

JIBAS (The International Journal of Islamic Business, Administration and Social Sciences) (Quarterly) Trilingual (Arabic, English, Urdu) ISSN: APPLIED FOR (P) & (E)

Home Page: <http://jibas.org>

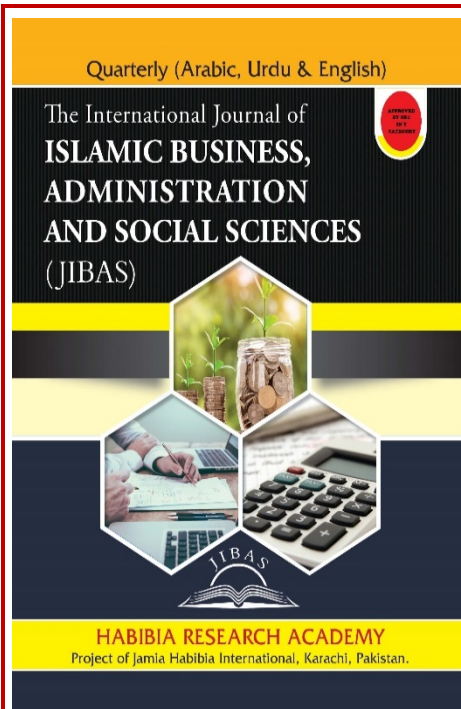
Approved by HEC in Y Category

Indexing: IRI (AIOU), Australian Islamic Library, Euro pub.

PUBLISHER HABIBIA RESEARCH ACADEMY
Project of JAMIA HABIBIA INTERNATIONAL,
Reg. No: KAR No. 2287 Societies Registration
Act XXI of 1860 Govt. of Sindh, Pakistan.

Website: www.habibia.edu.pk

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TOPIC:

THE RIBA CASE AND THE DISCOURSE ON DEVELOPMENT OF ISLAMIC LAW

AUTHORS:

- 1- Dr Syed Hasnat Ahmad shah Gillani, Assistant Professor, Department of Law, Faculty of Humanities and Social Sciences, University of Azad Jammu and Kashmir, Muzaffarabad, Email ID: gillani500@gmail.com Orcid ID: <https://orcid.org/0000-0001-7496-6308>
- 2- Atta Ul Mustafa, Lecturer, Department of Law, Faculty of Shariah and Law, International Islamic University, Islamabad, Email ID: a.ulmustafa@iiu.edu.pk
- 3- Syed Mudasser Fida Gardazi, Assistant Professor, Department of Law, Faculty Humanities and Social Sciences, University of Azad Jammu and Kashmir, Muzaffarabad Email ID : smgardazi@ajku.edu.pk Orcid ID: <https://orcid.org/0000-0001-7532-6038>

How to Cite: Gillani, Syed Hasnat Ahmad shah, Atta Ul Mustafa, and Syed Mudasser Fida Gardazi. 2022. "E-1: THE RIBA CASE AND THE DISCOURSE ON DEVELOPMENT OF ISLAMIC LAW". *International Journal of Islamic Business, Administration and Social Sciences (JIBAS)* 2 (2):1-26.

URL: <https://jibas.org/index.php/jibas/article/view/51>.

Vol. 2, No.2 || April –June 2022 || P. 1-26

Published online: 2022-06-19

QR. Code



THE RIBA CASE AND THE DISCOURSE ON DEVELOPMENT OF ISLAMIC LAW

Syed Hasnat Ahmad shah Gillani,

Atta Ul Mustafa,

Syed Mudasser Fida Gardazi,

ABSTRACT:

The recent decision from one of the apex courts of Pakistan hailed as a landmark ruling, infect validates the practical viability of an interest-free economy. The Federal Shariat Court has directed the government to adopt Shari'ah-compliant modes in the future while borrowing either from domestic or from foreign sources. The five years deadline is given to adopt such models. It is apprehended that the verdict has opened up new avenues for the realization of the Riba free trance which can be treated as a stepping-stone by the government and all stakeholders collectively to further build upon. In this context, the research endures to present the discourse on development of Islamic commercial law from its sources to shaping into a legal system. More specifically, it focuses on theory of adaptability of contemporary Islamic law and principles of modern legal system in contemporary transactions.

KEYWORDS: *Riba, Islamic Law, Banking, Economics, Debt, Pakistan.*

INTRODUCTION: The much-awaited findings of the Federal apex court of Pakistan on interest-free economy, despite being overly delayed which caused hindered, but ultimately to somehow set the course in the right direction by cogently answering all reservations put forward earlier. The decision, infect validates the practical viability of an interest-free economy. To this, it could be apprehended that this verdict has opened up new opportunities for the realization of this dream, and should be treated as a stepping-stone by the government and all stakeholders collectively to further build upon. In this context researcher endure to present discourse of Islamic commercial law from its sources to shaping into a legal system. More specifically in this paper, the research focus more prominently towards the discourse on development of Islamic law from its sources to shaping into a legal system with an almost exclusive focus on theory of adaptability of contemporary Islamic law and principles of modern legal system in contemporary transactions. Law in every society aims at maintenance of individuals conduct in their daily affairs, which effects social control and settlements of rights and liabilities. It is a mechanism which primarily is established to safeguard the rights of individuals particularly, and of society in general. Every legal system for apiece society has its distinct nature, characteristics and scope. Similarly, Islam also has its own unique legal system known as *Shari'ah*. Although, *Shari'ah* is not purely legal in the strict sense of its terminology, rather simplistic, it embraces the different fragments of life i.e. ethical, religious, political and economic. It is different in the sense that the norms and all basic concepts of Islamic law have its origin in the *divine revelation*. The revelation determined the norms and the basic principles of Islamic law, and in many respects initiated a disruption with the customs and the other values of tribal legal system.

1.1 Basic Concepts and scope of Islamic Commercial Law: With that forgoing, a comparative analysis indicates that there are certain basic differences between the purpose and scope of law in the modern sense and in the sense of *Shari'ah*. The scope of Islamic

law includes rules of human conduct in all spheres of life. It covers every slice of human life, most importantly, it ensures man's wellbeing not only in mundane life but also in hereafter by making it the liability of the state to enforce the Islamic laws ordained by *Qur'ān* and *Sunnāh*. The application of rules of moral conduct of individuals and its governing depended on two important factors. First, Muslim society's collective responsibility for observation of Islamic teachings; and second, the individual's relationship with Allah as well as with society where he lives in.

Markedly, according to wisdom laid down in *Qur'anic* teachings, it is obvious that the Muslim society is supposed to be under obligation for application of rules of moral behavior and mutual conduct as divine commandment for its own welfare in conjunction with the wellbeing of fellow human beings. Accordingly, the *Qur'ān* dignified the concept of law along with the ethical values of its principles by making the observance of the rules of the *Shari'ah* a matter of human conscience by appealing the human conscience toward the teachings of Islam. It is stated in *Qur'ān*: "Oh, you believe! Stand out firmly for God, as witness to fair dealing."¹

Broadly speaking, the foremost function of law is the preservation of rights of those who submit their obedience to state and same is the case with Islamic law². However, *Shari'ah* has broader scope and application. It can be truly termed as a social code which aims at establishing a society based on a deep sense of moral responsibility in which every citizen has equal and proper opportunity to endure for his wellbeing according to his own spiritual and moral values. Thus, *Shari'ah* is the science of such principles of law which may concern itself with law in its various aspects through traditional analysis. Further, due to ideal character of *Shari'ah* and its historical origin and legal theory, it has direct relation with human conduct in their daily lives. Indeed, a precise legal theory springs from a legal system which already exists in society. To be certain in case of *Shari'ah*, the theory of law in Islam in its novelist form must have existed in the era of the companions of "The Holy prophet" (PBUH). When they have come across certain new conditions, they must have resorted to sources of law and have pondered over same in terms of their method for reasoning to get solutions of fresh problems and glitches. That being said, in some cases they gave their own rulings and ignored the practices, which were existing at that time favoring legal reasoning. The classical legal theory; however, in the time of companions, in its technical and systematic form was not yet shaped. It was a phase where Islamic law started to be systematically construed from its basic form. The principles of law were derived from the law itself and it further developed and formalized during the period of second and third generation.

"Therefore, in this context the fundamental difference between *Shari'ah* and law (in general) emerges that former is based on revelation and divine in nature and later is not. For this reason, *Shari'ah* does not agree with the idea that whatever human society determines fit for society, based on its usefulness, is good. It is quite possible that, sometime in changing circumstances, the 'good' of human society may turn out to be an evil in Islamic law.³ For example, usury is allowed by modern law which, in *Shari'ah*, is prohibited. Similarly, the secret liaisons/relationships based on free will between adults are permitted in modern law but in *Shari'ah* these are prohibited, rather they amount to be sinful acts.

Additionally, *Shari'ah*/Islamic law presents the concept of *Maslahā*, which forms the basis of the philosophy of Islamic law in a more boarder sense as compare to the modern law. Islamic jurists have developed the concept of *Maslahā* as the fundamental characteristic of Islamic legal system, which makes it adaptable to social changes and needs. To this point, contemporary Muslim reformists and jurists, such as *Subhi Mahmassani*⁴, upheld that legal principles like consideration of *Maslahā* and *Istehhsān* (juristic preference), the flexibility of Islamic law in practice and utility of *Ijtihād* (legal reasoning) sufficiently demonstrate that *Shari'ah* is adaptable to social changes.

Interestingly, the relationship between legal theory and social change is vivacious and considered a basic problem of the philosophies of law. Social change here is used in a broad sense, to indicate that change in question has happened in society in response to social needs. A legal change, that interacts with such social needs, exhibits the adaptability of a particular legal system. More often, the impact of social change is so profound that it effects legal concepts or norms as well as legal structure and institutions, which creates a need for fresh and wider interpretation of philosophy of law. This problem of social change and legal theory is of particular significance in Islamic legal philosophy. It is an important question that how does Islamic law face the challenge of change? Keeping in mind the rapid changes occurred in the scenario of modern trade advancements in respect of contractual liabilities, the problem could be formulated in the form of these words: is Islamic law adaptable to the extent that the change and modernization sought can be pursued under its aegis?

For drawing conclusive arguments, regarding the adaptability of Islamic law, the problem requires a great deal of spadework for achieving clear analysis. For this, primary task is to study the various phases of the development of Islamic law. Since, Islamic legal theory has developed through the writing of various jurists, it requires a detailed study of the developments that have taken place in earlier periods of the history of the Islamic law. Further, an analysis of Islamic law on the other hand requires a brief study of the essential phenomena in Islamic legal theory, especially those pertinent to the inquiry of adaptability, namely *Ijtihād*, *Maslahā* and *Istehhsān*. In terms of acquaintance, these concepts are having fundamental significance for the understanding of the issues. In the essence, Islamic law aims at the *Maslahā* of humankind, hence, logically, it should welcome any social change. With such objectivity, Islamic law cannot be rigid and inert about social change to serve the purpose. Furthermore, last task is to study the various aspects of this problem, which should be distinguished from one another in conjunction with each other.

In a bid to understand this phenomenon, in attempting to formulate an understanding of the philosophy of the problem of adaptability of the Islamic legal theory to social change, the discussion concerns the analysis of certain indispensable concepts. The following, therefore, may be arranged according to these four aspects.

- . *Shari'ah*, *fiqh* and their identical concepts
- . Emergence of systems of interpretations (schools of law)
- . Continuity and change and methodology of *Ijtihād*
- . Philosophy of Islamic Law of Contract (Adaptability of Islamic Commercial Law)

1. Shari'ah, Fiqh and their Identical Concepts : As a part of analytical debate, in the quest of greater understanding, it may be important to examine the term *Shari'ah*, its development from its original meaning to its technical sense and incremental tremendous growth of term *fiqh* with other relevant concepts.

1.1. Shari'ah : Assuredly, it has been understood that Islam is principally a political systematic body of norms and rituals, it would only make sense that it has a legal code to apply. The Islamic legal code is called *Shari'ah*; meant the path or road to be followed. The fundamental source of the *Shari'ah* is with the *Qur'ān* and the *Sunnah*. As for the term '*Shari'ah*' is concerned, it was rarely used in the beginning of the Islamic legal history. It was introduced to carry particular meaning of the law of Islam. Explaining this term, however, early literature reveals that the word '*Shari'ah*' literally means a way leading to a watering place where people have access to this indispensable life ingredient, a course to the watering or resort of drinkers, which is permanent and clearly marked out for a beneficiary. The *Qur'ān* uses the phrase *Shari'ah* in this meaning and put to use religion, which states: "We made out of water every living thing."⁵ As water is the essence of all the creatures living on this earth, so *Shari'ah* represents what is indispensable for a human being's spiritual and social growth. It is notable that the word has occurred in the *Qur'ān* in three places. First reference is, where it is stated that:⁶

"In matters of *Shari'ah*, He (*Allah*) has ordained for you that which He had enjoined upon Noah — and into which We gave thee (*Oh Muhammad* "ﷺ") insight through revelation — as well as that which We had enjoined upon *Abraham* and *Moses* and *Jesus*: Steadfastly uphold the (true) faith, and do not break up your unity therein."

Here in this verse, linguistic conformity advances the position, that *Shari'ah* stands for the essence of all revealed religions with regard to acknowledging God, being obedient to him and guided by him. Another reference which is to be quoted states:

"And unto thee (*Oh Prophet* "ﷺ") have we vouchsafed this divine writ, setting forth the truth, confirming the truth of whatever there still remains of earlier revelations and determining what is true therein. Judge, then, between the followers of earlier revelations in accordance with the *Shari'ah* that God has bestowed from on high, and do not follow their errant views, forsaking the truth that has come unto thee."⁷

Furthermore, a third place is found, in which it is said that:

"And finally, (*Oh Muhammad*, "ﷺ"). We have set thee on a *Sharia* by which the purpose (of faith) may be fulfilled: so, follow thou this (way), and follow not the likes and dislikes of those who do not know (the truth)."⁸

Ultimately, one should be cognizant that the above-cited references clearly demonstrate the true connotation, '*Shari'ah*' is referred to point out the practical course for a human being's development and well-being morally, socially, economically and otherwise. It also seems that the term *Shari'ah* refers to a straight and clear path, and also to a watering place where both humans and other animals come to get benefitted.

With the forgoing, it is affirmed that *Shari'ah* means the clear path or 'highway' to be followed, in this sense it is the way ordained by God for human race or clear-cut way for all humankind. The phrase *Shari'ah* was used in early stages for the essentials of Islam in

the meaning of '*din*' - religion. In a similar vein, within the realm of exposure, certain reports further reveal that on the request of newly converted Muslim tribes "The Holy prophet" (ﷺ) deputed some companions to their locality to acquaint them with '*Shari'ah* of Islam', which meant in this sense the fundamentals and basic duties of Islamic religion. It indicates that the term *Shari'ah* here denotes the basic essentials of religion.⁹

2.2. 'Fiqh': Alongside *Shari'ah*, the term '*fiqh*' too was existing among the early Muslims. However, *Shari'ah* is much wider in meaning and application than the other allied terms like '*fiqh*', which in literal sense means jurisprudence. Interestingly, often, the two terms are used in literature interchangeably, they are poles apart in meanings. It is of note that difference between both the terms is comparable to the difference between 'law' and 'jurisprudence' in literature of modern laws. The original meaning of term '*Fiqh*' denotes the meaning of understanding or knowledge of certain thing. Thus, in this sense, it is synonym of '*Faham*'. As the Arabian Bedouins people used saying "so and so neither understands neither comprehend"¹⁰. The word '*fiqh*' by its origin was used by Arabs for those camel experts who had possessed ability to distinguishes the she-camel that were lusting from the pregnant. Accordingly, the expression (الفقيه فحل) was found in their literature. From this expression, *fiqh* means deep knowledge and understanding of anything.¹¹

Surely, in more than one places the word *fiqh* in its general sense of 'understanding' is found in *Qur'an*. The notion of the expression of *Qur'an* (الدين في ليتفقوه) (that they may gain understanding in religion) suggests that during earlier period this term was not applied in the legal sense alone but it was covering the meaning of other aspects too, i.e. theological, political, economics, and logical so it carries wider scope in its meanings.

2.2.1 Incremental Growth of Term '*Fiqh*' and Usage of '*Ilm*', *Imān*, *Hikmat* :

Furthermore, it is perhaps necessary to note, in early period, we came across with the usage of a number of terms which were common among Muslims. Usually, these terms were used in a broader sense, like '*Ilm*', *Imān*, *Hikmat* etc. But, with the passage of time their original meanings got narrow and specific and then became different in their usage.¹² The Muslim society in the era of "The Holy prophet" (ﷺ) was not as complex as it got diversified in later periods. Wherefore, the diversity and difference of interpretations were not quoted generally. Thereupon, the beginning of conquest of non muslim territories, association with newly converted Muslims, the emergence of several theologies and legal schools, rapid growth and developments of Islamic learning were the major factors which caused this sort of diversity in the meaning of these simple terms from what were they understood in "The Holy prophet" 's ﷺ life times by Muslims.

To this in quest for understanding, we shall focuss on the term '*fiqh*' with which we are concerned. It is notable that the term '*fiqh*' and '*ilm*' were frequently used for understanding of Islamic knowledge in the early days of islam, as it is a famous Hadīth that "The Holy prophet" (ﷺ) is reported to have blessed 'ib. abbāass' "O God, give him understanding in religion"¹³ (الدين في فقه الله). From this it is quite obvious that in this **Hadīth** word '*fiqh*' does not carry exclusively the meaning of law, but rather a deeper understanding about Islam in general sense is indicated here. Notably, on another occasion, it has been reported that once some bedouins had approached "The Holy prophet" (ﷺ) and asked him to send someone to their tribe, who should instruct them in religion. Here

in this report, we also found the expression (الدين فى نأ يفقهوا) used and denotes the meaning of deeper understanding.¹⁴ In this setting, above examples give us an idea that in early era, the term 'fiqh' was used in its broader sense because the bedounis obviously did not meant to be *tought* mere legal rules. And setting aside other essentials of islam, the reason for its general uesage in the early days of islam appear to be that in that era emphasis was being given on fundamentals of religion and people were not used to in engaging themselves in minute details. Hence, this term signified the puerly intellectual understanding and as well as the depth and intensity of faith, *Qur'anic* wisdome and knowledge, rules relating to rituals and all other injunctions of *Islam*.¹⁵ It is to be noted that *fiqh* embraced both the theological as well as legal issues. Till the times of *al- Mamūn* (218.AH) in 2nd century, the term *kalam* and 'fiqh' were also identical and had not been seperated yet. However, in early Islamic literature, we found a book known as *al-Fiqh al Akbar* attributed to *Abu Hanifah* that deals with the basic fundamental tenets of religion, like faith unity of God, life after death, hereafter and prophethood etc. These are the problems which could be subject of *kalām* and dealt within *kalām* and not in the subject of science of law. The title of said book, therefore, shows that in early stages of Islam, *kalām* too was covered by the term 'fiqh'.

Imam Abu Hanifah have defined 'fiqh' as 'a soul's knowledge of its rights and obligation', thus, prefering its coprehensive and generic meaning.¹⁶ When theological problems came into question, and discussion about its varasity had arose to begin among Muslims, subsequently Ummah was inflected with several sects. Wherefore, in result of this conflict, considerable attention towards these conflicting thoughts and beliefs was attached. It is reported that *Abu Hanifah* had declared the preference of Din over knowledge of ahkkam. He obviously meant by Din as the basic belief of Islam. And as mentioned earlier, he included the *Towhīd* and other aalied believes al *Fiqh al akbar*.¹⁷

It is also reported that when the Greek works on philosophy were transformed into Arabic in the era of *al-Mamūn*. At first, it was the beginning that the *Kalām* was introduced as an independent science by *Mu'tazilah*. In fact, it was the real separation between terminologies of *Kalām* and 'fiqh'. It indicates that prior to the emergence of *Kalām* as an independent science 'fiqh' covered the all subjects of this science.¹⁸

Along the same lines, the term *Ilm* in early periods also have its comprehensive meanings. This can be seen, in a statement reported from *Ibn Mas'ūd*, that he had passed remarkable statement, at the occasion of the death of Caliph 'Umar, the nine-tenth of *Ilm* has gone away with him¹⁹. Which shows that he did not mean just his knowledge about legal or Islamic 'fiqh' but he meant by saying that *Umar* possessed a comprehensive knowledge of Islamic religion. It also directs that *Ibn Mas'ūd* used the word *Ilm* not for specific branch of knowledge but into its wider sense in a comprehensive manner. It is notable point that *Ilm* is a very unique term which carried the sense of knowledge by its meaning from beginning which comes through authority, it may be the God or the Prophet (ﷺ); *Qur'ān* or *Hadīth*. While the other term 'fiqh' involved the element of personal thinking and exercise of one's intelligence or the application of personal judgment by its very definition, both the terms were more or less interchangeable and being used in wider sense of their

meanings. Yet, it is vibrant that *fiqh* never lost its intelligence character ever. It is reported from companions of “The Holy prophet” (ﷺ), in the early stages right after the life time of “The Holy prophet” (ﷺ) when the Muslims were confronted with new problems, the new cases emerged seeking the solutions, and thus, they had to exercise their personal judgment. At this stage, the term *fiqh* came to be frequently known for the exercise of intelligence. In this context, literature also witnessed that the companions who gave legal judgment and were known for employing their reason and exercising intelligence in their judgment for solving legal cases were known as *Fuqahā*.²⁰ Markedly once ‘Umar, the Caliph in his speech said about *Mu ādh b. Jabbal*, “Let him who desire to seek *fiqh*’ to the *Mu ādh b. Jabbal*” due to his ability to solving legal problems and his intelligence.²¹ At the same time people endeavored to collect and record the traditions via chains of narrators, then the knowledge came through reports got description as *Ilm*. However, at the end of third century when the movement of collecting *Hadīth* got its peak, this term appeared generally to be used in the relation to the knowledge of traditions i.e. *Hadīth*, *Āthār*. Historical hermeneutics, for its part, roughly in this period, these two terms got separate from one another, when jurists and specialists in *Hadith* emerged and new venues came into existence and there appears a need to signify and distinguish between these too. However, it is difficult to draw sharp line between both *Ilm* and *fiqh* especially in early periods.²²

From the above analysis, it may be said that scope of the term *fiqh* was narrowed down gradually and with the passage of time reduced to be used in the legal literature or body of laws which came into existence and this whole corpus comes to be known as *fiqh* as a systematic science of law.

2. Development of Legal Reasoning and Diversity of Opinion in ‘Fiqh’

The outcome of our inquest, in preceding debate so far is that, with the passage of time, a body of systematic science of law came to emerge, and this whole corpus appears to be known as *fiqh*. Hence, during the life time of “The Holy prophet” (ﷺ), such science, as that of jurisprudence, was not known. “The Holy prophet” (ﷺ) did not categorize the *Ahkām* into these recent known categories namely *Wājib*, *Mandūb*, *Harām*, *Makrūh* and *Mubāh*.

Needless to say, that this classification is a result of the work of jurists based upon the deep study of *Qur’ān*, various traditions of “The Holy prophet” (ﷺ) and the practices of the companions of “The Holy prophet” (ﷺ) and early Muslims. But this was not the case with the companions in the life time of “The Holy prophet” (ﷺ). To this point, it should be stated that the only ‘ideal’ for them was the conduct and the practices of “The Holy prophet” (ﷺ). They learnt everything from “The Holy prophet” (ﷺ) by observing or, even sometimes, they have been taught directly or in response to a question they asked. So, they learnt everything through “The Holy prophet” ’s (ﷺ) normative actions under his instructions, prays, *Hajj*, *Zakat* and even trade and fiscal transactions etc. At that time, whenever any case was brought to “The Holy prophet” (ﷺ) for seeking decisions,²³ the people did not use to inquire about the particular points of law in terms of purely theoretical way. Following this, they would consider such decision as model for similar inference and used to request only serious matters as we learn from *Qur’ān*.²⁴ In the course of that time, they were not apparently indulged in meticulous details of the entire matter and refrained from less important philosophical debates

of minute issues. They just relied upon asking generally few questions. It is evident from *Qur'anic* text that once some people put unnecessary question to him, the *Qur'an* asks them as a warning to refrain from doing so.²⁵

All these things were reformatory in character. Later on, early Muslims interpreted them in different ways, while the basis of their interpretation was core principles and regulations laid down by "The Holy prophet" (ﷺ). Thus, the law was neither inflexible nor as rigidly applied in early stages of Islam as deliberated in earlier discussion. Different and even contradictory views relating to different legal issues could be tolerated but only on the basis of arguments, which were obvious from the diversity found in the opinions of companions after the life time of "The Holy prophet" (ﷺ) and from the conduct of early legists.²⁶ "The Holy prophet" (ﷺ) provided a wide scope for differences. He had made endorsement in his commands for multiplicity and he left many things to the discretion of community according to giving situations. Through the application of directives of broad nature, it is clearly understood that "The Holy prophet" (ﷺ) sanctioned the employment of human reasoning/legal reasoning and common sense in diverse circumstance.²⁷

Furthermore, due to the extension of Islamic territories, in early period of Islamic history right after the life time of Prophet (ﷺ), companions were spread out in different areas of Muslim world, some of them came to occupy the positions of leadership and some other had occupied the positions of intellectual and religions distinctions. The people of their respective territories used to approach them for their judgments and decisions regarding various juristic issues. They gave their judgments sometimes according to their knowledge, on the basis of the commandments of the Prophet (ﷺ). Sometimes they issued their decisions as they understood from the *Qur'an* and *Sunnāh* by applying intellectual aptitude. Often, they interpreted the matter by looking to such *Shari'ah* value which led the Prophet (ﷺ) to take a decision. For instance, in case of Dower when *Ibn Ma'sūd* was reportedly approached by someone, that if husband died, without fixing amount of dower and without consummation of the marriage, in such situation whether a widow of that deceased person would be entitled to dower? In this case *Ibn Ma'sūd* first declared that he had not heard anything from Prophet (ﷺ) on the subject. But later on, he suggested two things, first that the women would be entitled for dower similar to which somewhat of her social standing might expect as average dower; second, he suggested that full share of inheritance from her husband property and also observes the *Iddah* period. It is also reported, that *Ma'qil b. Sinān* stood up on the occasion and endorsed the decision, and said that similar decision was given by the Prophet (ﷺ) on similar case. But in another case, it is also reported that two other companions *Ibn 'Umar* and *Zayd b. Thābit* are reported to have issued different verdict in similar case. In their opinion such a woman would be entitled only to her share in heritage.²⁸ The reason for the preference among *Iraqi* Jurist may be that the view of *Ibn Ma'sūd* later on attributed to the Prophet (ﷺ) while the other is not. But on other hand, opposing views are based on claim that if there had been a clear decision made by Prophet (ﷺ) on such an important issue and social institution as marriage, how could such difference of opinion, ever arise leading in distinct direction. Further, the ignorance of the authority of the tradition of the Prophet (ﷺ) on the part of such prominent persons like *Ibn Umar*, *Zayd b. Thābit* and even *Ibn Ma'sūd* makes it extremely difficult to believe that the point in question is such an important and the decision of Prophet (ﷺ) on

such an important social institution as marriage remained so private and isolated, that it was not known to anyone else except companion or two.²⁹ Therefore, the *Hadith* is not reliable and assumption that it might not have reached other companions, cannot be accepted.

Along the same lines, another reason for causing difference of opinion is that when some *Hadith* was adduced but not accepted because it was apparently contradicting to the verses of *Qur'ān*. There was occasion when a woman *Fātimah bi. Qays* reported to have testified that she was given triple divorce, but was not given any residential accommodation during *Iddah* period to her. Moreover, she then concludes by saying that, Prophet (ﷺ) recommended expenses for my maintenance. As opposed to *Fātimah bi. Qays*, 'Umar the second Caliph denied accepting this *Hadith* by arguing that he could not abandon the *Qur'anic* verse for the report of a woman,³⁰ when it is hard to judge about her truth. *Abū Yūsūf* follows the views of 'Umar while *Mālik* and *Al Shāfi'ī* have followed this *Hadith*.³¹

Notably, another reason which caused difference of opinion among the companions is the interpretation of *Qur'ān* on such a point where the injunctions were either silent or ambiguous, in terms of interpretation, and needed explanations and interpretations. The interpretation was made in the light of traditions and sometimes on the basis of the Jurists opinion wherever the traditions were diverse. So, the differences were natural.³² As an example, in *Qur'ān* a verse says, "Women who are divorced shall wait, keeping themselves apart, three courses".³³ In this verse word '*qurū*' needed interpretation. Thus, it has been taken in two meanings; (i) for menstruations, and (ii) for the state of purity (*Tuhr*). 'Umar, *Alī*, *Ibn Ma'sūd* *Abū Mūsā al Ash'ari* are reported to have interpreted in the meaning of *qurū* as menstruations, on the other hand '*Ā'ishah*, *Zayd b. Thābit* and *Ibn 'Umar* are reported to have maintained the meaning of other period of purity between menstruations.³⁴

With that realization, the same is the case, we found in early stages with *Hadīth*. Several factors caused the differences; e.g. sometimes two contrary traditions are reported and thus, some followed one and some preferred to follow other. In some cases, a tradition was not known to the companion; hence, he marked his decision on his own opinion. However, when relevant *Hadīth* was brought forward, his decision was withdrawn. The companions tried their best to base their judgments and decision on the *Qur'ān* and the *Sunnāh*. They tried to keep their decisions and personal opinion as much closer to those of the Prophet (ﷺ) as they could. Despite all this diversity in opinion, they did not, in any way, deviate from the spirit of *Shari'ah* value, which led the Prophet (ﷺ) to take decision.³⁵

During the time of second generation, the successors followed the opinions formulated by the companions of Prophet (ﷺ). Effectively, at this stage they made apiece attempts to reconcile the contradictions in opinions of companions on distinct issues. Nevertheless, they endeavored to exercise *Ijtihād* (independent interpretation) by different methods. Firstly, in terms of preference of view of one companion over the other, they did not get any influence and nor they get afraid in giving preference. Secondly, they freely exercised original thinking for legal reasoning, and from that point, in fact, formation of Islamic law begins in more or less professional manners.³⁶ Finally, variances in legal opinions were too no small degree owing to local and regional factors. Hence, there emerged three great geographical divisions in the Islamic history, where independent legal activity started to grow on. With that prospect in mind, one could say that they were in *Iraq* (*Kūfa* and *Basrā*)

under the influence of *Muslim b. Yasāir*, *Muhammad b. Sīrīn*, and *Alqam'āh b. Qays*, *Masrūq bi. al-Ajdā* and their companions. In a similar manner, *Hejaz*, including *Mecca* and *Medīnah*, were under the influence of *'Ata b. Abi Rabāh*, *'Amar b. Dinār*, *Sa'īd bi. al-Musayyib*, *'Urwah bi. al-Zubayr*, besides their other companions. Also, *Syria* was under the influence of *Qabisāh bi. Dhuwayb*, *Mukhūl* and their companions. We found comparatively more about the legal and Juristic developments of *Islamic 'Fiqh'* in *Kūfa* than in *Basrā*, and this was well established by *Abū Hanīfah* and *Ibrāhīm al-Nakha'ī*, the noticeable Jurist and the celebrated companions of *Abdullah bi. Ma'sūd*. Similarly, as mentioned earlier, that *Hijaz* also had two conspicuous centers of legal activity, *Mecca* and *Medīnah*. To be sure, *Medīnah*, of these two, was leading center for development of Legal thoughts in *Hijaz*, hence, prominent Jurists in middle of second century, as known in the text of *Ibn Ma'sūd*, 'seven Jurists of al-Medīnah.'³⁷ Above and beyond, there were other celebrated names. Notably, *Mālik* and his contemporary fellow Jurists were the major last exponents of the School of *Medīnah*.

Interestingly, the *Syrian* school is not so frequently mentioned in early texts, nevertheless its legal trend has been authoritatively known to us through the writings of *Abū Yoūsuf*.³⁸ However, every prominent town or locality had its own *shaikh* or head of opinions whose contribution in growth of legal activity and in development of legal thoughts is vital. These Jurists of different region did tremendous efforts to lay down their decisions, legal verdicts of their judgments, and to record opinions of the companions who reside in their respective places. To this, verdicts of the Jurist of *Medina* were derived from the reports of *'Umar' Ā'ishah* and *Ibn 'Umar*. The *Kūfī Jurists* developed their legal doctrine from the opinions of *Ibn Ma'sūd* and *Alī*. These were only general trends, otherwise they also considered several others in support of their legal judgments.³⁹ One has to admit that the dynamic impact of local element in the early schools, it cannot be ignored. Notably, one of the *'Abbassid* Caliph *Abū Jaf'ar al Mansūr* has reported to ask *Mālik* during his *Hajj* journey that he has intention to distribute the copies of *al-Muwatta'* the famous book of *Mālik* in the provinces with instruction that it should be followed as sole authority in law. *Malik* advised him adversely on the grounds that people had already had their own divergent opinion for themselves founding on diverse traditions.⁴⁰ *Mālik*, reply is a solid justification for the existence as well as recognition for the difference of opinion in the legal field. It also shows that ever since early days, Islamic law remained flexible, allowing on wide range for adoptability, differences of opinion and acceptance for social changes. Quite a few other pieces of evidences can be traced which prove the contribution of factors alike social changes and adoptability of Islamic law.

As part of the historical discourse in the quest for greater understanding, it should be recognized that the reasons and factor involved for difference of opinion among the Jurist of this stage are almost the same as we have discussed earlier in the discussion of the period of companions⁴¹. At the end of period of the *Tabi'un* (successor), there began a period wherein the personal decisions of companions as well as of successors were in circulation in different localities. Now here is the emergence of another chaotic state of affairs. Eventually, besides the contradictory opinions about the traditions from Prophet (ﷺ),

there were also contradictory reports from the companions about their own practices and conduct. In effect, Jurists followed different methods to eliminate this chaos. *Mālik*, therefore, attempted to use emphasize on “practice”⁴² for this; *Al-Awzā’ī* often used the phrase “practice of the past Leader of Muslims”; whereas, *Abu Yūsuf* warned against the isolated traditions and emphasize on *Sunnāh* in order to check on this chaotic state of affairs and to save the *Ummāh* from disintegration. Remarkably, they tried to strengthen the institution of *Ijmāh*, leaving aside the stray opinions, the average gentle opinion from the basis of locality - considered as local *Ijmāh*.

To this point, among the early schools of law, we often come to listen the names of *Abu Hanīfah*, *Abu Yūsuf*, *al-Shaybānī*, *Malik*, and *al-Awzā’ī* according to their different respective region, where they won their fame. Admittedly, it is thought that they got their fame and prominent status due to independent *Ijtihād*, based on pure reasoning in the arena of Islamic law. Thinking of this, it leads us to believe that these Jurists were not influenced by the milieu in which they settled, or by general trend of their respective regions. But reality is that this is not entirely correct. In fact, they were influenced in two ways, by the practice and by the considerations of their respective regions, which reflected in their reasoning clearly. Similarly, in the region of *Hijāz*, particularly in *Medīnah*, for instance, even before the appearance of *Imām Mālik*, a specific trend of opinion already did exist. There had lived a large number of people from the chain of companions as well as *Tabi’un* (successor) who had insight into the law, and they contributed much to the formation of legal opinion in *Medīnah*. They include *Ibn ‘Umar*, *Ā’ishah*, *Ibn al-Mūsayyib* and others among the known seven celebrated jurists of *Medīnah*. These predecessors of *Mālik* were those who originally exercised *Ijtihād* and left mass heritage in the shape of legal opinion behind them. Interestingly, *Mālik*, we found in history of Islamic legal thought, exercised *Ijtihād* himself on several issues; nevertheless, he did not deviate from spirit of his predecessors. Similar was the case with Iraqi Juristic approach on the scene. It is to be said that a trend of Iraqi opinion had already been formulated before the rise of *Abu Hanīfah*. The companions like *‘Ali Abdullah bin Ma’sūd* and successors like *Alqam’āh*, *al-Aswad*, and *Shābī*, *Ibrāhīm al Nakha’ī* who lived there, left a handsome rich heritage, mass of legal opinions representing Iraqi tradition. Notably, *Abu Hanīfah*, like *Mālik*, exercised *Ijtihād* on the lines of his predecessors not deviating from their course but keeping alive the spirit and practices prevalent in region of Iraq. However, his influence spread far and wide and became a symbol around which the Iraqi tradition crystallized.

In short, these early schools of law owe their origins to a lengthy long process of independent interpretation of laws that contributed in different localities from the earliest times. As time passed, people started to depend mostly on the decisions and legal opinion of these early authorities and ultimately resulted to strict personal allegiance to one master (School of thought).

3.1 Emergence of Islamic Schools of Law (Madhāhib Fiqhiyya) : Based on the above, it should be recognized that in the first two centuries of early Islamic calendar, there was not strict personal allegiance to one specific school or Madhāhib. Though, there existed some geographical division which we had mentioned previously. There were some

common principles and the Jurists in every region were more or less like-minded. These early school however, focused their values around certain personalities, from whom they claimed to achieve their knowledge.⁴³ With that, it is being noted that Abu Hanīfah has been reported to have acquired his knowledge from Ibrāhīm al- Nakha'ī via his master Hammād and despite his erratic differences on some issues, he often follows Ibrahim. Similarly, Al-Shaybānī refers to Abu Hanīfah, and typically concludes each chapter with his formula, and used the text “this is the opinion of Abu Hanīfah and our Jurists in general”. Similarly, Abu Yūsuf mostly refers to “our masters” ‘our Jurists’ in his text and in a similar vein, it is found that Al Shāfi'ī says in Kitāb ul ‘Umm that a group in Kūfa followed Abu Yūsuf while another followed Ibn Abi laylā, somewhere he says about some people in Kūfa “The followers of Abu Hanīfah.”⁴⁴

Along the same lines, in some way we found in case of *Medīnah*, where bulk of people relied generally on *Malik*, they had taken his opinion as the *Ijmāh* of *Medīnah*, even on some event some people has been reported to have cited expressly “we follow the opinion of our master while referring to *Imām Mālik* particularly, even *Al-Shāfi'ī* while debating with the *Median*’s himself calls *Mālik* as “their master”.⁴⁵ Needless to say, that these entire examples show, at that stage people get started to have some personal attachment to some prominent individual Jurists, and people from far and wide, indeed from regions of Iraq, Africa and even from Spain flocked to them to attain knowledge from them. However, the above analysis indicates that the trend towards personal allegiance started from the middle of the second *Hijrah* year. With that, apart from these grouping in distinct areas of Islamic world, people were generally engaged in independent thinking on legal issues, and *Ijtihād* was remained open to every competent Muslim. Although, it came to be restricted to the minimum, when the regional character of the early schools began to be stained and influence of personal allegiance to one particular school and their principles prevailed generally.⁴⁶

3.2. The Four Leading Schools of Law (*Madhāhib*)

1) **The Hanafi's School :** The founder of this school *Abu Hanīfah Naumān bin Thābit* belongs to *Kūfa*, and got the knowledge of Jurisprudence in the hands of *Ibrāhīm al Nakha'ī* and *Hammād ibn Abi sulaymān*. His⁴⁷ disciples or group of students built up this school on the basis of lectures given by him. To be certain, he has left no work in the shape of written document except a small volume as said ‘*Al-fiqh al -Akbar*’ found in his literature left in dogmatic. Two of his eminent disciples known as *Abu Yūsuf* and *Al-Shaybānī* indeed complied and documented his teachings. Notably, Abu Yūsuf, who was honored with the place of Chief Justice and composed a book at the request of *Harūn*- the famous *caliph* of *Abbāsīd* dynasty on fiscal and public law, known as *Kitāb al Kharāj*. His other disciple *Hasan al- Shaybānī* compiled the Corpus Jurist of the *Hanafi* School. Another well-known work done by him devoted to principle matters which became the base for many future scholarly efforts on Jurisprudence, which collectively called the *Zāhir al-riwāyāh*. Later on, all of the six books combined again in one volume entitled *Al-Kāfi* by *Muhammad bin Muhammad al-Maruwzi* known in literature as *al-Hakim al Shahid*. Subsequently, explained by another scholar in thirty volumes entitled *Al-Mobsūt*. (The Extended)⁴⁸

Broadly speaking, *Hanaḥī* law is considered to be more lenient, and most humanitarian of all the schools of law. *Hanaḥī* Jurists are known for their extensive reliance on *ra'y* and analogy (*Qīās*), on inclination or natural tendency which is also noted in somewhat theoretical bent of *Hanaḥī* jurisprudence. Compared to the *Hanbliches*, they were inclined not only to pose real and actual problems but also to present theoretical issues which were based on mere presumptions upon supposition. Being a salesman by occupation, Abu *Hanifa's* contribution towards development of law on trade and commercial matters (*Mu'amalat*) has been particularly significant. Remarkably, another noted feature of this school is their unique liberal stance for individual autonomy or if we put it differently is about freedom and liberty; they are reluctant to put on any unwarranted limitations or unjustified restrictions on any free individual. They have upheld their opinion that neither the public or any community nor the monarch have the power to interfere in the personal liberty of the individuals as long as law is not been violated, as they entitle an mature girl, who gain the age of majority, to be rightful to get conclude her own marriage contract in absence or without the consent of her legal guardian.⁴⁹ To this point, *Ibn 'Ābidīn* quoted one of the brief statement of *Abū Hanīfah* wherein he represent a leading principle not only of *Hanaḥī* School, but about which there exists a general agreement as; "When the authority of a *Hadīth* is ascertain and established that is only *Madhāb*".⁵⁰ Another statement also strengthens this essence where it is stated with mere general way and statement also attributed to *Abu Hanīfah* "When you are faced with evidence then speak for it and apply it". The message here is sort of encouragement for independent enquiry and *Ijtihād*.⁵¹ To be certain, that the *Hanaḥī* School has the largest following of all schools and also was adopted by the *Ottoman Turks* in the early sixteenth century as official code for Islamic state. It is now predominant in Turkey Jordan Pakistan, Afghanistan and among the Muslims of India.

2) **The Malaki's School of Law :** *Mālik'ī* School named after its founder *Mālik bin Anas al- Asbahī* who lived in *Medīnah*, spent his entire life in the city of Holly Prophet ("ﷺ") except for a transitory pilgrimage to city of *Mecca*. He was distinguished from other jurist in different ways more specifically due to the fact that he added another source of law to those were known to others, namely the practice of the inhabitants of *Medīnah*. (*Amal ahl al Medīnah*).

To this, it may be simply stated that since each generation followed the preceding one, the generation immediately was preceding them, and process would have gone back to the people that were directly in contact with the teachings and actions of Holly Prophet ("ﷺ"). In the context of this philosophy, he has opinion that the practice of inhabitants of *Medīnah* thus constitutes basic legal evidence. The major reference book of *Malik'ī* School is *Al-Mudawwanāh* (The Enactment) which is compiled by the famous jurist *Asad al-Furāt*⁵² and later edited and arranged by *Sakhnūn* and published by him again under the edited name *Al-Mudawwanāh al Kubrā* .(The Great enactment). *Imam Malik* reputation is borne out by his life, his long experience of residence and teaching in *Medīnah* especially by his renowned work *al-Muwwatāh*, where *Hadīth* are arranged according to the Subjects of *Fiqh*⁵³, *Imam Malik* included in *Sunnāh*, not only *Hadīth* from Prophet ("ﷺ") but also

included precedent of companions on common practice of *Medīnah*. To this, *Imam Malik* preferred the common practices of *Medina*'s to solitary report, *Hadīth ahād*, on the basis that it was a more authentic and reliable indicator than a solitary report by old individual. For example, in relation to the conciliation in contracts (*Khīyyār al Majlis*) *Imam Malik* did not accept the *ahād Hadīth* which validated the option of conciliation here "The parties to a sale are free to change their mind so long as they have not separated nor left the meeting of the contract." This *Hadīth* was found contrary to the practice of the common people of *Medīnah* which regarded a contract final upon agreement irrespective of the fact that parties separated or remained together.⁵⁴

Regardless of this from the view point of its diversity and wilderness, the Jurisprudence here may be said to be most dynamic on comprehensive in nature. This is borne out by the fact that *Mālikī* School literally validated the entire range of proofs. *Mālik* have added some other sources, one we mentioned earlier common practice of *Madīnī's* (*Ijmā ahl al-Medina*). The second is *istislāh* (consideration of public interest) and the third is *sadd al-dharā'ī* (Blocking the means). Thus, the scope is opened then, it is, in this respect distinguished by its openness, and with comprehensive approach, which represent sources or materials of *Ijtihad* more widely to the understanding of *Shari'ah*. Furthermore, public interest is given due prominence in *Malakī's* Jurisprudence and this School recognized it as independent proof, while other schools do recognize it as proof but tend to additional subjectivity, requirement, on which the *Shari'ah* is more explicit. That's why we find that on number of occasions the fatwa was issued by *Imām Mālik* solely on basis of *Istislāh*. To illustrate, *Shātibī* quoted the validation for imposing of supplementary taxes on the rich people in situations in such circumstances where state reserves face shortage of funds, to prefer the larger interest, to safeguard the lives and properties of people.⁵⁵ However, *Imām Mālik* made his standings clear about his principles that 'I am human, may I be wrong and maybe I am right' so examine my views and opinions: if found in agreement with the Book of Allah and the *Sunnāh* of his Prophet (ﷺ) accepts them otherwise reject them.⁵⁶ With that realization, he has opinion about disagreement and perception of diversity and dynamism of *Ijtihād*, he argued that companion had different among themselves and they also showed tolerance towards disagreement in matters of *Ijtihād* and this should be allowed to continue.

3) **Al-Shāfi'ī School of law :** In the context of Islamic jurisprudence, this is the third major prominent school of interpretation of *fiqh*. It is named after, its founder, great *Imām Muhammad bin Idrīs Al-Shāfi'ī*. He was also the student of *Imām Mālik*. He had delivered and articulated the legal theory of '*usūl-fiqh*', then first time introduced a new approach by discussing methodological issues. With that, apart from such introduction, he formulated the legal theory of *Shari'ah* which says that Islamic law is based on certain basic roots, or in the term ('*usūl al fiqh*'). The direct word of Almighty Allah in the shape of *Quran*, the divinely inspired conduct or *Sunnāh* of the last messenger Prophet (ﷺ) consensus of opinion (*Ijmā*) and reasoning by the way of enology (*Qīās*).⁵⁷ *Al-Shāfi'ī's* role in development and exclusive treatment of the methodology of '*usūl*' is obvious. Notably, he was the first to write on many new themes of '*usūl al fiqh*' such as *Āam* (general) *Khās*

(particular), *al-nasikh* and *al-mansūkh* and introduced different avenues of interpretation of *nusūss*(text). He has ability to substantiate his views on the basic unity between *Qur'ān* and *Sunnāh*.⁵⁸

However, *Al Shāfi'ī* took an intermediate stance between the two of major dominant stakes of his time, the *Ahl al Ra'y* and *Ahl al Hadīth*. Interestingly, he tried to reconcile *fiqh* and *Hadīth* and stick a balance between both *Hanafī* and *Maliki* while both traditionalist and rationalist were involved in vicious disagreements. For this, he stood critical to *Malik's* opinion of endorsement of unrestricted *Maslahā* and *Abu Hanifa's* persistent concessions at the cost of general principle. *Shafi'ī's* attitude of reliance on evident or apparent evidence was also reflected in his refutation of the *Hanafī* doctrine of *Istehhsān*, which based on the taking upon the spirit rather than letters of the text. Along the same lines, we find *al-Shāfi'ī* distinct approach in interpretation of contractual obligations, though, his approach almost based on the form rather than intent or object of the contract.⁵⁹ He thus, ignored the enquiry into the intentions, object of the parties to the contract. With that realization, we find in his literature that, he overruled this even in suspicious circumstances such as the double sale 'īnāh, which is prohibited among others and in case of *Nikah al Tehlil* and intervening *Nikah* even for the purpose of legalization device between divorced couple. *Shāfi*, however, further articulate his opinion and validated the both, as he advocated the first transaction and said, "If we on the basis of fear that it might become a source to some unlawful, we would have acted on conjecture". To this point, in his opinion a man can buy sword if he intent to kill an innocent person with it. Thus, in contracts and sale transactions matter is apparently conformity to the law, as mere suspicion has no value. This reliance on the apparent form of contracts etc. tendency has been shown by as many others but in his part, it is exhibited more than most.⁶⁰ The *Shāfi'ī* school is now prevalent in lower Egypt, southern Arab States, Africa in its eastern coast, Palestine, Jordan, Malaysia, Indonesia etc.

4) **The Hanbblī School of law :** At the heart of dynamism of the quest for greater understanding, in ninth century there emerged another school, founded by *Ahmad bin Hanmbl*. He was one of the orthodox opponents of rationalists, the *Ahl ra'y*, emphasis on the authority of *Hadīth* was taken by this School of thought. For that, as like *Al Shāfi'ī*, his reliance on *Hadīth* was so total that some time was regarded mere traditionalist not as Jurist. Effectively, his work is remarkable as he collected some forty thousand *Hadīth* known as *Al-Musnad* (The verified). In terms of principles, *Hanmblī's* school practices *Qīās* very little and draw their opinion mainly upon the sacred text. If the fatwa of companions come into contradiction with *Hadīth* no matter if even *Hadīth* is weak, *Ibn Hanmbl* abandoned that ruling or fatwa, he thus, applied this principle in case of granting the right of maintenance to a divorced woman, he followed the reported *Hadīth* by *Fatima binte Qays* and abandoned the ruling of 'Umar bin *Al Khitāb*(RZ).

However, it is also notable and interesting that *Imām Hanmbl* relied extensively on consideration of public interest or *Maslahā* too, we found many of his ruling validated on the basis of this principle. This is why, *Imam Ahmad bin Hanmbl* issued fatwa, in which the possessor of a vast house was compelled to provide shelter to the displaced people. He also issued some ruling on issue of 'Ujra bi al mithal regarding services in consideration

of fair wages.⁶¹ Moreover, another feature of *Hanmbli* Jurisprudence is that, permissibility (*Ibāhah*) has meant much more as compare to other schools, especially with reference to contract. Apart from that, the *Hanmbli* School of law differed from the majority as to whether the norm in contract is permissibility or prohibition; they have maintained that norm in respect to contracts and stipulations therein (*al-‘uqūd wa al shariat*) is that, they are permissible in the absence of clear prohibition in *Shari’ah*. I may quote *Ibn. Qayyim* here: “The norm regarding *Ibadat* is prohibition, which means that they are null and void unless they are specifically validated and norm in contracts and transactions is permissibility unless there is evidence to contrary”⁶²

To this point, in the contract the will and consensus of parties thus considered as of primary significance, in respect to requirements of contract. The thing which creates binding rights and obligations therefore is their agreement.⁶³ The *Imām* also at variance with the majority on the matter of suspended contracts (*al-uqūd al mu allaqah*), majority has view point that contract which involves transfer of ownership must be prompt. While *Ibn Qayyim* argued on other hand that *Imam* validated suspended contract including a suspended contract of marriage indeed all kind of contract as such.⁶⁴ At the end another example of the *Hanmbli* view is about the freedom of contract where majority of Muslim Jurists differed over the legality of sale in which at the time of contract parties did not specify the price and they used to make reference to the prevailing market price. For this, *Ibn Qayyim* mentioned that *Imām* has validated it, in his view point this kind of transaction has become customary among people and there is nothing in text to prescribe it.⁶⁵

The above categorical analysis gives us a brief idea that the trend towards personal allegiance started roughly and many factors played vigorous role for development of this sort of allegiance. Apart from this allegiance and sectarianism, however, in different regions inhabitants of these areas were generally engaged in independent thinking on law, people used to adopt reasoning and endowed with the necessary methodology to move up with to the realities of social change. But One has to admit that, unfortunately the long period of stagnation and colonialist dominion of Muslims by European supremacies created gap wide enough to put the relevance of *fiqh* to concern of modern society seriously in doubt. For these odd reasons, one could hardly expect *fiqh* and *Ijtihād* to remain viable forces in our changing circumstances and in so called liberal developed societies, where majority of the viable social factors are influenced by western liberal lobbies.

Interestingly, based on the above, it may become ostensible that, decline of application of *Shari’ah* or *fiqh*, to a large extent, caused by lack of governmental participation in the development for adaptability of *fiqh* and its capacity for growth. And it is also notable and observed fact that none of the tradition or report witnessed which to manifest the idea that the *Shari’ah* cannot be revitalized. Though, it is evident from its methodology of construction and interpretation from, the very early periods of Islamic history, that it is not stagnant nor redundant and static in nature entirely but capable of adaptability to accept and adopt new circumstances.

To this, the course of events in recently past decades has shown once again that when government intended to bring legal reforms in area of personal laws, they were appreciably

able to find the resources of *Shari'ah* responsive to the prevailing requirements of community. The Islamic revivalism of past World War-II especially in recent decades has certainly accentuated the role and value of *fiqh*, it has in statutory legislation. In the pursuance or perusal of this favorable pattern of development, the scope of revivals interest may widen further, particularly in the area of law of contract, a mixed pattern of co-existence between *Shari'ah* and existing statutory law of western origin, especially in the compass of pre-contractual obligations, which has been dominated by the provisions of Sales of Goods or common law requirements, but which may see improvements and positive growth of *Shari'ah* based legislations.

With that forgoing, as a device for renewal and reforms, *Ijtihād* always remained dominated by its dual concern of continuity and change; continuity with the given fundamental basics of *Shari'ah* while keeping pace, also with the realities of social change. Upcoming lines will provide a review of basics of *Ijtihād*, its definitive functions and proposes certain adjustment in relation to its modern application. As well as, also presents briefly various formulas proposed under the leading schools, and review the problematical issue of *Ijtihād* in current times while making suggestions for reform under the circumstances.

3. Continuity and Change (*al ṭhawābit wa al mutaḡhiyyrāt*) in Islamic

Commercial law: As it is mentioned earlier that companions of Prophet (ﷺ) took their lead directly from the *Qur'ān* and *Sunnāh* in tracing public interest (*Maslahā*). It is found in their conduct that none of exclusive pretentious methodology and procedure was followed by them. Their precedent and verdict often witness consultation and consensus among them which was a proper guideline for the next generation of Jurists and their followers in coming age band, which consequently paved road map in turn, for the development of *Ijmāh* (general consensus) as a strong source of Islamic Jurisprudence and law after *Qur'ān* and *Sunnāh*. Then, gradually got more developed by the second generation of Jurists 'Ulma' known as 'Tabi'un' (successor) as legacy of companion. Nonetheless of the fact that, they were faced with more complex progressive developments in state of metropolitan changes. Notably, Islamic world was manifested in the territorial expansion of the 'Umayyad rule, by the influence of foreign traditions, proliferation an emergence of different schools on sectarianism and also the growth of sustainable competence of self-styled scholars. In time, these all circumstances and situations were in fact considered as a threat to the unity of Islamic community and integrity of Islamic legal system; hence the need for a methodology to manage *Ijtihad* was sought in different ways.⁶⁶

To this point, confusion regarding the methods becomes quit ostensible that, every school of law has its own views; they differed extensively on the methods, scope which they acknowledged for *Ijtihād* and *ra'y* (personal opinion) therein.⁶⁷ For this, in the opinion of *Ahl al Ra'y*, most importantly, *Hanfi'ī*, show their tendency toward enquiry into the rational and ultimate objective of the text through the mode or logic of analogical reasoning (*Qīās*). With that, as a method *Qīās* functioned on through the utility of "Effective Cause". To this, debate between *Ahl al Ra'y* and *Aha al Hadīth* was concerned mainly with the identification of that effective cause due to its inherent indefiniteness and indeterminacy.⁶⁸ As

fundamental modes of *Ijtihād*, logical reasoning or *Qiās* ensured the acquiescence of Juristic opinion, with the textual ruling of the *Qur'ān* and *Sunnah*, while it sought to extend similar cases. No doubt, in this way it was considered the best device in terms of Shari'ah resources to construe the law according to the spirit of the manuscript or text. But *Qiās* was not altogether devoid of object, especially in situations, when the analogical extension of presented case to a similar but not to an identical- situation, that could lead to unwanted conclusions. In terms of remedial measure, to cure this, some Jurist felt the need for some different formula to overcome the rigidities of *Qiās*. To this, for example the partisans of *Hanafi* School developed the doctrine of Juristic preference (*Istehhsān*), which equipped them with ease, and make them able to search for an equitable solution in the stances where strict analogy thwarted the ideals of fairness and justice. *Al-Shāfi'ī*, however, further articulates his opinion totally in against to the ideal of Juristic preference and consider it as arbitrary exercise in questionable opinion. Similarly, consideration of public interest (*Istislāh*) is also recognized as a source of law because of its high utilitarian tendency by leading Jurists.

However, almost every major school profound a method or principle to regulate *Ijtihād* and to ensure its compliance with the authority of divine revelation, whereas the orthodox opponent of the *Ahl al Ra'y* (rationalist) the *Zāhari* school of *Dawood al Zāhari* restricted the sources only to the *Quran*, *Sunnah* and *Ijma*(consensus). Along the same line, *Hanafi* school's leaning to untie or join so as to increase analogy (*Qiās*) Juristic preference (*Istehhsān*) and custom (*'urf*), while *Mālik* says further about public interest (*Istislāh*) and also *Sadd al Dharā'i*, blocking the means, to serve as an addition. *Sadd al Dharā'i* denotes the end of the rulings of *Shari'ah* by stopping the effort to use the lawful means toward and unlawful end, in other words, it is likely similar to English phrase. "The matter is good which ends good". *Māliki* school applied it more widely than most.⁶⁹ To this, the *Shāfi'ī* school acknowledged the doctrine of *Isteshāb* or presumption of continuity, which observe continuity and predictability in law by suggesting, that the facts, rules of law and reason, be presume to remain valid until there is a proof to establish a change.⁷⁰ The constituent or basic of doctrine of *Isteshāb* is that (*Al yaqeen la yazūlu bi Al shakk*) that certainty may not be overruled by doubt.⁷¹ Certainty can, in other words, only be overruled by certainty, not by doubt. In this context, a different supplementary maxim here is to be considered as norm that presumes the continued validity of the *status quo ante*, until we know there is a change. "The norm is that the *status quo* remains as it was before" (*Al-aslu baqaa'u ma kaana 'ala ma kaana*) unless it is proven to have changed.⁷² This principle derives its basic strength from the logic that, Islam did not aim at a total cut off with the values and traditions of the previous faiths and laws, nor did it target to nullifying or relinquishing or substituting all the laws and customs prevailed in Arabian society. It allows a lot of these practiced social values, and sought only to nullify or abandon on to and re-establish those which were oppressive and unjust. It is evident from *Qur'anic* teaching that when it is talked about the implementation of justice and beneficence, generous (*adl Wa Ihsān*) it referred *inter-alia*, to the fundamental principles of justice and good conscience.

“We sent our messengers with clear sign and sent down with them the Book and the Balance (of right and wrong) in order to establish the justice among the people”⁷³

Certainly, it is also obvious that many things we find in *Shari'ah*, which their regulation left upon the general principle of equity and fairness. Thus, substance of this doctrine declares permissibility to be the basic norm of Islamic law and confirm its validity with the principles of natural justice and good consciences.⁷⁴

In essence, each of these rational sources in their broad outline is framed systematically, in its respective capacity to exercise *Ijtihād* and suggest systematic way for finding answers to new issues, preserving the basic principles and objective of *Shari'ah*, with a limitation that law must evolve and develop within the framework of certain methodology, not contradicting the basics objectives of *Shari'ah*. It is in fact the main function of these doctrines that, these all are designed in their respective capacity to relate the *Shari'ah* with social reality. To act as instruments of adaptation, and to offer formulae for discovering solutions to issues as they arise and these solutions must be in conformity to the basic principles and philosophy of *Shari'ah*. All of these, in turn, rely on rational proof, celebrated opinions of competent scholars of *Shari'ah* and practicability of social custom.⁷⁵

The underlying note about the function of these doctrines also conveyed the Idea that *Ijtihād* in modern times can meet the much-accelerated pace of change. Still *Ijtihād* in modern times tends to be unlike to what it was in earlier time when these doctrines were flourished. *Mujtahid* in medieval times lived in different social environment of preoccupied issues, like marriage, divorce, usury. The society was not liable to swift change and *Ijtihād* could be conducted with a certain level of predictability that is no longer the case. For this, now situations and complexities of circumstances demand multi-disciplinary approach for *Ijtihād*, to come near in character, time, amount etc. For instance, issues pertaining to new economic realities, modern products in banking, swift E. transactions, it seems hard for Jurists now to address without being properly equipped with the knowledge of all aspects of the issues. Technical issues in medicine and science also generate different demand on the skills of *Mujtahid*. Within contemporary Islamic thought, *Ijtihad* in modern era has taken place in three different shapes.

- . Through statutory legislation.
- . In the shape of Fatwa by scholars and Jurists and
- . Through the verdict of *Shari'ah* Courts.

As we discussed afore, that we could broadly classify the sources knowledge in two categories, first the revealed and second the derived. To this, the revealed knowledge is considered as the main source for construction of Islamic principles. When we are talking about the second it signifies the knowledge that derived from human intellect through *Ijtihād*. It is important to note that *Ijtihād* is used only in such situations when revealed knowledge gives no explicit verdict upon the issue. To this point, the Scholars, Jurists come up with resolutions based upon *Shari'ah*, to expand the body of Islamic law.

4.1 Philosophy of Islamic Law of Contract : With that added understanding of Islamic concept of *ijtihad*, it may be appropriate to proceed further, to this, one of the important determinations of financial development is adaptability of law to changing conditions,

which underscores the formalism of Islamic law and the ability of its legal framework to evolve. With that, the term adaptability focuses on the ‘Process of Law making’ and refers to the ability of the law to evolve in response to the changing socioeconomic conditions. To be certain, the inclusive goal of Islamic law is to promote the common interest welfare and goodwill of human being. This goal in broader general terms implies, among others, to ensure growth of consciousness (*Tazkiyāh*) and enforcement of justice and equity, which in specific terms links to objectives of *Shari’ah* (*Muqāsid al-Shari’ah*) implying the protection of religion, life, intellect, posterity and prosperity.⁷⁶ Thus, the objective of Islamic commercial law would be to ensure one or several of these goals. Suppose the objective of prohibition of *ribā* is to ensure Justice and equity in respect to the distribution of wealth.⁷⁷

4.2 Underlying Principle: Broadly speaking, over the centuries *Shari’ah* has evolved to great sophisticated systematic shape of regulations covering a large number of what the contemporary world precious as law. Assuredly, Islamic legal system divides its directions and regulations concerning human conduct broadly into two categories, devotional matters termed as (*Ibadat*) and dealings or transactions termed as (*Mu’amalat*).⁷⁸ With that prospect in mind, here we have couple of interrelated distinctions regarding both the categories. For this, the *Shari’ah* principle in respect to the first of these two categories which is *Ibadat*, specifically, in the permissibility sphere, it is given that “Anything Not validated by *Shari’ah* is Prohibited”. It means, everything is permissible unless it is proved by valid evidence from the sources of Islamic law, basically it is accepted fact, all that is considered as *Ibadat* is specified early in *Shari’ah*, and any addition to it or even slight variation into its prescribe format, way, and manners are not allowed.⁷⁹ On the other hand, the principle is quite opposite or contrary in matters of *Mu’amalat*, where thing is permissible unless it is not proved forbidden by divine guidance. This is known as principle of permissibility in *Ibadat* and principle of prohibition in *Mu’amalat*. It is important to mention here that prohibitions are explicitly specified by divine guidance and one has to be cautioned (careful) not to expand the list of prohibitions. Particularly *ribā*; undue gain, and *Gharar*; speculation and uncertainty are forbidden in commercial transactions. Thus, in *Shari’ah* commercial law makes all contracts permissible that are devoid of these defects. Consequently, based on the above, the adaptation in dealing *Mu’amalat* can be applied through the process of *Ijtihād* on the basic principles or doctrines given in Islamic law for matters pertaining to *Mu’amalat*, and their interpretation accordingly for various circumstances to address the needs of the people establish the efficiency in *fiqh* of *Mu’amalat*. Since, all the principles and doctrines of *Shari’ah* aim to bring about fairness and stability in vary affairs of individuals as well as collective.

4.3 Adaptability of Contemporary Islamic Law and Principles of Modern Legal System in Contemporary Transactions: With that prospect in mind, to analyze the adaptability of Islamic law of commercial transaction it is important to make a comparison of the traditional *fiqh* rulings pertaining to contracts, applicable in contractual relation, to the contemporary one. So then, traditional Islamic conception of contracts and agreement,

in relation to the contractual obligations, can be classified under three major categories: Gratuitous, accessory and exchange.⁸⁰ However, in the category of gratuitous contract right to own or possess, right to use along with right to dispose of certain property are transferred without consideration (payment or compensation). Gratuitous include loan (*ariyā* and *qard*) deposit (*wadia* 'h) gift (*hibāh* without *iwaz*) and contract of guarantee related to security (*damān* or *kafālah*). In contrast, accessory contracts are those where in a contract one party assigns certain obligations to other party in shape of work, capital for performance. In these contracts we find (*wakala* 'h agency), partnership (*shirkā*) contracts in the form of *mudarabāh* and *musharkāh*, assignment *hawalāh* and pledge or mortgage (*rahn*) etc. Whereas, exchange contracts are consisting of simple spot sale (*bay*).⁸¹ Ordinarily, in modern financial system financial activities can be conducted through markets or intermediaries. Thus, cater to the requirements of the modern structure, the challenge for Islamic legal system is to adapt to this new change by enabling financing through markets and intermediaries, and to create or develop a new set of financial contracts, which actuate the stagnant situation, observing the basic Islamic phenomenon of Islamic trade. To this, it is understandable that, these new contractual reforms would have to fulfill the needs of various sections of trade, by carrying out a comparative approach, perusing the essence of the framework of “*Al Darar Yūzāl*” *Haram* must be eliminated or “*La darar wa la dirrār*”. There should be neither harming nor reciprocating harm, especially, the segment for pre-contractual liabilities must be focused. With that realization, based on the principle of “*darar*” Islamic law can evolve as long as the limits imposed by *Shari'ah* are not traversed.⁸²

In due course, one should be cognizant of the fact that the most Muslim countries are subject of western adopted legal system, which resulted in lack of real legal infrastructure that can provide assistance to the application of Islamic commercial law during current times. In time, however, even if people agree or gradient to practice Islamic contracts, the rules and courts may not be there to interpret or make able the enforcement of these agreements. As we come across with an example of using traditional concept for pre-disclosure of information, the use of principle of “*Caveat Emptor*” and its parallel like LCIG principles etc. To this point, it may be simply stated that under Islamic commercial law, a seller, in its sale transaction is bound to allow the buyer to inspect or check the fitness of the subject matter of sale agreement not only before the conclusion of the agreement but also after its decision, regardless of whether the fault is discovered earlier to the conclusion of the agreement or before it was processed. That very doctrine is known as “*Doctrine of Khīyyār*”. Thus, through the comparison of said contemporary principles with Islamic law can give an accurate depiction of the approach toward pre-contractual duties of disclosure in two legal systems the Islamic law and common law to attempt as juxtapose these two systems, in their similarities and differences. To put it differently, the positive thing that emerges from the features of Islamic law to provide such a safeguard, not only to buyer but also *Khīyyār* can be for both for the seller and for the buyer, as long as the *Khīyyār* is essentially designed to fulfill the interest of business transaction. With that, these interests contain the preservation of benefits and desires of both the contractual parties in addition

to provide protection from possible harm.⁸³ The most important feature of this frame work of *Khīyyārat* which makes its applicability in time, possible and productive, is its diversity that the jurists have divided it into several categories, *Hanafī* divides it into seventeen types, *Shāfi* in sixteen types and *Hanblies* division is of eighteen types.⁸⁴

However, it is important to acknowledge that, the Islamic doctrine, which allows the buyer the right to investigate the fitness of the goods sold (and thus giving him the right of option, after the conclusion of the agreement) also allows such rights of inspection and option to be exercised by the buyer before the contract is concluded, is much closer to face market realities and to meet product development requirements.

4. Conclusion: The Federal Shariat Court in its judgment held that all interests stipulated by the government in borrowings either from domestic or foreign sources are *Riba* which is clearly prohibited by the Holy Quran. The judgement draws attention to the financial sourcing from China where the lender is willing to switch Islamic modes of transactions as it does with Islamic Development Bank and other Muslim countries. Moreover, it emphasizes on the acceptability of Islamic transactions globally why not in Pakistan.

This paper delved into the discourse on the development of Islamic law from its sources to shape a legal system. It has been shown that ultimate objective of development of legal reasoning is to increase humane welfare, as is always is in the case of *Muqāsīd al Shari'ah*, which is achievable through stable and sustainable growth in wealth. By and large, with a particular reference to the concept of adaptability in contemporary Islamic law and the principle of modern legal system in contemporary transactions, that was examined in detail. On balance, having discussed the origin of *Shari'ah* and other allied terms like *fiqh*, *Ilm* and *kalam* etc., the discussion included the emergence of *Madhāhib Fiqhiyya* too. Certainly, the basis of their interpretation was core principles and regulations lay down by “The Holy prophet” (ﷺ).

This discussion also proved, that ever since early days, Islamic law remained flexible, allowing on wide range for adoptability, differences of opinion and acceptance for social changes. In brief, the law was neither inflexible nor as rigidly applied in early stages of Islam as deliberated in earlier discussion. Throughout the discussion, particular emphasis has been given to the conceptualization of (al-ṭhawābit wa al Mutaḡhiyyrāt) continuity and change in *Shari'ah* and methodology of *Ijtihād*.

Suffice it to note at this stage, that on the basis of definition and meaning, Islamic law is susceptible to adaptability from a conceptual and practical viewpoint, due to the changing nature of things along with the methodology of *ijtihad*. It was also endeavored to deduce that legal principles like consideration of *Maslahā* and *Istehhsān* (juristic preference), the flexibility of Islamic law in practice and utility of *Ijtihād* (legal reasoning) sufficiently demonstrate that *Shari'ah* is adaptable to social changes. Specifically, as a device for renewal and reforms, *Ijtihād* always remained dominated by its dual concern of continuity and change; continuity with the given fundamental basics of *Shari'ah* while keeping pace, also with the realities of social change. Interestingly, this discussion had shown the flexibility of the Islamic law in the face of real commercial challenges that confronted the Muslim population across the globe. Apart from the issue of permissibility, the conceptualization of continuity and change it is recognized, from the foregoing discussion,

that there are some aspects in the face of these commercial challenges that merit reform and innovation, these will be alluded to in the coming chapters and will hopefully make their way to the literature on the subject matter in the future. With this overview into the conceptualization, it is also demonstrated that theoretical framework, which also outlined in research methodology as “*Al Darar Yūzāl*” (harm must be eliminated) or “*La darar wa la dirrār*” (“There should be neither harming nor reciprocating harm”), in Islamic jurisprudence is an effective mean to lessen the chance of uncertainty and unfairness in trade.

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