islamic Law is a system of interpretation based on opinion or methodology of derivation of detailed rules. Opinions differ because of difference in methodology. School of legal opinion is organized around a legal theory, for derivation of rules. Muslims are divided into numerous schools, also referred to as sects.

6.xvi. Spatial Development

Expansion of Islam brought it into contact with different cultures, societies and traditions, like Byzantine and Persian, inside their door-step.

Hijaz was home to divine revelation, bearers of *Shariah* and narrators of the *Sunan*. They felt little need to exercise opinion, and their problems were scanty as compared to those arising in conquered territories, e.g., in Iraq.

Ahl al-Hadith were devoted to the *Sunan*, the word and practice of the Companions. *Ahl al-Hadith* (people of *Hadith*) were more in Hijaz, and *Ahl al-raay-i* (people of opinion) in Iraq.

6.xvii. Application of Raay-i and availability of Hadith

The rule given in the text has to be followed, but situations not covered in the text are to be addressed by finding a rule which realizes public benefit signified in the texts. Therefore, enquiries are to be made into its effective cause, purpose, reason and wisdom behind it.

In this process and application of this methodology, sometimes, emerging legal opinion (*fatwa*) appeared contrary to *Hadith*.

Neither Islamic law nor the *Sunnah* was available as a compilation, at that time.

6.xviii. Academic Impetus

Scholarly and academic effort got impetus from translation of sciences and learning on which advancement of Persians and Romans was based, and Greek civilization had flourished. Collection and collation of sciences, and compilation of *Hadith* tremendously helped jurists also in development of Islamic Law.

6.xix. Ottoman World and Turkey:

In Ottoman times, *Qanun* and *Shariah* were distinguished. Till 1915, generally, opinion prevailed that family law should remain under *Shariah*. But in Turkey under *Ataturk*, *Shariah* was kept aside in favor of legislation of foreign inspiration. Legal reform was introduced through 'codes' based on European models.

Tanzimat reforms in Ottoman Empire, obliterated *Shariah*. Syria, Lebanon, Palestine, Jordan, and Iraq were included in *Tanzimat* reforms. In Saudi Arabia, Yemen, and Oman, *Sharia* reigned supreme.

Turkey abrogated *Majalla* entirely after World War I. *Shariah* was no longer applied. After abolition of Sultanate (1922), and elimination of Caliphate (1924), by Turkish Republic, tendencies to adopt or come closer to secular law (*qanun*) in place or alongside *Shariah* were on the increase in all Muslim countries.

Jurisdiction of *Shariah* courts was restricted to family law. Mixed' courts were also established to deal with litigation between Ottoman subjects and foreigners.

6.xx. From Ottoman to Muslim World

Shariah in secular Muslim states:

Muslim countries such as Mali, Kazakhstan and Turkey have declared themselves to be secular; religious interference in state affairs, law and politics is not admissible. *Shariah* is limited to personal and family matters. Nigerian legal system is based on English Common Law. The constitution guarantees freedom of religion and separation of church and State. However some northern states have adopted *Shariah* law for Muslims. Some of Muslim countries, including Indonesia, Bangladesh and Pakistan, have largely secular content in their constitutions and laws, with only a few Islamic provisions, mainly in family law. Turkey has a constitution that is officially strongly secular.

Muslim states and some other states with blended sources of law:

Muslim countries including Pakistan, Indonesia, Afghanistan, Egypt, Sudan, Morocco and Malaysia have legal systems strongly influenced by *Shariah*, but also cede ultimate authority to their constitutions and codified law.

India and the Philippines, although not Muslim countries, have many laws based on *Shariah*. In 2008, United Kingdom government recognized *Shariah* tribunals, in situations where both sides in a legal dispute freely choose a *Shariah* court as a binding arbitrator rather than taking a matter before official courts. Similar Jewish *beth din* court arbitrations have been recognized in England for over 100 years. Neither party can be forced into arbitration by a *Shariah* or a Jewish court.

Most countries of the Middle East and North Africa maintain a dual system of secular courts and religious courts, in which the religious courts mainly regulate marriage and inheritance.

Muslim states applying Shariah:

Saudi Arabia and some of Gulf states do not have constitutions or legislatures of Western systems. Iran shares some of these characteristics, but also has a parliament that legislates in a manner consistent with *Shariah*. Saudi Arabia and Iran maintain religious courts for all aspects of jurisprudence, and the religious police (*mutaween*) assert social compliance, while Somaliland, and Maldives adopted *Shariah* in legal aspects but with Western style of judiciary system (Common law or civil law). Laws derived from *Shariah* are also applied in Afghanistan, Libya and Sudan. *Shariah* law is officially recognized by the justice system in Israel in matters of personal status of Muslims if they choose a *Shariah* court (e.g. marriage, divorce, guardianship.) Lebanon also incorporates *Shariah* for Muslims in family matters. Some states in northern Nigeria have reintroduced *Shariah* courts.

In Algeria, French laws, both criminal and civil, have been applied to all, except personal status and family relations, since 1850.

In Tunisia, Code of Obligations and Contracts, enacted in 1906, was based on Islamic sources. In last a few years, French law has been directly adopted, in part, in Tunisia and Morocco.

In Kuwait new codes incorporated European with Islamic principles. In rest of Arabian peninsula *Shariah* law and customary law largely reign supreme, except (i) for Aden, where Indian law, in general, prevails, and (ii) for application of Indian codes to foreigners, by British courts, in Gulf Sheikdoms.

In Sudan, general law, which includes Penal Code and Criminal Procedure Code, based on Indian model, rests on "*justice, equity and good conscience*", as practiced and largely interpreted as English legal principles in British India.

Islands of Zanzibar have been chief bastion of *Shariah* law in East Africa.

In Kenya application of *Shariah* law, rests on:

- (i) such enactments as Mohammedan Marriage, Divorce and Succession Ordinance, 1906, and *Waqf* Commissioners Ordinance, 1951;
- (ii) certain Muslim courts under Courts Ordinance, 1931;
- (iii) certain provisions of Native Courts Regulations, 1897, have been preserved.

This law is applicable in Kenya only as personal law of Muslims, but restricted and modified, to considerable degree, by different enactments, e.g.:

- Marriage Ordinance, 1902,
- Penal Code, 1930, etc.

On mainland Tanzania, application of English law goes back to Tanganyika Order in Council, 1920, with provisions for application of "native law. *Shariah* law is applied within terms of certain legislative enactments.

In Uganda, the law is comprises English law, local enactments and customary law. Application of *Shariah* law is largely confined to terms of Marriage and Divorce of Mohammedans Ordinance, 1906, and law of succession applicable to immigrant Muslims.

In Malawi, *Shariah* law is not applied under terms of Asiatics (Marriage, Divorce and Succession) Ordinance, 1929. In Zambia and Rhodesia territories, it is not applied under principles of Private International Law.

Application of English law in Republic of Somalia goes back to Principal Order in Council, 1929. *Shariah* law is applied either as a variety of "native law and custom" or as law applicable at the time when Britain occupied the territory.

In Gambia, Order in Council provides for application of English law, native law, and custom. Mohammedan Law Recognition Ordinance, 1905, provides for Mohammedan Court.

In Ghana there is a Marriage of Mohammedans Ordinance, 1907. *Sharia* law is regarded as a variety of "native law and custom".

In Sierra Leone, there is Mohammedan Marriage Ordinance, 1905. *Sharia* law is regarded as a variety of "native law and custom".

In Nigeria, in Western Region, position is the same as in Ghana and Sierra

Since Egyptian Law of Testamentary Dispositions came in 1946, doctrine of *taqlid* is increasingly being challenged.

In Lebanon and Syria *Shariah* law was eliminated in stages.

Islamic law was established in Malaysia by about fourteenth century. According to Federal Constitution, Islamic law is a matter falling within State List, i.e., State Legislatures are empowered to enact the law. Malaysia maintains two parallel justice systems.

During Mughal Rule, *qadis* administered law, as the law of the land, till British rule, when influence of English common law and principles of equity, apparently increased. *During colonization most Islamic laws were slowly replaced by Western laws, on one hand, and some others were consolidated, e.g., Muslim Personal Law.*

6.xxi. Learning From Lessons:

As law became rigid, changing needs of state and society could not be met in real time, on time or reasonably on time line of history. *Usul al-fiqh* was not *internalized, interiorized and integrated* with legislative, judicial and executive machinery, *widening the gap between theory and practice.*

6.xxii. Research and Reform

If *concurrent ijihad* can offer legal solutions or formulation of laws, socially beneficial, in consonance with fundamental tenets of Islam, rather than being literally restricted to specifics, then only gates to reform could be opened.

6.xxiii. Some of Serious Issues Involved:

- There are problems of dichotomy in the system.
- Principle of *maslahah* needs to be formalized.
- Understanding the purposes and the principles of the Texts.
- Need of analytical consistency and continuous process, *qiyas-ijma-qiyas....*

- Synthesis of early systems is required.
- Mis-founded assumptions about *raay-i*.
- Differentiation of ‘*generic juristic verdict*’ and ‘*judgment in circumstances*’.
- Appropriate application of the rule of the *Sunnah* having its origin in *stare decisis*,
- Appropriate application of the rule of the *Sunnah* developed in reform of the *custom*.
- Feminism, human rights, attitude towards democracy, concept of fictitious person.
- Accelerating developments in genetics, forensic and other sciences, are exceedingly posing new challenges, to solve emerging problems.

Combination of strategies are needed for updation of Islamic law.

7. Short Introduction to the Terminology

7.i. *Fiqh*

7.ii. *Ilm*,

7.iii. *Fiqh and Kalam*

7.iv. *Fiqh and Fahm*

7.v. *Fiqh: Amah and Khassah*

7.i. *Fiqh*

Fiqh, formally (*de jure*) enjoys status of law.

Meaning: understanding, comprehension, personal cognition with intelligence and intellect; understanding of what is intended, and to be done.

Technically, *fiqh* means ‘expertise in distinguishing’, *legal understanding*.

Science of *fiqh* consists of:

- (1) *Usul* (roots): Science of *usul* deals with sources of law, and principles of interpretation,
- (2) *Furu*: (branches: Science of *furu* deals with particular injunctions (*ahkam*: substantive law), which follow from science of *usul*).

7.ii. *ILM (Knowledge)*

Term *ilm* has been used in the Quran for *learning*.

When *Hadith* was collected towards end of first century Hijrah, *knowledge of Hadith and Athar*, was described as *ilm*, and term *fiqh* came to be used for knowledge based on exercise of intelligence and independent judgment; i.e., terms *ilm* and *fiqh* began to separate.

7.iii. *Fiqh and Kalam*

Kalam was introduced by Mutazilah during Mamun’s time (d.218 A.H.), as independent science, when Greek works on philosophy were rendered into Arabic, and the term *fiqh* came to be restricted to the corpus of Islamic law.

7.iv. *Fiqh and Fahm*

Fiqh and *Fahm* (*intellect, intelligence*) as synonyms, signify besides intellectual understanding, *depth* of knowledge of injunctions of Islam.

7.v. Fiqh: Amah (general) and Khassah (special)

Amah includes five prayers, fasting during Ramadan, *Hajj* and *Zakah*, etc., for which all individuals are obligated.

Khassah relates to specialized areas and were recognized as *ahkam al-khamsah* (five categories of obligations).

8.Usul ul Fiqh

8.i. Usul ul Fiqh

8.ii. Khilaf

8.i. Usul ul Fiqh

Usul: (sing. *Asl*): *origin, source* from which something originates.' *Asl* is origin, root, foundation upon which structure is constructed.

Usul al-fiqh teaches reasoning in:

-evidences, general (in the *Quran* and the *Sunnah*) and specific (e.g., in a verse or *Hadith*, in other words in primary sources of Islamic law, that indicate *ahkam* of Allah,

-*ijma* (accomplished consensus of opinion) as secondary source of law, that affords *ahkam*, and

-process of *qiyas* (analogy), as 'process source' (deductive source), that entails valid *ahkam*. There are different types of *Qiyas* depending upon methodologies and concepts.

8.ii. Khilaf

Khilaf is a discipline that studies as to how jurists used reasoning in specific evidences is known as science of *khilaf*. In modern terminology its some aspects may perhaps be likened to 'reverse engineering'.

9.Important Terminology

9.i. Ijtihad

9.ii. Istihsan (Juristic Equity)

9.iii. Istidlal

9.iv. Istislah

9.v. Takbayur

(selective choice from alternate opinions)

9.vi. Ellah

9.vii. Fatwa

9.viii. Mujtahid, Mufti, Faqih, Mufti, Muqallid

9.ix. Taqlid

9.i. *Ijtihad*

Ijtihad is the individual and collective utmost endeavor. 'Religious experience of mankind' is not only in the revelation and traditions of Prophets. It also reflects and ensures its continuity in the institution of '*Ijtihad*'.

9.ii. *Istihsan*

Istihsan means *to consider something good*. It refers to juristic preference for a judgment over other possibilities in personal interpretation or *ijtihad*.

It is defined as moving away from implications of an analogy to an analogy which is preferable, or to an analogy for a stronger evidence from the Quran, the *Sunnah* or *ijma*, or giving up some of the implications of an evidence by way of exception.

9.iii. *Istidlal*

Istidlal (inference) is a principle of public interest as a basis for legislation, in order to avoid strict analogy where clear precedent could not be found. *Istidlal* as a method of juristic deduction includes all forms of ratiocination which do not fall within the scope of analogical deduction.

9.iv. *Istislah*

Istislah (*Maslah*: public interest) is a methodology to solve problems for which no clear solution is found in the texts.

9.v. *Takbayyur*

Takbayyur: selective choice from alternate opinions: In this methodology choices from appropriate alternate opinions, a solution may be stitched together.

9.vi. *Ellah*

Sign: textual provisions containing *ellah* (specific evidence, words, entities), or basis for systematically deducing *ellah*, i.e., the basis for legal provision.

9.vii. *Fatwa*

A *fatwa* (legal opinion or learned interpretation) can be issued by a qualified *mufti* (jurist), not necessarily in a formal position, on a point in Islamic law. It generally contains reasoning and a declaration on a point. *Fatwa* does not carry weight like secular common-law opinions. *Fatwa* is binding only on its author.

9.viii. *Faqih, Mujtahid, Mufti, and Muqallid*

A person may be learned (*alim*, pl. *ulema*), but to be *faqih* (pl. *fuqaha*), he must possess intelligent and independent judgment. *Faqih* is 'jurist', skilled and expert in matters of Islamic law. *Mufti* is one who is competent to issue a legal verdict in matters of religion. *Mujtahid* is a qualified person of higher standing, who can exercise *Ijtihad*, and derive rules under the laid down principles, from the sources of law of Islam. *Muqallid* follows the rule already derived or explains it further.

9.ix. *Taqlid*

After the early period, people mostly gave up going back to the Quran and the *Sunnah*. They just wanted to follow, rather than make effort to find and follow the original source. Blind *Taqlid* went increasingly remote, to unqualified 'leadership'.

10. Concepts in Legal System of Islam

10.i. Deen

10.i.a. Purposes of Deen

10.i.b. Principles (Maxims) of Deen

10.ii. Mazhab

10.iii. Millah

10.iv. Shariah

10.v. Minhaj

10.vi. Nusk

10.vii. Shariah Law

10.viii. Shariah and Law

10.ix. Shariah Based law

10.x. Muhammadan Law: Anglo-Muhammadan Law

10. xi. Muslim Personal Law

10.xii. Muslim Law

10.xii.a Corpus of Law

10.i. Deen

Deen represents the fundamental conception, worldview, or creed about the universe and its Creator. *Deen* stands in relation to God (*Deen Allah*: Religion of God).

“*Deen*” is a much wider concept than *Shariah* and even religion. Term ‘*Deen*’ is used for the ‘Religion’ of the Prophets of Allah and their inspired Books, and also their laws. In the past in general terms (without ‘*al*’, article ‘*the*’) it was also used for religion, but after the advent of Islam, it has been used as synonymous to ‘the Religion of Islam’ (*ad-deen*).

10.i.a. The Purposes of Deen

The purpose of *Deen* is to set on the path of *righteous living* based on submission to the Laws ordained by God. Following purposes are generally, prioritized:

- preservation of *Deen* itself,
- preservation and protection of life,
- maintenance of family unit and family values,
- development of personality and intellect,
- economic well-being,

10.i.b. Principles (Maxims) of Deen

Some scholars, e.g., Ibn Rushd, made efforts to compile principles (maxims) of *Deen*. Where immediate effective *illah* is not textually obvious, legal provision may be formulated on direct systematic deduction from these texts for addressing developing and evolving situations in human life, through purposes and principles enshrined in the specificity or totality of these texts (*nass*).

10.ii. Mazhab

Mazhab (Shariah) stands in relation to religious teachings: 42-13

‘*Mazhab*’ is generally translated as *pathway*. *Mazhab* denotes rules, customs, conventions and institutions, ceremonials and offerings which govern human life in its manifold spheres.

10.iii. Millah

‘*Millah*’ stands in relation to a prophet, e.g.: ‘*Millat Ibrahiim*’: The Religion of Abraham (peace be upon him): 3-95

10.iv. Shariah

Shariah means clear path or highway to be followed.

Shariah combines law and tenets both. It covers all aspects, combining *Fiqh* and *Kalam* both. The term "Sharia law" includes both moral laws as well as the legal enactments. While moral law was revealed in the Quran and the *Sunnah*, the legal enactments are made for its enforcement.

Term *Shariah* has wider meaning than *fiqh*. *Shariah* includes *fiqh* and *aqaid* (tenets of faith).

10.v. Minhaj

Minhaj (Open Way, Path), seen in the perspective of continuity of the scriptural tradition, and philological relationship of the family of the languages of the region, the term *Minhaj*, in Hebrew refers to an accepted tradition or group of traditions.

10.vi. Nusk

Nusk ‘the manner or ceremonial of devotion’, outward manifestation in practice. A related concept *Nusach* (Hebrew), refers to the traditional form of prayers.

Shar’a (Way) generally means the ‘law’ prescribed by the religion and *Nusk* the form of devotion or worship: 5:48 and 22:67

10.vii. Shariah Law

It usually refers to the Islamic Law as *codified* or *enacted* and in usage in the legal system or adjudication. It also includes the judge-made law or precedent of the supreme judiciary based on the Injunctions of the Quran and the *Sunnah* of the Prophet,

10.viii. Shariah and Law

Usage of the term ‘law’ with *Shariah*, here may refer to the law which is not derived from *Shariah* and not accordingly codified or enacted, but may not be in conflict with or contradictory to *Shariah*, and be in force as law of the land, side by side, with *Shariah*,

10.ix. Shariah Based Law

In Indo-Pak sub-continent, British policy provided that "*Mohammedans, ...*" shall be governed by their own personal law. British Court was to apply *Shariah* law, not covered by any special enactment, on the common law principle, and that "*in civil matters the Law of Islam is and is hereby declared to be fundamental law of the Protectorate.*" Regulation II of 1772 provided that

'in all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the Koran with respect to 'Mahomedans', shall be invariably adhered to'.

10.x. Muhammadan Law:

During colonial rule, influences on Muslim jurisprudence was broadened by:

- *legislation, and*
- *principles of justice, equity and good conscience.*

Muslim law, e.g., in India, was and continues to be *Shariat grafted* by principles of English common law and equity.

Thus jurisprudence developed as what was called *Anglo-Muhammadan Law* or simply *Muhammadan Law*.

10.xi. Muslim Personal Law

Personal law is the law that governs a person's family matters, usually regardless of where they go. In civil-law systems, it refers to the law of nationality, in comparison to territorial law.

"The Idea of the personal law is based on the conception of man as a social being, so that those transactions of his dally life which affect him most closely in a personal sense, such as marriage, divorce, legitimacy, many kinds of capacity, and succession, may be governed universally by that system of law deemed most suitable and adequate for the purpose. (R.H. Graveson, Conflict of Laws 188 (7th ed. 1974). (Black's Law Dictionary 8th Ed.)

10.xii. Muslim Law:

During British rule, Muslim law manuals were translated, e.g., the following:

Hedaya (Guide) deals with almost all topics of Muslim law, except Law of Inheritance.

Fataawa Alamgiryah expounds *Hanafi* rules, almost on all topics of Muslims law.

Imamiyah is another important compilation.

Baillie's 'Digest of Mahomedan Law' Vol. I is founded mainly on *Fatawa Alamgiri*.

Baillie's Digest Vol. II is based on *Sharaya-ul-Islam*.

Sharaya-ul-Islam is leading work on *Shia* law.

11. Legal System of Islam

11.i. Legal Institutions and Practices:

11.i.a. Qadi

11.i.b. Court System

11.i.c. Procedure

11.i.d. Shahadah (Evidence)

11.i.e. Hearing

11.i.f. Decree

11.i.g. Agency (Wakalah),

11.i.h. Justice

-*Taqwa*

-*Ihsan*

-*Adl*

11.i.j. Jurisdiction

11.i.k. Punishments:

- Hadd* (standard):
 Concept of Deterrence
- Tazir* (discretionary)

11.ii. Muamalat (Civil Matters):

- 11.ii.a. Ownership ('Milk')*
- 11.ii.b. Possession*
- 11.ii.c. Contract*
- 11.ii.d. Claim (da'wa)*

11.iii. System of Rights and Obligations:

- Rights
- Obligations

11.iv. Acts (*mahkoom fih*)**11.v. Person (*mahkoom alayh*)**

- 11.v.a. Legal Capacity (ahliyah),*
- 11. v.b. Fictitious Person*

11.vi. Hukm:

- Primary Rules (Hukm Taklifi)*
- Secondary Rules (Hukm Wad'i)*

11.i. Legal Institutions and Practices

Laws generally relate to:

- dealings (*muamalat*),
- family laws (*munakahat*);
- remedies (punishments:*uqooubat*);
- court rules/procedures (*aadaab-ul qadi*),
- relations of Muslims and non-Muslims, and administration (*as-siyar*),

Acts of worship (*ibaadaat*) are not within purview of jurisprudence.

11.i.a. Qadi

Classical judicial system in Islam, grew from foundation tradition of '*hakam*' (arbitrator, adjudicator). *Qadi*, then, came to administer *Fiqh*.

Qadi was appointed, and could be removed by Executive, to whom he looked for enforcement of his judgments. Competence was all-inclusive. He could seek advice from jurisconsult (*mufti*) or an expert. However, their advice, was not mandatory. He could institute discreet enquiries (*tazkiyya*) about eligibility and believability of witnesses.

11.i.b. Court System

In classical system *bench* of judges was not familiar. Formal appellate jurisdiction as part of legal system was also not there, except, for complaint courts.

11.i.c. Procedure:

The *qaḍi* conducted court (procedures), without ceremony and splendor. Legal representation was not unknown, but parties would usually appear in person and address their pleas orally to the *qaḍi*. *There were specific procedures for different categories of cases, e.g., in family matters, hudood cases, confession and retraction, etc.*

11.i.d. Evidence (Shahadah)

Shahadah (testimony) is the Islamic creed declaring belief in the oneness of God and the Prophethood of Muhammad. In legal context, *shahadah* is a testimony to the occurrence. In Islamic jurisprudence a person who is not competent to be a witness (*shahid*) cannot be a judge.

11.i.e. Hearing

A case must be heard in presence of parties or their representatives. The court issues summons to secure attendance of parties and witnesses. If parties refuse to come or appoint representatives, they can be compelled, if necessary. An agent can be appointed by the court. After hearing claim and evidence in presence of the parties, or their agents, as the case may be, give decision. In *ex parte* decree, if defendant appears afterwards, with explanation, and objects to correctness of decree, his defense can be heard. *Ex parte* proceedings are not permitted in charges punishable with *Hadd*, because in such cases there must be 'no doubt' as to proof.

11.i.f. Decree

Decree (*qadi's hukm*) settles or terminates a dispute. Decree may be *directory*; directing judgment-debtor to provide requisite relief to judgment-creditor, or *prohibitive*, that he is not entitled to what he claims. Law provides for enforcement of decree and realization

11.i.g. Agency (Wakalah)

Wakalah is like *power of attorney*. A person may appoint his representative to undertake transactions on his behalf. Parties to the contract of *wakalah* are:

- (i) principal,
- (ii) agent,
- (iii) authorized act; and
- (iv) form (*sighah*).

The principal must have capacity to undertake the act himself which he authorizes to his agent, who also should have legal capacity to undertake the same.

11.i.h. Justice

The Quran demands justice on the basis of (*bil Haq*):

- law, and
- fact,

assured through the principles of:

- Taqwa* (God-consciousness of the judge),
- Ihsan* (excellence in relief),
- Adl* (excellence in appropriation)

in a fair system in which witness stands straight (*bil qist*), for God only, neither for plaintiff, nor for defendant, nor in fear, nor for consideration, even for the closest relation.

11.i.j. Jurisdiction

A *Qadi* could be appointed with jurisdiction over a particular area, or in particular class of cases. *Qadi*'s decree is binding within his jurisdiction. A plaintiff has to file his suit in court of *Qadi* of relevant jurisdiction. If defendant or decree-debtor is found outside territorial jurisdiction, *Qadi* may record evidence, and pass order and after properly sealing and securing record, in presence of two witnesses of unimpeachable character, remit it to the *Qadi*, within whose jurisdiction the defendant is to be found.

11.i.k. Punishments:

-Hadd (standard sentence):

Concept of Deterrence

-Tazir (discretionary sentence)

Hadd (standard):

General Policy of Islamic law is to punish offenders who defy public civility, morality, or flaunt their vices. Degree of Hadd (deterrent standard punishment) is specified by the law itself.

The Quran prescribes:

- (i) *Hudood* as Parameters for adjudication, (2-229)
- (ii) *Hudood* as Perimeters of conduct, including family matters, (2-187, 2-230, 58-4, 65-1).
- (iii) *Hudood* as Prescribed Punishments,
- (iv) *Hudood* as Warning-Posts: (4-13 & 14, 9-63 & 97, 58-4)
- (v) *Hudood* carry the connotation of *prohibiting disorder*, obstructing *wrong access*, and commanding orderly conduct. (58-5, 20 and 22)
- (vi) Severely deterrent nature of Warning-Posts and Punishments (17-50, 18-96, and 22-21, 34-10, 57-25, 33-19, 50-22).
- (vii) Glad tidings are for the obedient, who observe the limits (9-112).

Tazir (discretionary, corrective sentence):

Tazir is *species* of correction for prevention of recurrence, not determined by law, but left to judgment. However, under *Tazir*, range of discretionary chastisements is also specified in codified laws. Objects of *tazir* are correction of offender and of crime.

11.ii. Muamilat (Civil Matters):

11.ii.a. Ownership ('Milk')

11.ii.b. Possession

11.ii.c. Contract

11.ii.d. Claim (*da'wa*)

11.ii.a. Ownership ('Milk') property

'Milk' defines property or asset (*shayun*) of a person, under his full *power and control* for its disposal, to the exclusion of *control* or disposal by others. It may be an object holding more than mere proprietary rights. Juristically, 'milk' may be *mal* (physical object), its usufruct (*manf'at*), or services.

11.ii.b. Possession

Attributes of possession:

- right to possess, and
- de facto* possession,

Possession may be:

- actual (*haqiqi*),
- symbolical (*hukmi*),

Possession whether actual or symbolical is distinguished from 'right to possess. '.

Possession may be:

- Complete:
- Incomplete

11.ii.c. Contract

Necessary conditions:

1. *capacity* of person for the *juristic act*,
2. *object* (*subject-matter*),
3. *act*: e.g., express *intention* of a donor to part with proprietary rights,
4. *consent* of all concerned parties is necessary.

11.ii.d. Claim (da'wa)

Claim (*da'wa*) is a demand of a right by one from another before a court. One making demand is *Mudda'i* (plaintiff, claimant). and the other from whom a demand is made is *Muddaa alayhi* (defendant). (*Al-Majallah*), It must be a possibility and in accordance with the rules.

Claimant is entitled to withdraw the action, if he so chooses, but the defendant cannot, at his will, escape the claim being pursued. Claimant cannot succeed without proving his claim, but defendant may get decision in his favor without adducing evidence.

11.iii. System of Rights and Obligations

Two kinds of rights:

- Right of Allah,
- Right of individual.

Other categories of rights are derived by combination of these two types of rights based on predominance of one or the other, e.g., rights of individuals collectively, rights of state.

Distinction between right of Allah and right of state is of crucial significance for understanding nature of Islamic law, e.g., acts related to *ta'zir* (taxes) fall within right of state, distinct from right of Allah (*zakah*). Acts pertaining to right of Allah involve duties owed to Allah alone, while right of state relates to obligations created by state.

Obligation (Iktilaf, Taklif):

Primary Rules (*hukm taklifi: Defining Laws*) create obligations (impose duties).

Secondary Rules (*hukm wadi': Declaratory Laws*) determine relationship between causes and consequential obligations, acts and their conditions and exemptions, and how laws are made, validated and implemented.

Obligations may arise:

- i. by implication of law
 - (a) towards God
 - (b) towards community or state,
 - (b) towards individuals,
- ii. by utterance, e.g., admission, confession,
- iii. by conduct.

11.iv. Acts: *Mahkum fih*

Mahkum fih is the act to which the *hukm* is related as *taklif* (obligation).

Natural Acts (Hissee: of senses) include:

Physical Acts (af-aalul jawaarih): perceptible to other persons, including his utterance, e.g.:

Acts of *utterance (Qaul):* spoken words, including gestures, expressions, writing, etc.

Acts of *conduct (Amal or Fa-il):* motions of body or limb, omission of obligation (*tark*), e.g., default in fulfilling contract, etc.

Physical Acts, according to another classification, are:

Voluntary Acts (tasarrufaat): willful acts.

Involuntary Acts are not willful.

In juristic terms, *physical* acts are:

-acts for which there is *pronouncement of law*, and are also *cause of another command* of law,

-acts for which there is pronouncement of law, but these are not causes of other commands of law.

Juristic acts are also distinguished as:

Originating Acts (*Insha'at*): create legal effect:

Revocable Acts: legal effect can be undone,

Irrevocable: legal effect cannot be undone,

11.v. Person (*mahkoom alayh*)

11.v.a. Legal Capacity (*ahliyah*),

Mahkum alayh: Subject is the person whose act invokes *hukm*, in legal parlance, called *mukallaf*.

Legal capacity (*ahliyah*) is the essential condition for obligation, before the law can apply to him.

Ahliyah (legal capacity) depends upon capacity for acquisition (*Ahliyat al-wujub*: capacity to acquire, receive)

Manat (foundational basis) for capacity for acquisition is an attribute of being a human (*insaniyah*). It determines 'eligibility.'

Aql (intellect) and *Rushd* (discretion) are bases for capacity for execution. .

Dhimmah: it is that basis for capacity for acquisition, which entitles a person to acquire rights and obligations. *Dhimmah* includes, both, capacity for acquisition and capacity for execution, which corresponds to 'fitness of person' in law.

Two types of *Ahliyah* (legal capacity):

- (i) *ahliyat al-wujub*: (Receptive Capacity) capacity for acquisition of both rights and obligations:
 - to acquire rights,
 - to accept duties,
- (ii) *ahliyat al-ada*: (Execution Capacity) ability to exercise rights and discharge of obligations:
 - to exercise rights,
 - to perform duties.

Capacity for acquisition may be:

- complete, or
- incomplete (deficient):
- suspended temporarily (wholly, partially)

Causes of deficient capacity:

- (i) *Samawiyah* (natural, beyond control of the subject (*mukallaf*),
- (ii) *Muktasabah* (acquired deficiency).

11. v.b. Fictitious Person

Earlier jurists, generally, did not recognize artificial person or juristic person, other than human being. But now the need of fictitious person is acknowledged, e.g., in *waqf*, corporate entity, etc.

11.vi. Hukm:

- Primary Rules (*Hukm Taklifi*)
- Secondary Rules (*Hukm Wad'i*)

Sharaee Ahkam:

Hukm (plural *ahkam*: injunctions, commands): is a rule (law) in Islamic legal system, considered as ordainment of Allah, discovered directly from the Quran, or the *Sunnah*, or derived through analogy (*qiyas*), by *fuqaha*, or established through *ijma* (consensus).

Hukm taklifi:

Categories of obligations arising from primary rules (that create obligations: may be:

- Obligatory (*wajib*)
- Recommended (*mandub*)
- Reprehensible (*makruh*)
- Prohibited (*haram*)
- Permissible (*mubah*)

Sahih, Batil, Fasid

An act performed properly is deemed to be valid (*sahih*), otherwise it may be invalid (*fasid*), or null and void (*batil*). *Fasid* (irregular or vitiated) act can become valid if cause of irregularity is removed, otherwise it remains suspended, but, may have some legal effects.

Azimah and Rukhsah

A *hukm* (obligation) imposed as *general rule* (***azimah***), may be subject to other rule (e.g., proviso, or *exemption* (***rukhsah***)).

Conditions of obligation (taklif)

- a subject must be asked to perform a known act.
- an act should be possible,

Ingredients of Primary Rules:

Sabab: cause on basis of which primary rule (*hukm taklifi*) is established.

1. Not dependent on act of subject,
2. Dependent on act of subject.

Shart: condition must exist to invoke related *hukm*.

Mani' (obstacle): set of facts may exist that prevent *hukm* from being applied even if cause is found and condition is met.

Hukm Wad'i (Secondary Rules)

Secondary rules may be optional or procedural.

Course Material/Brief Points:

MUSLIM LAW

1. Contemporary Development of Muslim Law:

1850-1915:

Codes of law based on European models were adopted "alongside", rather in displacement of, *Shariah*.

1915 onwards:

Changes were introduced in family law, administered by courts. 'Reformers' were not prepared to displace *Shariah* by Western law. Turkey was, however, more receptive in this regard. Major method of reform was through selective choice from alternative opinions (*takbayyur*), considerably justified through classical texts also.

Law reformists remained supportive of following trends:

- (i) to abolish separate, community-, and belief-based jurisdictions,
- (ii) to centralize litigation in national courts;
- (iii) to formulate and codify law,
- (iv) to encourage enactments; and
- (v) to expand judge-made law.

2. Muslim Personal Law,

2.i. Marriage

Institution of *nikah* (*aqd*, marriage) is pivotal in Muslim Personal Law, e.g., paternity, heirship. Family is a social unit, balancing family bond with individual freedom and responsibility. The law does not sanction joint family holding property. Law places certain responsibilities, e.g., economic, administrative and advisory, on the head of the family (*wali*).

The objective is to preserve human species, restraining indecency, encouraging chastity, promoting love, harmony, mutual help, as a kind of worship (*ibadat*). The *mu'amalat* (social contract), is legally protected by *hudood-Allah* (*parameters of Allah*). The relationship requires mutual adjustment and understanding on equitable terms.

It cannot be made contingent on a future event. It is constituted by proposal and acceptance. Its validity does not depend on any ritual.

A person, male or female, who is not a minor, is competent to contract marriage and cannot be given in marriage without his or her consent.

2.ii. Dower

Mahr (dower) may be a sum of money or other property which the husband gives as a gift to his wife on marriage. It is not a consideration for the contract of marriage, but it is an obligation imposed by the law on the husband as a mark of respect and demonstration of his commitment to his financial responsibilities, stipulated at the time of

marriage. If no sum has been specified she is entitled to her proper dower (*mahru'l-mithl*) which is customarily fixed for the females of the family.

The wife's right to dower becomes complete on consummation of marriage either in fact or what the law regards as such, e.g., by valid retirement (privacy). It may be immediate (*mua'jjal*) or deferred (*muwajjal*).

2.iii. Divorce

Divorce is permissible to end the irreconcilable marital discord, yet it is not encouraged: The Prophet said:

"Divorce is the most detested permissible legitimate act in the eyes of God".

When a husband and wife fail to reconcile their differences between themselves, a family committee, representing each of them, may act as mediators, with utmost effort. In the last resort, if divorce is initiated, there are time bound (about three months) options to reconsider the divorce if there is the slightest possibility that married life be resumed, during wife's *iddat* (period of waiting). It becomes valid as soon as the marital affinity is resumed by the couple.

After expiry of the necessary waiting period (*iddat*), after divorce or death of husband, the woman can marry anyone, if she wants, of her choice.

Divorce is initiated and finalized by husband. However, if the right of divorce is secured by the wife in her hand in the marriage contract, she can exercise it accordingly. If the terms stipulated by the wife in the contract are violated by the husband, she can legalize the divorce. The judge, on the basis of failure to discharge his duties as husband, including safety and maintenance of the family, can dissolve the marriage. It can also be dissolved by the mutual consent of husband and wife, e.g., on financial or property settlement,

2.iv. Khula

If the marriage is dissolved on financial or property settlement by wife with her husband, it is called mutual release (*khula'* or *mubarat*). The Quran detests taking back anything, whatsoever the value, from the wife, given during the marital bond.

2.v. Polygamy

Marriage is a contract. It is open to the wife at the time of marriage or subsequently to stipulate conditions against polygamy. Under codified law in many Muslim countries, polygamy cannot take place without free and express permission, in circumstances, of the first wife. The contravention is punishable with imprisonment. The Quran does not favor polygamy highlighting that justice is not possible in polygamy which was permitted as a way out, in a situation.

2.vi. Guardianship

The term *wilayah* is used in the sense of help, cooperation, and authority. "It is an authority granted to a person over the affairs of another by virtue of which acts undertaken on behalf of such other person, without his (person of defective legal capacity) consent, are assigned legal effects." It has to be for benefit not disadvantage. A person acting on behalf of another requires, in addition to legal capacity, carries legal authorization for the acts, under the law or agreement.

Types of Wilayah

-*wilayah* over property (*wilayah 'aid al-mal*),

-*wilayah* over person.

2.vii. Child Custody

The law gives custody (*hizanat*) of a child (boy up to seven years, and girl till she attains puberty) to the mother or a near female relative in order of precedence in relation with his/her mother, then father's mother, sisters, sister's daughters, aunts and so on, solely for his/her welfare.

After the boy attains seventh year and the girl attains puberty, the right to custody belongs to the father, subject to consideration of the welfare. Failing the father or his executor the paternal grandfather has the right of custody and failing him other agnates. In the absence of any proper natural guardian it devolves on the Court.

2.viii. Bequest ((wasiyat: Will)

A bequest (*wasiyat*: will) is a transfer which operates after the testator's death. The testator during his lifetime can revoke it. The law considers one-third of the property to be sufficient for bequest, for the benefit of non-heirs alone, so that rights of others are not affected. A bequest may be in favor of an individual living at the time of making the will. A bequest may be in favor of a class of persons such as the family. In that case, it will be operative in favor of such members as may be living at the time of the testator's death. A bequest may also be made in favor of a charity.

2.ix. Iddat

Iddat (prescribed period) is incumbent upon a woman, whose marriage has been dissolved by divorce or death to maintain privacy and abstain from marrying another husband. In case of divorce, the *iddat*, if the woman is subject to menstruation, is three courses; if she is not, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery.

When the marriage is dissolved by death, the duration of the *iddat* is four months and ten days. If the woman is pregnant, the *iddat* lasts for four months and ten days or until delivery, whichever period is longer.

If the marriage is dissolved by death, the wife is bound to observe the *iddat* whether marriage was consummated or not. If the marriage was dissolved by divorce, she is bound to observe the *iddat* only if the marriage was consummated; if there was no consummation, there is no *iddat*, and she is free to marry immediately.

2.x. Maintenance

The husband is bound to maintain his wife and children, according to his financial status, so long as the wife is faithful to him. Wife is entitled to maintenance till the end of *iddat* period.

2.xi. Paternity: Legitimacy & Acknowledgement

Paternity and maternity are the legal relations which give rise to certain rights and liabilities, e.g., inheritance, guardianship, maintenance.

In absence of direct proof of marriage, and of parents of child having lived together as husband and wife, evidence of repute and treatment of putative father as his child, would be sufficient to prove legitimacy of child.

The maternity of a child is established irrespective of the lawfulness of the mother's connection with the begetter. The paternity can only be established by marriage between the parents. The marriage may be valid (*sahih*), or irregular (*fasid*), but it must not be void (*batil*).

Paternity decides legitimacy also.

2.xii. Gift

Hiba (gift) means transfer of right of property in substance by one person to another without consideration, accepted by or on behalf of the latter.

2.xiii. Wakf

Wakf means the permanent dedication by a Muslim of any property for any purpose recognized by the Muslim Law as religious, pious, or charitable. The term 'wakf literally means *detention*. *Wakf* signifies extinction of the proprietor's ownership in the *detention* of the thing in the implied ownership of God, so that its profits be applied for the benefit of mankind". Mutawalli is the manager of the *wakf*, but the property does not vest in him, as it would in a trustee.

2..xiv Marzul-Maut

Marz-ul-maut is the condition of sick person in which there is generally a fear of death, being unable to attend to business, and dies before a year, whether confined to bed or not.

2.xv. Pre-emption

The right of pre-emption (*shufaa*) is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person. Pre-emption is as a right by which a person can buy the property by paying the price of that property to the vendee, which he sold to other person. It is an exception to the general law of sale transaction, with the purpose of convenience and peaceful enjoyment of one's own property.

2.xvi. Administration of Estate of a deceased Muslim

Share of inheritance is due only after opening of succession. *The* estate of a deceased is to be applied successively in payment of

- (1) his funeral expenses and death-bed charges;
- (2) expenses of obtaining probate, etc.
- (3) wages due for services rendered to the deceased preceding his death,
- (4) debts of the deceased, and
- (5) bequests not exceeding one-third of what remains after above payments.

The residue is to be distributed among the heirs of the deceased according to the law of the school which he professed at the time of his death.

2.xvii. Inheritance

Inheritance-General Rules

Hanfi Law of Inheritance

Shia Law of Inheritance

Death of a person transfers most of his rights and obligations to his heirs and representatives. *Transmissible rights* include all rights to property, usufruct, many dependent rights, such as debts and choses-in-action, rights to compensation, etc.,

Transmissible obligations are those which can be satisfied out of deceased's estate. Property (*Mal*) comprises all forms of property.

Property of deceased devolves, in proportion to strength of consanguinity or affinity. The rigid divider rules prevent any diversion of property even with consent of heirs, which may defeat the law of inheritance, but heirs after becoming owners themselves, could deal with it as they willed. No will can be made in favor of any heir or bequest to stranger, for more than one-third of the owned property. Specified Fractional Shares (*sahm*) prescribed in the Quran, are obligatory (*faridha*).

3. Study of Selected Sections of the Enactments in some Muslim Countries, such as:

The Dissolution of Muslim Marriages,
 The Muslim Family Laws,
 Muslim Personal Law (*Shariat*) Application Acts,
 The Guardian and Wards Act,
 The Child Marriage Restraint Act,
 Marriage and Divorce (Registration) Act,
 Dowry Prohibition Act,
 Family Court Laws,

4. Human Rights:

-Rights of God (*Huqooq-Allah*):

Individual and Public Rights for greater good

-Rights of human beings (*Huqooqal-ibaad*)

Human rights emerge from the *maqasid al-Shartah* (purposes of *Shariah*). Human rights are guaranteed as Rights of Allah:

- (a) State owes these rights to Allah,
- (b) These rights cannot be constrained as rights of state,
- (c) These rights are outside ambit of state law; no law can be made that modifies these rights.
- (d) Human rights guaranteed in Islam, cannot be suspended whatever the state emergency.

*Rights of God (*Huqooq-Allah*)* correspond to individual and public rights for greater good.

*Rights of human beings (*Huqooqul-ibaad*)* correspond to rights of individuals and people. In case of infringement of private right, it is for the victim, not the state, to pardon or pursue for compensation or punishment. It is the duty of the state structures to ensure justice (*adl*).

5. Broader Principles of Human Rights and Fundamental Rights:

Right to Justice

See 5:8, 3:195

Equality of Human Beings

See 4:1, 49:13.

The Prophet said:

"No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man, or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay." (al-Bayhaqi and al-Bazzaz).

Ruler Not Above Law

A woman of a noble family, arrested in a theft case, was recommended to be spared the punishment. The Prophet replied:

"The nations that lived before you were destroyed by God because they punished the common men for their offences and let their dignitaries go unpunished for their crimes; I swear by Him (God) who holds my life in His hand that even if Fatimah, the daughter of Muhammad, has committed this crime then I would have amputated her hand."

The Right to Life

See 5:32, 6:151.

The Prophet declared:

"The greatest sins are to associate something with God and to kill human beings."

Acknowledged Right for the Needy and the Destitute

See 51:19.

Economic Distributive Justice

The Prophet said:

"It (wealth) will be taken from their rich and given to those in the community in need" (al-Bukhari and Muslim).

Social security

"The Head of state is the guardian of him, who has nobody to support him" (Abu Dawud, al-Tirmidhi).

Right to Work and wages

See 4:32, 3:195.

Security of Life and Property

See 2:188.

The Prophet said:

"Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection."

Individual's Right to Freedom

The Prophet said:

"There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgment. Of these three, one is he who enslaves a free man, then sells him and eats this money." (Bukhari and Ibn Majjah).

Freedom of Religion

See 6:108, 2: 256.

The Right to Participate in Affairs of State

See 42:38

Human Dignity

See 17:70.

Right to Defense of Religious Communities:

See 22:40.

Right to Economic Relief

...and give up all outstanding gains from usury...for if you do not, then know that you are at war with God and the Conveyer of His Message. But if you repent, you shall be entitled to your principals. You will do no wrong and neither will you be wronged.

Slaves March to Freedom:

Free slaves as atonement for breaking oath: 5:89

Free slaves as atonement for Zihar oath: 58:3, 9:60

Liberating slaves, the most beloved charitable act of worship: 90:11-13

Allow deed of manumission: 24:33

If a person committed a sin that necessitated emancipating a slave as expiation, and he did not have a slave, but he had the means, he was to buy a slave and grant him freedom.

If anyone beat his slave, he must liberate him as expiation for his sin.

Funds from Alms and Treasury were also allocated help slaves pay for their liberty: 9:60

Slavery sources were banned:

- Creditors enslaving indebted paupers,
- Parents selling their children,
- Personal decline of freedom. a person selling oneself to meet his need,
- Acts of piracy, kidnapping and abducting for slavery,
- Sentence of punishment as slave,
- Reproduction of slaves even if the father was a freeman.

Right to Acquire Knowledge

The Prophet said: "Seek knowledge even though it be in China."

Right to Privacy

See 49:12, 24:27.

The Security of Personal Freedom

Umar said:

"In Islam no one can be imprisoned except in pursuance of justice."

Right to Protection against Defamation:

See 49: 11-12, 24: 16-19, 4:148-149.

Right to Aesthetics and Enjoyment

See 7:32.

The Right to Protest Against Tyranny

See 4:148.

Right of Immigration and Asylum

The Prophet emigrated to Medina.

Also see 4:97-100.

Purpose of Governance

See 22:41.

Freedom of Conscience and Conviction

See 2:256.

Political Freedom

Abu Bakr after he got vote of allegiance, said :

"O people I have been summoned to rule you and I am no better than you. If you see me acting justly, aid and assist me, and if you see me doing wrong, rectify me and guide me to do what is right. Obey me provided I obey God's commands in ruling you, but if I disobey the commands of God, I will not be entitled to your obedience".

He also said:

"If I am in the right, follow me, but if I swerve from righteousness rectify me".

6. Universalization:

6.i. Da'wah (invitation)

6.ii. Inter-Faith

6.iii. Rights of Religious Minorities

6.iv. Rights of non-Muslims

6.i. Da'wah (Invitation)

Da'wah (invitation), as instrument, is a continuous peaceful activity. Muslim community has to maintain cordial approach and interaction for universalization of the message of righteousness through the institution of *da'wah*.

6.ii. Inter-Faith:

“ If it had been thy Lord's Will, they would all have believed, all who are on earth! Will you then compel mankind, against their will, to believe!?” 10:99

“When the Christian Waraqa ibn Nawfal had acknowledged Muhammad (Peace be upon him) as a true prophet, neither he nor Muhammad (Peace be upon him) expected him to convert to Islam. Muhammad (Peace be upon him) never asked Jews or Christians to convert to his religion of Allah, unless they particularly wished to do so, because they had received authentic revelation of their own. The Koran did not see revelation as canceling out the messages and insights of previous prophets but instead it stressed the continuity of the religious experience of mankind.(2- 4)... It is important to stress this point because tolerance is not a virtue that many Western people today would feel inclined to attribute to Islam. Yet from the start, Muslims saw revelation in less exclusive terms than either Jews or Christians. The intolerance that many people condemn in Islam today does not always spring from a rival vision of God but from quite another source. Muslims are intolerant of injustice, whether this is committed by rulers of their own – like Shah Muhammad Reza Pahlavi of Iran – or by the powerful Western countries.. The Quran does not condemn other religious traditions as false or incomplete but shows each new prophet as confirming and continuing the insights of his predecessors.”(Karen Armstrong, ‘A History of God’, p.177).

Interfaith dialogue is encouraged on common grounds.

Jews of Madina welcomed the Prophet to Madina and protected his nascent movement.

Jews and Muslims were partners in politics and business in Spain and Ottoman Caliphate.

Commercial dealings flourished with non-Muslims, both resident and non-resident, of the Islamic society. Eating their lawful food is also permissible to the Muslims.

Inter-marriages with Jews and Christians are permissible.

“ This day are (all)things good and pure made lawful unto you. The food of the People of the Book is lawful unto you and yours is lawful unto them. [Lawful unto you in marriage] are[not only] chaste women who are Believers, but chaste women among the People of the Book, revealed before your time, when you give them their due dowers, and desire chastity, not lewdness, nor secret intrigues.....” .5:5

6.iii. Rights of Religious Minorities

6.iv. Rights of non-Muslims

Principles Regulating Relations Between Muslims and Non-Muslims

Non-Muslims

The Prophet said:

"Leave alone the non-Muslims and whatever they believe in"

About Magians, the Prophet said:

"Establish with them the practice adopted for the People of the Book."

Belief, faith and personal law of non-Muslims is not to be interfered with. State has to recognize such laws and customs of non-Muslims as have found general acceptance, and not opinions of isolated individuals.

The phrase "Let there be no compulsion in religion: ..." (2:256) has always been interpreted in Islamic legal and theological traditions that followers of other religions should not be forced to Islam.

The phrase "Unto you your religion, and unto me my religion.",(109:6) is presented as "proof-text for pluralism and coexistence".

2: 62 demanded toleration for Christianity, Judaism, and Sabianism under Muslim rule.

(See Bernard Lewis)

Heretics:

Heresies are classified differently, e.g. some approaching unbelief. But those who believe in the unity of God, and the mission of the Prophet, Muslim law continues to apply to them; their legal capacity is not affected

Apostasy

Apostasy (change of faith from Islam to infidelity) affects legal capacity, including inheritance.

Dhimmi

Dhimmi (ahl al-dimma: people of *dhimma*, persons under protectorate) is a historical term for non-Muslim citizens of territories brought under Muslim rule. They paid *jizyah*, and were exempt from *zakat* and military service, fully protected, free in personal law, and equal under other laws. They could consume pork and alcohol. Jews had their own *Halakha* courts. *Qadi* could not interfere. Oaths of *dhimmis* in courts were tailored to their beliefs.

The Prophet said:

"One who kills a man under covenant (i.e. a *dhimmi*) will not even smell the fragrance of Paradise." (Bukhari and Abu Dawud)

"Whoever killed a *Mu'ahid* (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of traveling). (Bukhari)

"Whoever wrongs one with whom a compact (treaty) has been made [*i.e.*, a *dhimmi*] and lays on him a burden beyond his strength, I will be his accuser." Majid Khadduri

Ali said:

"They (*dhimmid*) have accepted our protection only because their lives may be like our lives and their properties like our properties." (Abu Dawud)

"The *sunnah* is that there is no *jizya* due from women or children of people of the Book, and that *jizya* is only taken from men who have reached puberty. The people of *dhimma* ... do not have to pay any *zakat*." (*Muwatta Imam Malik*)

7. Women's Rights and Status:

Equality; personal status; gender relations; marital consent and the right of women to contract her own marriage; dowry and dower; marriage; polygamy; right of wife to initiate divorce (khula); maintenance; right to education; right to employment; right to inheritance.

Woman retains her family's name after marriage, and retains all civil rights. She owns property in her own name and her wealth, business and income, belong to her alone and cannot be appropriated by her husband. Islam permits working together, provided no immorality ensues.

Spousal Closeness, Mutuality, and Equality:

See 2:187

Financial Responsibilities

Male relations are charged with financial responsibility of women in all stages of woman's life. If there is no male relative financially capable of supporting, it is the solemn obligation of the treasury. The husband's financial responsibilities include, marriage expenses, dower, maintenance, a home, and so on. Dower and gifts given to the wife cannot be taken back: 4:21

A widow has a share in her husband's estate. Mother, sister, daughter and other related females have shares in estate of concerned relations.

The husband is charged with paying dower. Payment of maintenance continues during the period of *Iddat* (probation). This continues for children given in the custody of mother, after divorce. She is separately entitled to proper compensation or supplements for suckling infants (65:6). She cannot be expelled from husband's house, except when she marries some other person or on the grounds of proven lewdness.

Laws of Inheritance

The difference in the shares of inheritance between males and females is based upon the financial responsibilities with which men alone are charged with. 4:34.

Marriage of free choice

A girl of marriageable age has the right to choose a husband for which responsibility has been placed on her guardian to provide all necessary advice, guidance, and support to her for the right choice and successful conclusion of the proposal, in which he cannot force her against her will.

The Prophet said:

"A girl has more right to her choice than her guardian".

In the matter of match-making, compatibility between husband and wife is ordained, 2:232, 2:229.

Testimony of Women

Testimony is a responsibility which must be diligently discharged. In Islam a woman is not charged with this responsibility in serious crimes. However, as a victim, her sole evidence, duly corroborated, is admissible. In certain futuristic financial family transactions two *ladies* (*imra-atayn*) of the family, have to be arranged, if one of the two required men is not available 92-282). For example, in bequest, each of the two ladies can stand witness to the interests of both, blood and marriage bonds in the family. In case of the one distracting, due to social, biological, physiological or physical reasons, the other can still keep the legal process on. There is no concept of division of two male witness as half and half. Similarly, there is no such concept of half witness for a female witness. For the proof of an allegation against the person of a

woman, there is a firm condition of four eye witnesses to the physical factum of the allegation against the woman.

8. Terrorism

Contemporary Muslim world has become violent, internally and externally, over its values, identity, and place in the world. The West is trying to influence the course and the outcome that should be compatible with international value system.

The Muslim world has been suffering from powerlessness, and backwardness, falling out of step with contemporary global culture of advancement. Many attempts, such as nationalism, socialism, Arab nationalism, and Islamic revivalism, have been made without success, creating frustration and anger.

Cheryl Benard identifies following known parties to the violent conflict within, with obvious implications for the world:

- Fundamentalists* reject democratic values and contemporary Western culture.
- Traditionalists* want a conservative society.
- Modernists* want the Islamic world to become part of global modernity.
- Secularists* want the Islamic world to accept a division of religion and state.

(See Cheryl Benard, Civil Democratic Islam)

9. Jihad

“The term *Jihad* means struggling, exerting one’s latent power and exhausting all potential to achieve a (noble) cause.” It does not allow war for its own sake, but its validity lies in the noble purpose of protecting human life and its intrinsic values. It is not an instrument for expansion or aggression. *Jihad* is essentially distinguishable from *intolerance* and *terror*.

10 Torts and Crimes

Ta‘zir (chastisement)

Hadd: (measure, limit)

Hudood (plural): *Hudood-Allah*:

Qisas: punishment by similar hurt

Diyat: specified compensation payable to heirs of victim

Hudood: Severity in *Hudood* punishments.

Justice is not only to be done but should be seen to have been done.

Leniency not to be shown at the cost of justice.

The *Sunnah* of the Prophet where takes stand on the Scripture, e.g., in some decisions based on Deuteronomy, Leviticus, etc., particularly during early period of Medina, has the Quranic sanction (5-48).

Important Terminology:

- *qisas*” means punishment by causing similar hurt at same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amd*, in exercise of the right of the victim, by a *wali*. *Qisas* is, thus, a retaliatory punishment for certain categories of offences against human body: 2:178-179,194, 5:45.
- *arsh* means the *compensation* specified in the law, to be paid to the victim or his heirs.

- *daman* means the *compensation* determined by the Court to be paid by the offender to the victim for causing hurt not liable to *arsh*;
- *diyat* means the *compensation* specified and payable to the heirs of the victim;
- *ikrah-e-tam* means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or rape (*zina-bil-jabr*);
- *ikrah-e-naqis* means any form of duress which does not amount to *Ikrah-i-tam*;
- *qatl* means causing death of a person;

Categories of Offences Generally Treated as Hudood:

- Theft (*sariqa*)
- Illegal sexual intercourse (*zina*): Adultery, Fornication, Rape,
- False accusation of *zina*' (*qadhf*): Imputation of *Zina*;
- Drinking alcohol (*shurb al-khamr*): Intoxicants/ Narcotics,
- *Lawatat*: Sexual intercourse against the order of nature;
- *Haraba*: Robbery, Highway robbery (*qat' al-tariq*),
- Dacoity: Offences against property.

11. Doctrine and Process of Siyasah

Idea of 'Islamic state' has origin in concept of *khilafah* (caliphate). This institution is generally identified with first four caliphs. The Caliphate was idealized as 'Islamic State' with high human welfare and moral objectives, including, enforcing human rights as rights of Allah. But political forces of history, geography and cultures transformed it into monarchy. The term '*khilafah*', however, was continued for several centuries, wishing to preserve at least its idea for the ultimate model or the ideal. Similarly terms *Imamate* and *Emirate* were also applied, with the similar ideas, as semblance, and desire for system of Islamic governance. Concepts of representative binding effect of *shoora*, and nomination by council or selection or election of ruler, continuously remained under geo-political shock.

Some of fundamental principles of *Siyasah al Shariah*, may be examined as laid down, for example, in verses: 42:38, 16:125, 14:90, 4:58, 5:8, 4:135.

Fuqaha mainly worked in area of law that could be derived directly from the texts. Whether state was 'secular' or 'Islamic'; the law that could, except for mainly *hudood* and *qisas*, be so derived, was practiced largely as *personal* (Muslim) law. Later, this practice was adopted by colonialists from Mughals and Ottomans.

Application of usul al-fiqh was not *internalized, interiorized*; and integrated with legislative, judicial and executive machinery. Governments did not persuade or promote '*ulema*' in its hierarchy and isolated itself from their juristic and scholastic expositions; *widening the gap between theory and practice*. The state made laws, through proclamation or legislation, under 'state policy' (*siyasah*), which were not based on strictly *qualified 'ijtihad'*. In this situation, case law continued to create space for itself, *at a distance*. In some cases rulers, patronized some *ulema* from their personal perspective or in specific interest of their rule.

The debate continues about the extent that *Shariah* could or should lay down laws in public interest (*maslahah*). The extended application has also to be based on *Shariah*. For example, derivation of rules from interplay of the Purposes of *Shariah* and the Principles of the Quran and the Sunnah, when not apparent as immediate evidence from specific texts only.

In Ottoman practice, '*Qanoon*' and *Shariah* were distinguished. In case of discord, between the two, it was declared that in *firman*s and decrees all matters were to be based on the firm support of *Shari'a* only.

State should be assisted by institution of '*Mujtahid*'. It should be effectively equipped with qualified *mujtahid-jurists*, for institutional support to all concerned organs and other institutions of state. Rule-making and development of regulatory mechanism is not limited to the functions of Parliament and Judiciary, but many other statutory and non-statutory organizations and organs of state need support for their legal frame, regular functionality, and regularization, where needed.

12. Constitutional and Administrative Laws

Constitutional Law

The concept of non-separation of state and religion in the Islamic legal system; the relationship between Sharia and constitutional provisions (the supremacy clause).

Administrative Law

Caliph after nomination and getting vote of allegiance (*bayat*), was all-powerful in appointment of advisors, chief qadi (chief judge), governors and other military and civil officers (*aamil*).

If the ruler (*imam or caliph*) develops law and lays down policy in accordance with permanent sphere of Islamic Law, it is called *siyasah 'adilah* (administration of justice) in accordance with *Shari'ah*. If he violates its principles, it becomes *siyasah zalimah* (tyrannical administration).

Prof. Schacht attaches political rather than legal connotation to the term *sunnah*, as it referred to policy and administration of caliphs also, e.g., *sunnah* of Abu Bakr and Umar. Uthman was claimed by some, to have been killed on charge of diverging from policy (*sunnah*) of his predecessors. Umar once awarded one hundred lashes to one of his governors. Arar b. Aas said: "If you introduce such types of punishment for your governors, this will prove too much for them and it will become a *sunnah* later...,"

Umayyad rule came to include rulings of administrative authorities and consensus of jurists of regions.

During Shafai's period, terms like *a'immat al-huda* came to be used in order to draw distinction between rightly-guided and worldly caliphs and their administrative and political policies.

It appears that *Ijma* of the people of Medina was tremendously influenced by the personal opinions of the jurists and the judges appointed in Medina from time to time and by the administrative practice of the political authorities."

(Ahmad Hasan) It is believed that Hanafi law was structured through experience with actual administration of justice.

. Initially, there was no distinction between domains of jurist and ruler (*imam*). Many jurists were *qadis* concerned with administration of justice as well as with teaching and development of law, followed by recording of this law in manuals by Hanafis and Malikis. Shafis' exposition of new theory of interpretation, and legal

methodologies of other schools, were followed by development of law, reaching maturity over two centuries.

13. Commercial Laws

13.i. Principles of Economic System

13.ii. Riba (unlawful advantage by way of excess or deferment);

13.iii. Islamic Banking

13.iv. Features of Islamic Trading

13.v. Principles of Financial Dealings and Distribution Of Wealth

13.i. Principles of Economic System

Priorities of Islamic economic system are determined by purposes of the *deen* (*maqasid al deen*). Preservation of wealth is also a purpose of priority of the economic sub-system within larger system of the *deen*, in order to support interests of the first four purposes of *Shariah*: Economic system must:

- (i) meet needs of *deen* (religion) and *dunya* (world),
- (ii) protect life,
- (iii) ensure means of sustenance of life, food, clothing, shelter, healthy family life, education, and
- (iv) development of intellect.

In this supportive system, (v) economy can pursue goal of increasing wealth in a regulatory system. In progressive needs of the time, whether free market, planned economy or a mix, it must aim to attain purposes of *Shariah* for greater and general good of mankind, including economic distributive justice.

Shariah forbids system based on *riba* (exploitative interest, usury), *maysir* (games of chance), and *gharar* (unreasonable risk).

13.ii. Riba

Riba (unjust gains through exploitation) is generally translated as usury, or simply as interest. *Riba* (as interest) is generally identified as an unearned income. Its meanings and connotations include:

- i. *riba* means excess or addition,
- ii. it develops a debt-bondage,
- iii. it also means an increase on loan,
- iv. "surplus value without counterpart",
- v. excess compensation without due consideration

The Quran describes *Riba*, not limited to financial transactions: 3:130, 30:39, 2:275-280, 4:161, 3:130

The Prophet said:

"God has forbidden you to take *Riba*, therefore all *riba* obligation shall henceforth be waived. Your capital, however, is yours to keep. You will neither inflict nor suffer inequity. God has judged that there shall be no *Riba*...."

13.iii. Islamic Banking

Islamic banking refers to *Sharia*-compliant finance or banking activity within Islamic economic concepts. The basic principle of Islamic banking is based on risk-sharing. It introduces concepts such as:

- profit sharing (*Mudharabah*),
- safekeeping (*Wadiyah*),
- joint venture (*Musharakah*),
- cost plus (*Murabahah*), and
- leasing (*Ijar*).

Islamic Banking excludes transactions involving alcohol, pork, gambling, etc.

13.iv. Features of Islamic Trading

Ijara (hire or sale of future usufruct), *salam* (advance) and *istisna* (manufacture, job) are treated as examples of exercise of *istihsan* (*juristic preference*) based on *dharurah* (*need*) for declaring 'permissible' that appears permissible on face of it. Use of Arabic terminology and juristic declarations have also assisted acceptance of these concepts in general public who are prone to *Shariah* appeal.

Bai:

Bai' (*sale*) is defined as an exchange of property for similar property. However, consideration, value, money, etc. are now included in the extended definition..

Bai Salam

The word *salam* means advance. When price is paid in advance for goods to be delivered later, it is called *salam*. In *bai salam*, price must be paid, in advance, at the time of the contract, and the date of the delivery must be mentioned. It covers almost everything describable as to quantity, quality, and workmanship, except gold, silver, or currencies based on these metals.

Bai-wafa

Bai-wafa is a sale on condition that when the vendor returns the purchase-money the buyer will return the property. The buyer is entitled to the income of the property. Till the buyer pays full price the property remains under lien for the unpaid amount.

Bai-ul-wafa may cover dealings of government promissory notes, shares in limited liability companies and other securities of a like nature.

Bai' al inah

Bai' al inah is a financing facility, between financier and customer, to buy and sell. The financier buys an asset (for which he pays the price), from the customer on spot basis, and sells it to the customer on a deferred-payment basis for a price payable in installments.

Bai' bithaman ajil (deferred payment sale)

This refers to sale on deferred payment basis at a price, which includes an agreed profit. This links the two transactions in one.

Bai' muajjal (credit sale)

In *Bai' muajjal* (credit sale, *deferred-payment sale*), the financier takes profit on the purchase price and the buyer pays the agreed price later in lump sum or in installments.

Musha

Musha, in law, denotes mixing up of proprietary rights of more than one person, as in joint ownership.

Ijarah

Ijarah means lease, rent or wage, e.g., 'use or service' for a fixed price or wage, i.e., rent-to-own. It is a mode of leasing contract, between lessor and lessee. The lessor transfers right to use of asset to lessee for a period, in return for a rental. The lessor retains right of ownership along with risks. The lessee is responsible for damage due to his negligence.

Ijarah thumma al bai' (hire purchase)

Parties enter into contracts in series to form a complete lease or buyback transaction:

- i. A contract (*Ijarah*) outlining terms of lease or rent over a fixed period, and
- ii. A second contract (*Bai*) of sale or purchase.

Ijarah-wal-iqtina

Ijara-wa-Iqtina (rent with acquisition) is a contract under which the lender provides assets on an agreed rental, so that the lender recovers its principal along with profit, with the connected undertaking that at the end of the lease period and full recovery, the ownership of the asset is to be transferred to the lessee.

Mudarabah

In *mudaraba*, one party provides capital and the other acts as agent, providing expertise for investment and management. The agent does not share losses. Profit is shared according to agreed ratio. If there is a loss, the owner will lose his capital, and the agent (*mudarib*) will lose his time and effort invested.

Murabaha

In *Murabaha* (installment sale) the financier purchases the item, marks it up and divides the total into installments over a period of time. It is like rent-to-own arrangements, in which sale of goods at a price includes costs and profit. The financier gets the time value of his money as profit. However, the financier does not get the time value of money beyond the contracted term, but the asset remains mortgaged till the default is settled.

Musawamah

Musawamah is the negotiation of a selling price between two parties without reference to costs or asking price, being under no obligation to reveal these costs.

Hibah (gift)

Hiba (gift) is a transfer of property (*mal*) without an *exchange or consideration*. The term is also applied to a token given by a debtor on a loan, e.g., when a bank pays the

customer a 'gift' on savings account balances, representing, in fact, a profit. Notionally, it differs from interest as *Hibah* is not 'guaranteed', as it is not a contractual obligation made in advance. It also differs from dividend, as it is not time bound, and it is at the discretion of the bank.

Istisna

Istisna' (manufacturing or job finance) is a form of contract without the condition of existence and delivery of the commodity or the price. In *Istisna* payments may be made with progress of work. *Istisna* enables to avail finances in installments for each stage of the job or project.

Qard hassan: benevolent loan

Qard hassan (loan on goodwill basis): The debtor has to repay the principal only. The creditor forgoes *the time value of money*.

Sukuk (Islamic bonds)

Sukuk (*Sakk*: legal instrument, deed, check, financial certificate, security) are fixed-income (rent)-bearing bonds (like conventional bond, a promise to repay loan, bearing interest). It refers to the concept of securitization (asset monetization). *Sukuk* are issued against existing as well as future assets, structured in a way to give partial ownership in the asset to the bond owner, to collect the profit as rent, e.g. in:

- debt (*Sukuk Murabaha*),
- asset (*Sukuk Al Ijara*),
- project (*Sukuk Al Istisna*),
- business (*Sukuk Al Musharaka*), or
- investment (*Sukuk Al Istithmar*).

Musharakah

In *Musharaka* (partnership) capital is provided by all parties. They can participate in management, but not necessarily, according to the rules of the partnership. Profit is shared in pre-agreed ratios, while loss in proportion to respective equity participation, distinguished from fixed-income loaning. For example, in real estate, the financier gets the share of the assessed rent on the basis of an agreement in advance.

There are two types of *Musharakah*:

Permanent Musharaka:

Diminishing Musharaka: Declining Balance Co-ownership

Gharar

Shariah prohibits trading in excessive uncertainty or risk (*bayu al-gharar*), which involves speculative transactions, because:

- "consequences are hidden."
- "nature and consequences are hidden"
- there are different "possibilities, with the less desirable one being more likely."
- "consequences are unknown"
- it is "undeliverable, whether it exists or not."

-"where the buyer does not know what he bought, or the seller does not know what he sold."

-"sale of probable items whose existence or characteristics are not certain, due to the risky nature that makes the trade similar to gambling."

Maysir

Maysir gets involved in contracts where ownership of a good depends on occurrence of a uncertain event in the future. The Quran prohibits gambling (games of chance).

Takaful

Takaful, based on the principle of cooperation, is an arrangement for reimbursement of loss out of a fund of small regular contributions, on the basis of shared responsibility (system of *aquila*).

13.v. Principles of Financial Dealings and Distribution Of Wealth

See verses 2:275 – 280, 2:188, Also see verses 2: 177, 2:215, 2:261-262, 2:267, 3:92, 4:36-37, 9:34-35, 30:38, 57:7, See verses 5:89, 4:36

..Prophet said:

"Whoever cheats my nation is not one of us".

He said that any transaction agreed upon by both parties concerned is blessed by God, but if they withhold the truth or cheat in the transaction, all blessing shall be erased. (Bukhari and Muslim)

"Nothing that has originated from ill-gotten gain will ever flourish and the Fire of Hell will be its home".

He said that if a person donated ill-gotten wealth in charity, it would not be accepted by God and if he spent ill-gotten wealth, it would never be blessed and if he left it after he died, it would be fuel to burn him in the Fire of Hell. (*Masaabeeh Al Sunna*).

Caliph Omar confiscated wealth of governors which they had gained from trade and other transactions which were prohibited. He also confiscated gifts and wealth presented to them because of their status and authority. When the governor of Bahrejn objected, the Caliph flogged him.

Islam imposes various taxes and alms upon wealth and economic activities in order to achieve economic justice for all classes of community, and meet needs of indigent and destitute, besides preventing accumulation of wealth in the hands of a few.

Caliph Abu Bakr fought the tribes who refused to pay *zakat*, although many of them had not renounced Islam.

The Prophet said :

"He is not one of us who goes to sleep at the end of the day, after having had enough to eat, while his neighbor is hungry".

Islam ordains that the treasury support the persons who cannot earn their living. This includes old men and women, without discrimination of Muslim and non-Muslim subjects.

While granting financial aid to an old man, Umar said:

"We will not have treated you justly if you pay your taxes to the state during your youth and the state leaves you to beg in your old age".

14. International Law:

*-Principles of Islamic Law of Nations; Treaties, Concept of Just War:
-Relations between Muslims and Non-Muslims
Universalism and universalization; political asylum, persecution;
conversion, Rights of religious minorities, Religious dissidents under
Islamic law; religious discrimination and rights of non-Muslims.*

Prohibition of Breach of Treaties

International treaties are to be honored and observed faithfully. In case of violation from enemy, or conclusive apprehension, treaties can be abrogated (8:58), but after sufficient effort and notice, otherwise it would amount to treachery. Prophet repeatedly instructed:

"Do not be guilty of breach of faith."

Sanctity of a Dead Body

"The Prophet has prohibited us from mutilating the corpses of the enemies"
(Bukhari; Abu Dawud).

Return of Corpses of the Enemy

In Battle of *Ahzab* a renowned enemy warrior was killed. The pagans presented ten thousand dinars to the Prophet and requested that the dead body of their fallen warrior may be handed over to them. The Prophet replied:

"I do not sell dead bodies. You can take away the corpse of your fallen comrade."

Non-Combatants:

Instructions of the Prophet:

"Do not kill any old person, any child or any woman" (Abu Dawud). "Do not kill the monks in monasteries" or "Do not kill the people who are sitting in places of worship". (Musnad Ibn Hanbal).

Combatants:

Prohibition of Torture with Fire

The Prophet said:

"Punishment by fire does not behove anyone except the Master of the Fire (God)"
(Abu Dawud).

Protection of the Wounded

The Prophet said:

"Do not attack a wounded person"

Prisoner of War not to be Slain

The Prophet said:

"No prisoner should be put to the sword"

Not to be Tied to be Killed

The Prophet said:

"The Prophet has prohibited the killing of anyone who is tied or is in captivity."

No Looting and Destruction in Enemy's Territory

"The Prophet has prohibited the believers from loot and plunder." (Bukhari ; Abu Dawud)

Abu Bakr's instructions:

"Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle."

No Aggression:

"Do not let your hatred of a people incite you to aggression" (5:2).

Before Declaration of War, Notify Renunciation of Treaties

See 8:58.

15. Islamization:

Islamization refers to official program of replacing, modifying, and updating laws of other origins, with laws based on Islamic sources.

Islamic states are those Muslim countries whose constitutions declare them as such. A special court or a special bench resolves conflicts of views between secular and Shariah courts.

Some pre-Islamic beneficial laws and customs, e.g., Judaic and Roman Laws, and Arabian customs were reformed and retained as material source on which certain segments of law were restructured and *reformed* as Islamic Laws.

Some scholars accustomed to European Civil Law propose complete codification of laws, while others used to English Common Law propose declaration of supremacy of Islamic law based on the Quran and the *Sunnah* to be enough, leaving the rest to judges trained in the Common Law.

Gradual Unfolding of Legal System of Islam

The Legal System of Islam was not pronounced as a written scroll, all at once. Development of integrated legal frame, took place in a historical process, spreading over about 23 years, for weaving a clean fabric of society.

Case of Liquor

Liquor was not banned at once, but gradually:

First Guidance: 2:219

Next Commandment as acceptance of Islam as a way of life increased: 4:43

When Muslims became firm in faith liquor was banned: 5:90

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