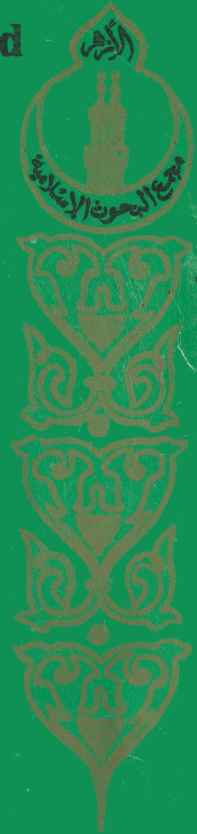


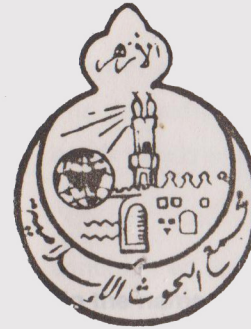
**The Prophet's Ijtihad
&
The Flexibility
Of Shari'ah**

BY :

THE GRAND IMAM
GADUL HAQ ALI GADUL HAQ
SHAIKH AL - AZHAR

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1410 A.H. — 1989 A.D.

FOREWORD

"In the name of Allah the most Beneficent, the most Merciful"

The flexibility of " Shariah ", " The Islamic legislation " is a fact ; because it depends on the different methods of italicized portion (Istinbat) which means the searching out of the meaning of Verses of Qur'an and Hadeth. It deals, also, with the different ways of " Ijtihad " and the exercise of judgment.

This fact asserts the ability of " Shari'ah " to cover the needs of Muslim societies at all time.

His Eminance the Grand Imam Sheikh Gadul Haq Ali Gadul Haq Sheikh Al Azhar is - as I see - the greatest jurist in our time.

He was a chief judge for a long time, and the Grand Mufti before being Sheikh of Al Azhar and the Rector of the Academy of Islamic Researches in Al Azhar.

He is the big authority in the subjects of " Fiqh " and " Ussul Al Fiqh " the jurisprudence.

This book covers two main topics ; Ijtihad of the Prophet Muhammad (P.B.U.H.) as a precedence to be followed, and the Flexibility of Shari'ah to suit all times ; and to clarify these facts for Muslims and non Muslims.

It is hoped that the benefits of this book will be guidance for humanity, to accept all these efforts, Amine.

Muhammad Hossam Al Dine
Secretary General
Academy Islamic Researches

Al Azhar — Cairo
1st. October, 1989.

TOPIC I

The Prophet's Ijtihad

In The Name Of Allah, The Beneficent, The Merciful

Introduction :

Praise be to Allah. May Allah's peace and blessings be upon His Messenger, our Lord Muhammad, and upon his family, his Companions and his followers.

There is no denying that some important aspects of the life of the Messenger have gone out of the heads of a large number of people. These aspects are not discussed by these people out of fear lest they would involve themselves in discussing doubtful issues although the Prophet's life and his Traditions are vulnerable to every one till the Day of Judgment. From the Prophet's deeds and speech the whole of mankind can draw inspiration enabling them to lead a Vertuous and perfect life.

Of these sides are his behaviour and conduct, deeds, words and exercise of reasoning in matters pertaining to the private and public life of his nation as well as the rules making and the

verdicts he passed on issues which were referred to him for decision.

In this study, the fact that Mohammad was none but a human-being is taken into consideration. He was a mortal, having the mannerism of humans. Allah says : " Say : I am but a man like yourselves, (but) the inspiration has come to me that your God is One Allah. Whoever expects to meet his Lord, let him work righteousness and, in the worship of his Lord, admit no one as partner. " (1)

Mohammad was chosen from his own people to deliver Allah's Message, after having been made immune from the foibles of other human-beings. And the Message is the religion that Allah had chosen for His servants, and, indeed, "The religion before Allah is Islam." (2).

All the Messages of former Messengers, before Mohammad, preached the worship of the One God and tried to administer justice among people and to lift them to a higher status. The last of these Messages is that of Mohammad, the Right Religion, after which mankind is in no need for any other Revelation. The religion of Islam is all-embracing, healer of people's illnesses and fit to be applied at all times and all

(1) Surat Al-Kahf : 110.

(2) Surat Al-Imran : 19.

places. And to be eternal, this Message has to meet all peoples' requirements ; and the relevant rules and injunctions are presented by Allah's Book, the Qur'an, and elucidated by the deeds, the speech and the wisdom of the Prophet. Allah says : " And We have sent down unto thee (also) the Message that thou mayest explain clearly to men what is sent for them and that may give thought. " (1)

And to make this research comprehensive, the Ijtihad, the-exercise of reasoning, by various Imams in various religious domains, should be reviewed in order that we be able to cast a light on the Ijtihad, the rules, and decisions made by the Prophet.

(1) Surat Al-Nahl : 44.

1 — Ijtihad :

In the Arabic terminology the word Ijtihad means "exerting oneself to the utmost " or " to the best of one's ability " and in the legal application it means " exerting the faculties of mind to the utmost for the purpose of an analogical deduction of a legal decision from a conclusive argument."

Ijtihad, according to Imams is exercised when no direction to the issue in question is found neither in the Qur'an nor in the Sunnah. Ijtihad is also exercised in inconclusive arguments as well as in the objectives the legislator sought to reach in formulating conclusive issues allowing exercise of judgment.

2 — Recognition of the value of Ijtihad :

Imams do not differ over the need for Ijtihad if it is exercised in the establishment, the explanation, the generalization and the particularisation of religious texts, or in the related matters concerning their inclusion or exclusion from these texts.

But the Imams differ in opinion over reasoning made to reach a legal verdict on an issue to which there is no indication neither in the Qur'an nor in the Sunnah.

(a) The Shias and a body of the Mu'tazilas of Baghdad, and the " Nizzamiyah ", a creed opposed to the Sunnis, and the Phenomenalists are of the view that Ijtihad is not an authority. Some of them even allege that it is disallowed legally. Others go further, claiming that it is absurd and irrational.

(b) The Majority of Muslims, on the other hand, see that Ijtihad, on the contrary, is allowed legally and rationally and that in emergencies it is incumbent. And this is the view held by the Prophet's Companions, their succeeding followers, the leaders of the four Islamic sects and most of the imams and scholarly philosophers. Each group has its own supportive views.

3 — Those opposed to Ijtihad advance a number of arguments, of which are the following (1) :

Firstly :

The Qur'an and the Sunnah provide all the religious verdicts that man requires to conduct his affairs, and as such, there is no need to resort to analogical reasoning or any other course.

The advocates of this opinion seek support from this Qur'anic verse : " And We have sent down to thee the Book explaining all things. " (2)

In another verse Allah says : " Nothing have We omitted from the Book, and they (all) shall be gathered to their Lord

(1) " Al-Mustasfa ", by Al-Ghazali ; Vol. 2, pp. 239 — 240. Also " A'lam al-Muwaq'in", of Ibn al-Qayyem, Vol. 1, p. 244.

(2) Surat Al-Nahl : 89.

in the end" (1).

This group also maintains that any question to which no indication is found in the Qur'an and the Sunnah must be treated on the basis of "Ibaha Asliyah", that all things are allowed unless there was restriction. In this argument, this body of jurists are seeking support from many Qur'anic verses. Allah says : " It is He Who hath created for you all things that are on earth (2) ". He also says : " O'ye who believe : ask not questions about things which if made plain to you may cause you trouble. But if ye ask about things when the Qur'an is being revealed, they will be made plain to you, Allah will forgive those, for Allah is Oft-forgiving, Most forbearing ". (3)

Secondly :

Some verses of the Qur'an disapprove Ijtihad, Allah says : "If ye differ in anything among yourselves, refer to Allah and His Apostle." (4) Issues must not be settled according to personal judgment. Allah says : " We have sent down to them the Book in truth that thou mightest judge between

(1) Surat Al-An'am : 38. It should be noticed that the term "Book" here, as Al-Qurtubi says in his commentary of the Qur'an, vol. 6, p. 420, means either "Tablet Preserved" or "The Qur'an".

(2) Surat Al-Baqarah : 29.

(3) Surat Al-Ma'idah : 101.

(4) Surat Al-Nisa' : 59.

men as guided by Allah ; so be not (used) as an advocate by those who betray their trust" (1). Here, Allah did not add " and also as guided by you ".

The Prophet is quoted by Malek al Ashga'i as having said : " My nation shall be divided into some seventy creeds, the most defiant of which is that which subjects the religion to their own judgment, making what Allah has made lawful, and the unlawful " (2).

Thirdly :

A large number of the Prophet's Companions are reported to have denounced the exercise of reasoning in religious matters and disapproved treating it as an authority.

'Umar ibn al-Khattab, may Allah be pleased with him, would say : " Keep yourselves away from those who exercise their own judgment ; they are hostile to the Traditions of the Prophet. Only when they failed to understand them would they resort to Ijtihad. They are misled and also misleading".

Ibn 'Abbas, may Allah be pleased with him, also says :

" Whoever forms an opinion to which there is no indication either in Allah's Book or in the Prophet's Sunnah shall not be able to determine his attitude towards them when he will face Allah". Again, 'Ali ibn Abi Taleb, may Allah be pleased

(1) Surat Ibid : 105

(2) " A'lam al-Muwaq'in" : by Ibn al-Qayyem : vol. 1, pp. 44 — 45 — 198.

with him. says : " If the religion is defined and determined by Ijtihad, the sole of a slipper becomes more deserving to be cleansed than its upper part ".

Ibn Mas'ud, may Allah be pleased with him, says : " If your jurists and scholars are overstepped and the people accept the exercise of judgment by ignorant leaders, in religious affairs, then Islam will be blunt and vanquish ".

Ibn 'Abbas, may Allah be pleased with him, says : " It is the Book of Allah and the Sunnah of His Messenger that we have to resort to. If anyone forms an opinion, overlooking these two sources, his action is not known whether it would be added to his credit or his sins ".

'Abdullah ibn 'Umar, may Allah be pleased with him, also says : " Knowledge is drawn from three sources : the ever-existing Book of Allah ; the eternal Sunnah of the Prophet ; and something that I do not know what is it " . (1)

4 — Those who recognise Ijtihad, and make it in certain cases incumbent, have also their own arguments, of which are the following : (2)

Firstly :

Allah says : "O, ye who believe : Obey Allah, and obey the

(1) Ibid : pp. 46 - 48. Also "Muftah al-Jannah", of Jalaluddin al-Siyuti, quoting many books of Sunnah,

(2) Al-Mustasfa, of al-Ghazali; vol. 2, pp. 241 - 244. Also A'lam al-Muwaq'in of Ibn al-Qayyem; vol. 1, p. 175.

differ in anything among yourselves, refer it to Allah and His Apostle." (1) To obey Allah, as rightly understood, is to abide by the Qur'an and the Sunnah. Reference of a matter to these two sources, when a dispute arises, is a warning against following personal desires and is a call to man to go through the Qur'an and the Sunnah trying to find out the texts that might have been obscured or overlooked by him. It also means the necessity of applying the general rules by reasoning based on analogy, or of the search for the objectives the legislator aimed to achieve by promulgating his general laws. All these methods fall under the category of referring matters to Allah and to His Apostle. (2)

Had the meaning of referring a disputed issue to Qur'an and the Sunnah been the same as that implied in the order to obey Allah and His Messenger, the statement would have then been a meaningless repetition of words, of which the Qur'an is clear.

Secondly :

The following Hadith is regarded as a basis of Ijtihad in Islam. On being appointed Governor of Yemen, Mu'az ibn Jabal, may Allah be pleased with him, was asked by the Holy Apostle and those charged with authority among you. If ye

(1) Surat Al-Nisa' : 59.

(2) Al-Jam'i li Ahkam al-Qur'an, by al-Qurtubi ; vol. 5, pp. 259-263 (Section: Interpretation of verse 59 of Surat Al-Nisa').

Prophet as to rule by which he would abide. He replied : " By the law of the Qur'an ". " But if you do not find any indication therein ". asked the Prophet. " Then I will act according to the Sunnah of the Prophet ", was the reply. " But if you do not find any indication in the Sunnah ", he was asked again. " Then I will exercise my judgment and act on that ", came the reply. The Prophet smote upon the breast of Mu'az, saying : " Praise be to Allah Who guides the messenger of His Apostle as He pleases. " (1)

'Ali ibn Abi Taleb is quoted by Sa'id al-Musayyeb as having said : " I once asked the Messenger of Allah as to what happens when no indication to a particular issue is found in the Qur'an or in the Sunnah. The Prophet said : " Gather the most learned men and consult with them ; do not accept a verdict made only by one man " (2) Another version of the Hadith places " the worshippers among the faithful " in place of " the most learned men ".

This Hadith was narrated by Malek, and it is described as " Gharib ". " strange " or " unfamiliar ".

Some of the transmitters of this Hadith do not consider it is an authority. But it is true and trust-telling because it

(1) Abu Dawoud : vol. 2 p. 116. Al-Tirmidhi : vol. 6. p. 616. Al-Darimi, in his "Sunan". p. 34.

(2) A'lam al-Muwaq'in : vol, 1, pp. 53-54. Al-Tabarani : vol. 1, p. 178.

urges on resorting to " Shura ", consultation, on important issues, on one hand, and, on the other, is endorsed by Allah's commands and the speech and deeds of the Prophet and the Companions who appeared afterwards.

The phraseology of the Hadith gives, " the most learned men " prepondrance over " the worshippers ". A meeting held of consultation to reach a decision on a particular case of interest to people is more effective and fruitful if it is attended by scholars and thinkers rather than worshippers who usually have no interest in people's public affairs. These worshippers might be desired to lead prayers, but are sometimes denied the right to give evidence before a judge. The Imam Malek is quoted as having said : " I have many friends in Madinah whom I like to invite to lead a prayer, but I never accept their evidences ".

Alluding to the afore-mentioned report of Mu'az. Al-Ghazali says : (1) " The statement was favourably received by the people. No-one has attacked or denounced it. It is not be degraded for being " Mursal ", the name of its transmitter is missing from the end. It must be taken even without tracing it back through transmitters. "

(1) Al-Mustasfa, vol, 2, p. 254. A'lam al-Muwaq'in ; vol. 1, p. 243.

Thirdly :

Islam is decreed by Allah to be the last of all religions and He perfected it so as to be fit and applicable at all times and all places. The Qur'anic verses dealing with Shariat, the Islamic Law, are few in number, and since new vistas were opened in life and new circumstances and developments are taking place in the realm of man, the need of restoring to Ijtihad became greater, following the increasing and pressing issues facing man ; and analogical deduction had to be carried out to meet the prevailing circumstances and to make the Shariat adapted to them. And this comes out of sound thinking, because had this work not been accomplished, the Shariat would have obviously lost its validity and become static.

The trend of this group of advocates of Ijtihad is supported by the fact that the Prophet himself had exercised his judgment in numerous cases. He had also permitted his Companions to exercise reasoning.

5 — No support is given to the views of the opposition to Ijtihad :

(a) The Qur'anic verses which they claim to be all-embracing, covering the present and the future events and circumstances, are not so comprehensive. These verses indicate that the Qur'an comprises the common articles of

faith, " Usul ", which are required to be adopted by man to enable him to lead a good life either in this world in the Next.

The value of reason is expressly recognised in the Qur'an and the Sunnah, and both are appealing to reason again, and are full of exhortations, so that action should be taken to preserve and guard the interests the Legislator aims to protect. Had this party been correct in its views, neither the Prophet nor any of his Companions could have exercised reasoning in matters to which there are no direction. The Prophet did exercise his judgment, and so were his Companions, even during his life-time. (1) After the Prophet's death, the principle of Ijtihad obtained a wider revalence and the Companions exercised it on a large scale.

They exercised reasoning in the question of electing Abu Bakr to succeed the Prophet in leading the Muslims as Caliph, and later in the appointment of 'Umar ibn al-Khattab as Caliph by Abu Bakr and also in reducing the Qur'an to writing and their unanimity to go on the work after exhausting deliberations on the subject. The Companions had also exercised reasoning in the question of distributing charity funds to the needy among the emigrants (Muhajirin) and others. Abu Bakr was of the opinion that the Muhajirin and others should receive equal shares, but 'Umar gave preponderance to the Muhajirin,

(1) A'lam al-Muwaq'in, vol. 1, p. 51.

protesting : " How can we equalise between those who left their homes and property behind and emigrated to the Prophet and those who converted to Islam unvoluntarily ? "

The reply came from Abu Bakr : " But they subdued themselves to Allah ; and it is Allah that will reward them. This worldly life is nothing but a transit to the Next life, and the Muhajirin have not any coveted object in this world. "

But when 'Umar took over as Caliph, after the death of Abu Bakr, he enforced his point of view.

The Companions, moreover, also exercised reasoning in the punishment imposed by Allah on drinking of intoxicants. To 'Ali, may Allah be pleased with him, " Whoever drinks wine is equal to that who accuses a chaste woman of fornication. The former, I think, is to receive the same penalty as of the latter ". To him, drinking of wine was equal to defamation.

The Companions, however, were unanimously agreed on some cases and differed in opinion over some others. Had there been direction to the case referred to them in the Qur'an or in the Sunnah, they should not have exercised judgment or differed in opinion.

(b) The argument made by this group that any issue, without any indication, is to remain free to practise because

Allah says : " It is He who hath created for you all things that are on earth," (1) is accepted only in verdicts reached by reasoning, not contradicting other verdicts provided by the Qur'an and the Sunnah on a similar issue, on condition that the verdict does not come out of causes specified in these two sources. This is applied in case of " Qiyas ",, analogical reasoning, and " Istishab ", application of a legal ruling to a new similar case, to which there is no indication neither in the Qur'an nor in the Sunnah, Ijma' or Qiyas, drawn from the usages and practices of people. But if the cause of the two verdicts is identical, the effect must certainly be also so.

Allah's order : " Ask not questions about things which, if made plain to you, may cause you trouble ", (2) was an answer to a question allowing no exercise of reasoning, lest religious obligations might have been multiplied. The Prophet was asked by the Muslims : " Should Hajj (Pilgrimage to Makkah) be performed yearly ? " and in reply, he said : " If I reply in the affirmative, the Hajj is to be performed yearly. Do not ask me of anything that I had not told you of before. Peoples before you were annihilated because they pressed

(1) Surat Al-Baqarah : 29.

(2) Surat Al-Ma'idah : 101.

their prophets with their repeated and numerous questions. " The Prophet would say : " The most guilty among the Muslims is he who asks about something which had not been made unlawful to men, but has later been made so due to his repeated questions. " (1).

(c) It was explained earlier (2) that Allah's saying : " If ye differ in anything among yourselves, refer it to Allah and His Apostle " is an evidence favouring those who allow exercise of reasoning. And in Allah's saying : " We have sent down to thee the Book in truth that thou mightest judge between men as guided by Allah. " (3) there was a direction to the Prophet to judge among people by what he was taught by Allah. including, probably, exertion of effort to reach a judgment to which there was no indication in the Qur'an. This point will be explained later. (4).

(d) The allegation that the Prophet and his Companions were against the exercise of reasoning is refuted by the fact that the Prophet himself had used his reasoning faculty in

(1) A'lam al-Muwaq'in, by Ibn al-Qayyem : vol. 1, p. 58.

(2) See Section 4 of this study.

(3) Surat Al-Nisa' : 105.

(4) See Para 6, passage «B», dealing with the view of the majority of Muslim jurists on the exercise of judgment by the Prophet.

certain matters, and that he had allowed, and approved, this effort to be made by his Companions, either during his life-time, or after his death.

As the Imams had decided, certain religious issues allow no reasoning to be exercised.

Reasoning is disapproved if it disregards the general rules of Shariat. Such a reasoning may make something unlawful lawful, and vice versa. It may seek the achievement of a goal which is not aimed at by the legislator, or the application of a verdict on a certain question to another, though the cause of one case is different from that of the other. This is described by theologians as reasoning based on analogy. An example is the judgment that treats usury as lawful, being similar to sale transaction, simply because the two processes are finalised by an agreement of the two contracting parties, in the interest of both. Another example is the verdict equalising a dead to a slaughtered beast, simply because both of them have already breathed their last. Wine is made lawful, exactly as water, since both are fluids. And this is exactly what this group identify as reasoning based on analogy. (1)

(1) A'lam al-Muwaq'in vol. 1, pp. 175-177.

But approved is the reasoning, exercised in equity and truthfulness, in a process of deduction by which the law of a text is applied to cases which are governed by the reason of the text. This type of reasoning is that which is exercised not to serve a particular end, but the whole mankind, as urged by Islam and as manifest in Allah's saying : " We sent aforetime Our Apostles with clear signs and sent down with them the Book and the Balance (of Right and Wrong) that may stand forth in justice." (1)

It is something totally disapproved and disliked if ignorant and selfish people were to decide matters according to their hearts and desires. Allah states : " If truth had been in accord with their desires, truly the heavens and the earth, and all beings therein, would have been in confusion and corruption." (2).

6 — Exercise of judgment by the Prophet :

The exercise of the reasoning faculty in certain religious matters by the Prophet and later on by the Wise Caliphs is taken by those who allow Ijtihad a proof that this faculty should be used in matters to which there is indication neither in the Qur'an nor in the Sunnah.

(1) Surat Al-Hadid : 25.

(2) Surat Al-Mu'minoun : 71.

And as difference of opinion had arisen among the imams as to whether Ijtihad is permissible or not, another difference arose as to whether or not the Prophet had really exercised his reasoning in certain matters.

The Qur'an was revealed by Allah to the Prophet who was instructed to judge among people by what has already been revealed to him. Allah says : " To thee We sent the Scripture in truth, confirming the Scripture that came before it, and guarding it in safety ; so judge between them by what Allah hath revealed, and follow not their vain desires, diverging from the Truth that hath come to thee " (1).

And according to this instruction, the Prophet had to decide people's disputes and also to explain to them Allah's ordinances.

To discharge this duty, the Prophet, like any other judge or jurisconsult, was in need of two things to enable him pass judgment :

Firstly :

To understand fully the case referred to him for decision by finding out the facts of the case from the evidences advanced by the litigants. In listening to such evidences,

(1) Surat Al-Ma'idah : 48.

the Prophet, as any other human-being, might had easily been influenced by stronger proofs of either sides. Expressing this feeling, the Prophet would say : " I am a mortal. You bring cases before me for my decision, and one of you may tender better proofs than the other, and I decide it accordingly on his evidence ; but to whom in whose favour I give judgment concerning any of the rights of his brother, let him not take of it, for I only cut off for him a piece of fire " (1)

Secondly :

The Prophet had to be aware of the legal ordinance that would determine the case under hearing. If the verdict is provided by Allah's Book, then the case is decided, since Allah's verdicts are final ; and in such a case there was no need for his exercise of reasoning or for deducing a verdict.

But ; had the Prophet to use his reasoning faculty to reach a solution to a case the verdict of which was not cited in the Qur'an ?

Over this question the Muslim Ulemas are divided into two groups, one in favour, and the other is not.

(1) Abu Dawoud and Al-Shawkani in "Nayl al-Awtar". vol 8, p. 278. This Hadith is considered an endorsement to the theory that a judge must not decide a case by his personal knowledge of facts.

The Ash'orites followers of Abu Moussa al-Ash'ari, and a large number of the Mu'tazilas, are of the opinion that the Prophet had not to use his reasoning faculty in any question to which there is no direction in the Qur'an. And they have their own arguments.

In the Qur'an Allah assures : " Nor does he (Prophet) say (aught) of (his own) desire : it is no less than inspiration sent down to him ". (1).

Here, Allah disapproves that the Prophet should speak out of a desire and tells that all that was uttered by him was inspired by Allah. Had he been allowed to exercise his judgment, hardly could all his utterances been described as inspired by Allah.

This group is also of the view that had the Prophet been allowed to use his reasoning faculty, he should not have waited on certain occasions for the inspiration to come to him with answers to questions put to him by inquirers. It is established that he had indeed waited on certain occasions for the inspiration to come down to him with replies to a number of various problems.

A number of men were sent by the Prophet to get information about the Quraish tribe. These men engaged

(1) Surat Al-Najm : 3-4.

in fighting with the Quraishites during a sacred month, without the Prophet's permission. They took spoils and captives from among the enemy. And when the Prophet was asked about fighting a sacred month, he did not say anything about seizing the spoils and capturing captives, protesting only that he had never ordered them to engage in fighting during a sacred month. Here, this verse was revealed : " They ask thee concerning fighting in the Prohibited Month ; say : Fighting therein is a grave (offence), but graver is it in the sight of Allah to prevent access to the path of Allah to deny Him, to prevent access to the Sacred Mosque and drive out its members. Tumult and oppression are worse than slaughter ". (1).

The Muslims rejoiced over the Revelation and the Prophet took hold of the camels and the two men captured during the battle. (2).

Another example is the story of the inheritance of the two daughters of Saad ibn al-Rab'i. Their mother complained to the Prophet that their uncle had usurped the whole legacy of their father. In answer, the Prophet said : " Let me wait for Allah's verdict in this case ", and Allah's revelation came

(1) Surat Al-Baqarah : 217.

(2) Al-Khafagi's commentary of " Al-Shifa " of al-Qadi Ayyad, vol. 4, pp. 208-209.

afterwards thus : "Allah directs you as regards your children's (inheritance) " verse concerning Inheritance ". (1)

Another example is this : One day, Khawalah, daughter of Tha'labah, came to the Prophet with a complaint that her husband had selfishly deprived her of her conjugal rights and yet kept her tied to himself, pronouncing words importing that she was to be treated by him as being like his mother. The woman asked the Prophet for a solution to her distress. He replied : " I have not so far received a verdict on such a question. But I think you no longer are considered his wife." The revelation came after a while. " Allah has indeed heard (and accepted) the statement of the woman who pleads with thee concerning her husband " (2).

The group apposed to Ijtihad holds the view that Ijtihad is less than Revelation in weight. While an error may occur in Ijtihad, no such occurs in a revelation, because revelation came from Allah. Drawing support from the stronger is evidently better than drawing it from a breakable source.

As to those favouring the Prophet's exercise of Ijtihad, they, too, have their arguments.

(1) Surat Al-Nisa' : 11.

(2) Al-Mujadilah (The Woman Who Pleads) : 1 and onwards.

The Prophet is told by Allah : " We have sent down to thee the Book in truth that thou mightest judge between men as guided by Allah ". (1) By this verse, this body of imams, including Abu Yusuf, says the Prophet was authorised to decide cases by his reasoning faculty ; (2) and this view is supported again by a statement made by Umm Salamah, may Allah be pleased with her, who quoted the Prophet as having said : " I will judge between you in that no relevant verdict is given in the Qur'an ". (3).

The phrase " as guided by Allah " in the above-mentioned verse may signify " as taught by Allah ", which, in turn, means that " you will judge between men as being taught by Allah ", and this, of course, includes Ijtihad. But this verse, in fact, does not expressly indicate whether Ijtihad is allowed or not, but by all means it does not prohibit it.

The order of Allah in this verse : " Take warning, then, O, ye with eyes (to see) " (4), as well as in other verses, appeal to man to reflect, to resort to analogical deduction and to attend in all cases to the public interest. The order

(1) Surat Al-Nisa' : 105.

(2) Moslem al-Thobut, commentary of Fawateh al-Rahamut: vol. 2, p. 268.

(3) Al-Mustasfa, by al-Ghazali : vol. 3, p. 255 (Section · Opposition to Qiyas).

(4) Surat Al-Hashr (The Gathering) : 2.

extends to the Prophet as well as to others. The Prophet, no doubt, is more deserving than anyone else to be authorised to use his reasoning faculty, because, unlike anyone else, he is well aware of the targets and objectives of Shariat and of cases of simile.

It is also argued that if Ijtihad is allowed to one who might err and continue to err, how it could be then that a man who scarcely errs, and his error is corrected by Divine Revelation, be denied the right to exercise his judgment.

Ijtihad enhances thinking, and for this reason, the Prophet, and all other Prophets, could not have been denied this privilege, because no-one of them had been exempted by Allah from the fulfillment of the obligations that cultivate men's souls, give them impetus and sharpen their minds.

Not only had the Prophet himself exercised his reasoning in certain questions, but he had also permitted his Companions to do the same. And as such, his entitlement or non-entitlement to exercise Ijtihad is out of question, because he had actually done this either in deeds or in words.

7 — Following is a refutation of the allegations made by those apposed to Ijtihad by the Prophet :

Seeking support to their opinion in this Qur'anic verse : " Not does he say (aught) of (his own) desire ; it is no

less than inspiration sent down to him " (1) is perversion.

The verse tells that whatever is produced by the Prophet is nothing but inspiration from his Lord. The second part of the verse is clear in implying that it is the Qur'an that is being involved, because had the implication was in general matters, all the words uttered by the Prophet should had been nothing but inspiration from Allah. And in such a case, these words, and all the speech of the Prophet, should had been infallible ; this is not true, because in more than one Qur'anic verse, the Prophet was censured by Allah on certain occasions. This verse under discussion can never be taken as hindering the Prophet from exercising his judgment. If the Prophet was allowed by the Legislator to use his reasoning in worships, the verdict pronounced by him in such a case was certainly that of Allah.

It is true that on certain occasions the Prophet had waited for inspiration to come to him concerning certain issues. These were cases which were either beyond the scope of Ijtihad, or needed further explanation that could not have been obtained except through inspiration. Never had the Prophet waited for inspiration concerning cases the verdicts for which had easily been passed after exercising reasoning.

(1) Surat Al-Najm : 2-3.

This is evident from the various judgments and rules making he had laid down. (1).

In taking time to give a verdict on a certain case the Prophet might have remained busy in reviewing the case referred to him and in forming an idea about it. However, Ijtihad in religious issues can never be limited by time. The Prophet might have also waited, looking forward to a provision in which no exercise of reasoning could not had been resorted to unless when such a provision was withheld. (2).

The statement that Ijtihad is weaker in authority than a revelation and therefore should not be resorted to is rejected, firstly because the Prophet had actually used reasoning, and, secondly, because a revelation was not to come at will. Ijtihad by the Prophet was not dissimilar to that of the advocates of Ijma', consensus of opinion. It was prone to error. Ijtihad is not to be resorted to unless there is no relevant provision in hand. And since it is an established fact that the Prophet's Companions, may Allah be pleased with them all, had exercised reasoning during the life-time

(1) Specimens of the Prophet's judgments and decisions will be provided later.

(2) Al-Ahkam fi Usul al Ahkam, by al-Amidi; vol. 4, p. 233.

(3)

of the Prophet, how then it should come that himself should be denied this right regarding issues pertaining to worships ? (1).

Whenever the Prophet erred in a judgment, this judgment had immediately been corrected by a revelation, and in such a case, the Prophet's reasoning was considered an extension of the revelation ; and this is the Ijtihad that the Hanafite system calls the " Inner Revelation ", a particular gift that endows man to make good judgment. (2)

If a Mujtahid gives preponderance to a certain verdict, to him, is correct and conclusive. An example of this the evidence given by witnesses. In passing a judgment on the strength of such witness, a judge is correct and fair, although the witnesses appeared later to have not been truthful in their testimony. When the Prophet decided a case depending on the evidence of two persons about whom he knew no transgression of Divine commands, he was correct in passing his judgment, although the testimony of these two same persons, in another case, was rejected

(1) Ibid : pp. 234-235. And also " Al-Jami' li Ahkam al Qur'an," by Al-Qurtubi; vol. 11, p. 250 (Section : Interpretation of verse 114, of Surat Taha : " Be not in haste with the Qur'an before its revelation to thee is completed ".

(2) Fawateh al-Rahamut, vol. 2, pp. 370-371 ; and also Al-Mutasfa of Al-Ghazali (Section : Advice).

by another judge because he knew that were really transgressing Allah's commands, Divergence of verdict by the Prophet appears in other cases, such as that concerning his advice to trim and prune palm-leaves ; prayer to Allah in favour of someone else ; and other worldly affairs.

8 — The exercise of judgment by the Companions during the life-time of the Prophet was a question that had been discussed comprehensively by the jurists and scholars of the principles of jurisprudence.

In his book " Al-Ahkam fi Usul Al-Ahkam ", (1) Al-Amidi states that the Ulemas had maintained different views as to the permissibility of Ijtihad by the Prophet's Companions. Most of the Ulemas approved it, while it was disapproved only by a quite few of them.

Even those who approved Ijtihad as exercised by the Companions during the Prophet's life-time had also differed in opinion. They fall under three categories :

One body approved the exercise of reasoning only by judges and agents who were away from the Prophet. Some of this group approved that this right could have also been extended to others.

(1) Vol. 4, pp. 235-238 (Egyptian State Library Edition).

The second category accepted the Companions' Ijtihad to be absolute, provided there was no opposition to any of their verdicts. Some of this group opined that an opposing view was not enough to invalidate a verdict ; the Companions must have been permitted to exercise reasoning. Still, others of this group opined that if judgment was exercised, and no-one disapproved the act, the judgment was valid.

The third party had its different view only over the exercise of reasoning in issues pertaining to worships.

Some agreed that this was acceptable while others, including Al-Gaba'i, disapproved it categorically. Some of this group, including Qadi Abdel Jabbar, held the view that this right to be given only to those who were present in the company of the Prophet. But it is preferable that a judgment by a Companion should be accepted whether it was passed in the presence or in the absence of the Prophet.

When the Prophet was allowed by Allah to use his judgment and to exercise reasoning based on analogy, the right was not confined to the Prophet alone, but given to others too. (1)

(1) Al-Ahkam fi Usul Al-Ahkam, by Al-Amidi ; p. 222.

This right was exercised in the presence of the Prophet. When Abu Qatadah killed a disbeliever and took all that he carried on him as a booty, he was told by Abu Bakr : Do not do the same with anyone who might be struggling in the way of Allah and His Messenger in quest of booty. The Prophet, in whose presence the two men were sitting, commented. " Abu Bakr is correct. He is correct in his judgment. " And this judgment was reached by using his reasoning faculty.

It is reported that when Sa'ad ibn Ma'az was appointed by the Prophet an arbitrator to Banu Qurayzah, he ordered that they be killed, and their families captured. The Prophet approved the verdict, saying : " You passed a judgment in accordance with Allah's judgment coming from seven heavens. "

The Prophet is again reported as having ordered Amr ibn al-Aas and 'Uqbah ibn 'Amer al Johani to decide a dispute which arose between two adversaries, telling them : " If you would pass a correct judgment, you will be granted ten rewards, and if you make a wrong judgment, you will have only one reward. "

As to the Prophet's approval of judgment in his absence,

the story of Mu'az and 'Uttab ibn Usaid, who were delegated to Yemen as judges, stands as a good proof.

Some imams describe as abomination and unaccepted the exercise of reasoning in the life-time of the Prophet, because at that time all the directions made in the Qur'an were available and the Prophet himself was there to consult. A Mujtahed at that time had no right then to use his reasoning faculty. This allegation is refuted by the fact that the same faculty was exercised by the Prophet.

To say that Ijtihad in the presence of the Prophet was an encroachment upon his station is untrue, because the exercise of reasoning was carried out by his permission. It was done in obedience, not in disobedience, to his instructions.

And to say that whenever the Prophet's Companions approached him when a new eventuality took place, an action treating Ijtihad as unallowable, this could be refuted by stating that the Companions sought his decision only when they saw no scope for Ijtihad, or reached two decisions on a certain case and wanted him to give the decisive say. If two verdicts were reached on a particular case, the approach of the Prophet was another course ; and this course was of course stronger in authority than Ijtihad or any other method.

They also allege that the verdicts reached through Ijtihad

were made in individual cases, binding not the conclusive issues, lacking the nature of being an authority. This is true and denotes clearly that Ijtihad had really been exercised by some of the contemporaries of the Prophet, and not by all that had lived at the time. (1)

9 — The question of Ijtihad was discussed by al-Shawkani (2) who made comparison between those who exercised reasoning in the presence of the Prophet, upon his order, and those who were far from him.

Al-Shawkani approved the exercise of reasoning by the Prophet and refuted the allegations of those who were opposed to it, and citing specimens of the Prophet's reasoning. Al-Shawkani particularised the question of pulling the offering of animal to the Ka'bah and that of the prisoners of Badr and of Zaid's wife. (3)

This question was discussed also by Ibn Khaldoun, with it from the angle of the Prophet's view on illnesses and their treatment. The endeavours by the Prophet in this regard, according to Ibn Khaldoun, were made not by inspiration, but by practice, inherited from the elders. Some of these

(1) Cf. Al-Mustasfa, of Al-Ghazali : vol. 2, pp. 354-355, and Fawateh al-Rahamut : vol. 2, pp. 374, 375, 376.

(2) Irshad al-Fuhul : pp. 326-327.

(3) Ibid : pp. 325-326.

practices came true, but not on the basis of a natural law. The Arabs, Ibn Khaldoun goes on to say, were clever in this sort of medical treatment ; and they had physicians of repute, such as Al-Hareth ibn Kildah. (1)

Reasoning exercised by the Prophet in ordinary cases was made following the practices of the time ; it was not the legal issues that he was instructed to deliver to people. This is evidenced in his advice to his people to trim and prune palm-leaves, after which the trees produced no dates. Here, the Prophet felt apologetic, saying to the people, " You know better how to conduct your worldly affairs ".

Many a time, the Prophet would direct some of his Companions to consult with Al-Hareth ibn Kildah, who had experience in medicament. (2)

This shows that the Muslims are not required to abide by the Prophet's directions in non-religious matters, such as medication, unless it is done to invoke his blessing, with full submission to Allah, and with the conviction that healing comes from Him, " And when I am ill, it is He who cures me. " (3)

(1) Prolegamena of Ibn Khaldoun. pp. 419-420.

(2) Zadul Ma'ad, by Ibn al-Qayyem ; vol. 3, p. 93.

(3) Surat Al-Shu'ara, : 80.

In his book (Al-Tahreer), Al-Kamal ibn al-Homam states that according to most of the imams, the Prophet was ordered to use his reasoning faculty freely in legal ordinances and issues, and that he, moreover, was allowed to resort to Ijtihad in questions of war and ordinary life affairs. Al-Homam points out that this is the opinion of the majority of jurists and Traditionalists. And in this question he seeks support to his point of view in Allah's saying : " Allah give thee grace ; why didst thou grant them exemption ". Had the Prophet's action, Al-Homam comments, been inspired by Allah, there must not have been such a censure.

To Al-Homam, the Prophet's statement he made when ransom was taken from the prisoners of war that, " if punishment comes down from the heavens, no-one would be spared except 'Umar " (1) indicates that this ransom was taken through Ijtihad, and that it was a great mistake. Alluding to the dictum that a Mujtahid, exercising reasoning, who might have made a mistake in judgment, would receive one reward for his endeavours, Al-Homam opines that this is true if the reasoning had not taken another course ; and this is what will happen to the heretics. And the opinion that these people had done nothing more than exercising judgment,

(1) Al-Milal wal Ahwa wal Nihal, by Ibn Hazm : vol. 4, p. 22, who had described the statement as unauthentic.

thus deserving a reward, is refuted by the fact that their reasoning was exercised in questions about which there are clear provisions in the Qur'an and in the Sunnah.

According to Al-Homam, the Prophet is known to have exercised reasoning in ordinances. This appears in the Prophet's action of pulling an offering for sacrifice to the Ka'bah. His admission that had he known anything about this question before denotes that his action was not through inspiration otherwise he should not certainly had done it. Here, the Prophet used his reasoning faculty in an ordinance, because pulling a sacrificial animal is commendable. Al-Homam adds that whenever the Prophet used his reasoning faculty, and made a mistake, his mistake had never been approved. The probability of erring by the Prophet in exercising reasoning is an indication that man's reasoning, whatever intelligent and gifted he might be, is prone to mistaking, and that, of course, is contrary to inspiration, Al-Homam says.

Al-Homam also says that those who rule that there are no mistakes in the Prophet's Ijtihad and interpret the two verses: "Allah gives thee grace; why didst thou grant them exemption" (1) and "It is not fitting for an Apostle that he should have prisoners of war", (2) in a way that pertubs

(1) Surat Al-Tauba : 43.

(2) Surat Al-Anfal : 67.

the rhetoric and apt use of the language of the Qur'an is a matter unbecoming of imams and scholars who exaggerate in elevating the status of prophets, because any mistake in exercising their judgment never degrades their high position. But to upset the rhetoric of the Qur'an is very grave, and is an action that no Muslim dares to do.

The mistake made in the case of the prisoners of war, Al-Homam says, was latent in the conviction of the Prophet and of those who were in his company that if the prisoners would have been kept in captivity, they might have converted to Islam, and that if they were ransomed, the proceeds would help them go on the struggle. They did not know that to kill them would have allowed Islam to triumph and at the same time terrorize and weaken their fellowmen.

Talking about the beliefs, Al-Homam says that whoever exercises reasoning in the doctrines of Islam, which are well-known even by women and young children, such as the obligation of prayer, Zakat, fast, Hajj, and the prohibition of adultery, homicide, drinking of intoxicants, theft, and disrecognition of the value of the Qur'an, is nothing but a disbeliever.

Reasoning in these cardinal doctrines is erroneous, because in such a case Ijtihad lacks one of its important requisites, that it should be exercised theoretically, over a question

which is not basic or unestablished. Those who deny a question not pertaining to the obligatory duties, disapproving for instance the acceptance of Ijma', consensus of opinion, the individual report and Qiyas, analogical reasoning, are sinners. As to those who do not deny the obligatory duties, but the ordinances reached through Ijtihad, a Mujtahid in them is not a sinner, provided that there is no conclusive provision on a decision reached by Ijma' which is contrary to his judgment. The Companions were all agreed to this point of view because they themselves differed in judgment over such issues in which they used their reasoning faculties. One of these opinions might have been wrong, and no-one of the Companions had been branded as a sinner as a result of his wrong decision. Had such a thing happened, it should have been known to everyone due to the gravity of the accusation. Cases which constituted a difference-matter since the days of the Companions till the end of the time of Mujtahids, are numberless. (1)

The viewpoint of Al-Kamal ibn al-Homam is endorsed by the statement made by 'Abdullah ibn Mas'ud, may Allah be pleased with him, already reported in Fath al-Bari, commenting on Sahih Al-Bukhari. Ibn Mas'ud quotes the Prophet as having said : " A Muslim who bears witness that there is

(1) Al-Tahreer, by Al-Kamal ibn Al-Homan, pp. 529-531.

no god but Allah and that I am Messenger of Allah, is not to be killed except in three cases : in retaliation for his killing a human-being : the adulterer widow and the apostate, deviating from the path of the community. "

Ibn Daqiq al-Abd is quoted by Al-Hafez ibn Hajar as describing a deviatist as he who rejects Ijma'. He who so behaves is not a believer.

But not in all the cases should the rejection of Ijma' be considered disbelief. Some people were so branded ; and this is very grave, because decisions taken by Ijma' might have been transmitted from one generation to another, tracing them back to the Legislator Himself, as it is the case with the obligation of prayer. Some other times, the Ijma' decisions are not transmitted. In the first case, rejecter is a disbeliever, not because he rejected the Ijma', but for his rejection of transmission. In the second case, the rejecter is not a disbeliever, and as stated in Sharh Al-Tirmidhi, a rejecter of Ijma' is a disbeliever when he is actually denying the fundamental religious obligations, such as the prescribed five daily prayers. Some imams, however, liken he who denies the basic doctrines of the religion to he who rejects what he has already received of these doctrines through transmission (1).

(1) Fath al-Bari, Commentary of Sahih Al-Bukhari, vol. 12, p. 162 (Sec. Blood-Money).

10 — Infallibility of prophets and their reasoning in worships:

In his book *Al-Shifa'*, (1) Al-Qudi Ayyad talks about the infallibility of the prophets before and after having been entrusted with the delivery of their Messages.

Alluding to the infallibility of the statements of Prophet Mohammad, may Allah's peace and blessing be upon him, he explains that the Muslims at large are agreed that it was decreed by Allah that no error should have crept in what he had received from Him, or through Revelation ; this was to be preached intact, without any alteration, deliberately or undeliberately made, and whether the Prophet was in a good or a bad mood, healthy or sick.

Then the author of the book refutes the allegations of those who discredit some doubtful verses and exposes their mis-interpretation of certain verses of the Qur'an and their fabrication of some stories. Then Al-Qadi Ayyad refers to Allah's denouncement of their unproven assertion, by telling them that He has perfected the verses of the Qur'an, and that " We have without doubt sent down the Message, and We will assuredly guard it (from corruption)" (2).

Not only was the Prophet unerring in delivering Allah's

(1) Commentary by Shehabul Deen al-Khafagi, pp. 89-91, and onwards, and then pp. 128-132.

(2) Surat Al-Hijr : 9.

Message, but he was also unailing in his speech either about himself or about others (1). And in an exclusive part of his book, Al-Qadi makes distinction between what the Prophet had delivered of Allah's Message, which was free of any error or mistake, and the statements he made covering worldly problems (2).

Sometimes the Prophet expressed an opinion on a worldly affair, but the opinion proved later to be futile. But, according to Al-Khafagi, such an uncertain judgment had never been exercised in a legal issue, because legal injunctions and rulings came from Allah, henceforth their infallibility. Any question that had been decided by the Prophet's exercise of reasoning was endorsed by a revelation.

"And you know better how to conduct your worldly affairs"; and Talha is again quoted by Moslem as saying that the Prophet also said on the occasion : " This was only an opinion of mine ; and I want you not to deplore my assumption. " Interpreting the last utterance, Al-Khafagi says it means : " I sought your good, but it proved not to be so ; so do not harbour any grudge against me. " (3)

(1) Commentary of Shehabuddin al-Khafagi, p. 295.

(2) Ibid : p. 283.

(3) Ibid : pp. 284-285.

result, he told the Muslims : " I am no more than man ; when I order you anything respecting religion, receive it, and when I order you anything about the affairs of the world, then am I nothing more than man ". Anas is quoted by Moslem as saying that the Prophet added to this statement :

Explaining that the Prophet had sometimes decided a worldly affair contrary to what it should have been, Al-Qadi Ayyad quotes Moslem's story whereby the Prophet advised the Muslims to trim and prune their palm-trees so that the trees could yield a bumper harvest. But when the work was done, and the trees yielded fruit, the fruits were very little. And when the Prophet was informed of this miserable

Ibn Rushd is quoted by Al-Khafagi as having said in : "Al-Tahsil wal Bayan " that although this statement of the Prophet had been reported in different words, the meaning is uniform and not inter-contradictory. Another report quotes the Prophet as having said apologetically : " I am not a cultivator nor an owner of palm-trees ". Each reporter, however, had mentioned the words that had been conveyed to him. But by all means, the judgment, or the advice, had not been made through inspiration, as stated by al-Tahawi. Abu al-Waleed recalls that the Prophet had repeatedly reminded that good and evil are decreed by Allah, and that things are done through experience, and as regards the advice of trimming the palm-trees, the Prophet was not to be held

responsible for the scarcity of dates because he had never been experienced in this field. (1)

During the life-time of the Prophet and the reign of his successors, it was customary, as reported by Al-Bazzar on the authority of Ibn 'Abbas, that the owners of palm-trees and vine-yards would make discretionary estimate of their products of date and grape, while still on trees, to assess the portion of Zakat they had to pay later. This assessment was approved by some imams and rejected by others on the plea that it was a conjecture ; and conjecture might lead to deceit.

In a statement, the Prophet reminds the Muslims again : " I am no more than a mortal. Anything that I have told you about Allah is true and binding, and anything that I have told you out of the exercise of my reasoning may be true and may be wrong. "

This statement, Al-Khafagi says, indicates that the Prophet might have erred in a judgment, but to other imams it does not give this impression, because it was an ordinary utterance, which came out of no reasoning, but of presumption. The statement was made out of his knowledge of worldly affairs ; it was neither a result of reasoning, nor a law promulgated,

(1) Ibid : p. 285.

nor a tradition the Muslims were required to follow, Al-Qadi Ayyad comments.

Commenting on the same subject, Al-Khafagi asserts the fact that on certain occasions, the Prophet had exercised his reasoning faculty, and that whenever he did that, he erred not, and that if any, the error was not accepted and was corrected. And those who allege that the Prophet did not exercise this faculty, relying on the verse : " Nor does he say (aught of (his own) desire. It is no less than inspiration sent down to him, " (1) rely on an incorrect interpretation of these two verses, because when the Prophet was allowed to exercise his judgment, it was then considered an inspiration, not revelation. And inspiration to prophets was in fact a sort of revelation.

Then, Al-Qadi Ayyad talks about the arrival of the Muslims in Badr, prior to the battle, and the counsel Al-Habbab ibn al-Munzir gave that the Muslims should change their position there and the Prophet's approval of this counsel, saying : " You have given the best idea. " And the Prophet acted accordingly.

This incident also came under controversy. Some jurists say that the resolution to change the position of the Muslims

(1) Surat Al-Najm : 3-4.

had not been inspired, but left to the Prophet and his Companions to decide. And as mentioned in the principles of jurisprudence, the Companions were allowed to exercise judgment in the Prophet's presence. Others say the incident related to a worldly affair and concerned tactics of war in which the Muslims were highly experienced. (1)

Al-Qadi Ayyad also recalls the Prophet's determination to come to a reconciliation with his enemy during the Expedition of Al-Khandaq (the Battle of the Ditch). At that time he proposed to 'Uyaynah ibn Hisn and Al-Hareth al-Marri, the commanders of Ghatafan, that he would give them one-third of the fruits of Madinah had they laid down their arms. But when the Prophet consulted with his Companions over the proposal, it was opposed by Sa'ad ibn Mu'az, who asked the Prophet on hearing him making his proposal : "Had you been ordered by Allah to do that ? " The Prophet replied : " No ; but I wanted only to repel their mischief ". Sa'ad said : " By Allah ; we need not do so ; we will not give them save the sword until Allah judges between us. " This, as stated Al-Qadi Ayyad, endorses the fact that in matters not related to the religion and belief, the Prophet had at times expressed an opinion which later appeared as futile. This happened only in worldly affairs, which were known to people by experience. But besides the delivery of the Message, he

(1) Commentary of Shehabuddin Al-Khafagi, p. 288.

was required to look after his people's worldly affairs. The Prophet's activity and his knowledge of worldly affairs, and the minutest details of people's life was astounding. (1)

The author of " Al-Shifa' " and its commentator go on to say that in deciding people's disputes, the Prophet passed judgments based on witnesses' evidence, clues, and the identification of belongings over which a dispute had arisen. Sometimes, these judgments appeared to have been passed incorrectly, and in such a case, the Prophet was not to be questioned because he did not pass his verdict except after having been convinced of the truthfulness of the arguments presented in the case. This was done in implementation of Allah's will and wisdom, had Allah desired, he could have informed the Prophet beforehand of the facts of the case referred to him for decision and also of the inner impulses and intentions of litigants. In this case, the Prophet could have passed his judgment according to Divine information, and there was no need then for a confession, an evidence or oath. Like any other judge, the Prophet passed his verdicts according to the conjunctures of the referred to him. Had he been so inspired of verdicts, the Muslims are not then in need to imitate and follow his traditions : an instruction given by Allah to the Muslim nation to abide by.

(1) Ibid : pp. 288, 289, 290.

The two imams go on to state that the Prophet was indeed infallible, far from approaching any prohibition. Whenever he did something uncommendable, but not prohibited, he is drawing the attention of the nation to the probability of doing the same. When he drank water, while standing, he wished to teach the nation that such an act could be done by them. And when he forgot and made mistakes in worships, the act was not to his discredit, but meant to lay down a ruling for his nation to follow in case similar mistakes are made. These deeds, however, were scarce ; and all his actions were carried out in conformity with Allah's injunctions.

In his temporal affairs, the Prophet used to adapt himself to the then prevailing circumstances ; and for each step, he had to make preparations.

He used to wear nice robes, and in all his deeds he sought nothing but the real interests of his people. He was not obstinate in any of the earthly affairs, and at many a time he accepted the views of others, which were opposed to his point of view. He, for instance, surrendered to the desire of some of his Companions, who did not take part in action at Badr, that he had to quit Madinah and proceed to jews, (Uhud) to encounter with Quraish, although he himself was of the opinion that the Muslims had to remain in Madinah.

And although the Prophet was aware of the nature and

intentions of the Hypocrites, he abstained from giving the order that they should be killed; and in so doing, he wanted that other disbelievers might feel peace and come to the fold of Islam, and he also took into consideration that those Hypocrites were relatives to the Muslims. He hated that people might accuse him of killing his fellowmen.

Another example is his acceptance that the Ka'bah was not to be re-built on the same foundation that was previously laid down by the Prophet Ibrahim. He did not want to injure the feelings of Quraish, who wanted the Ka'bah to be constructed after its old pattern, keeping it in the form that had been accepted and glorified by their forefathers. And since the Quraishites were still longing for the pre-Islamic days of ignorance, the Prophet feared that they might apostate and abandon Islam. In this context, the Prophet is quoted by Al-Bukhari and Moslem, the two Shaikhs, on the authority of 'Aisha, as having told her: "Had not your people abandoned disbelief but recently, I should have erected the House on the foundations laid down by Ibrahim." At the Battle of Badr, as stated earlier, the Prophet surrendered to the opinion of Al-Habbab ibn al-Munzir, when he proposed another place for the Muslim warriors to be stationed in; and the new place was indeed better from the strategical point of view than the former.

In the sermon the Prophet delivered at the Farewell

Pilgrimage, he said, "Had I acted as before, I should not have pulled an offering (for sacrifice)". This indicates that, after doing this, he came to realise that it was better that the offering should not have been pulled during Pilgrimage, and that by pulling an offering while he was in the state of Ihram for only the Hajj some trouble was caused to his Companions who observed Ihram for Umrah first and then for Hajj, but were obliged to doff their Ihram garbs. This case necessitated the introduction of a legal ordinance.

Alluding to his behaviour, the two imams state that he had never met with a disbeliever or a foe except with a smile in an attempt to bring him over to Islam. Whenever he met with anyone who knew nothing of the religion, he showed patience and forbearance, and as quoted by the two Shaikhs, Al-Bukhari and Moslem, 'Aisha is reported to have quoted the Prophet as having said, "The wicked is he whom people keep clear of to protect themselves against his wickedness." Not only that; he was very generous with the non-Muslims as well as with his enemies, trying all the time to tempt them to come to the fold of Islam. In his residence he used to do much of manual work, and whenever people came to his audience, they found him in good mood, exchanging words with everyone of them. People were happy with his cheerfulness and justice. He had never concealed anything from people sitting with him, or winked to anyone to do something he hid from others.

He exercised his reasoning faculty for nothing but to unite people's hearts. The Prophet's Ijtihad was in fact a religious policy, not adulation or sycophancy. He was generous in giving charity as well as good and nice words. As said by Safwan ibn Umayyah al-Jumahi, (1) " I was given money by the Messenger of Allah, and he was the most hated to me ; and he continued to give me more and more until he became the most beloved to me ".

11 — Ibn Hazm (2) says that on certain occasions something was made by prophets inadvertently and undeliberately, and some other things deliberately, in the hope that they would come closer to Allah. This action contravened Allah's Will, and He disapproved both, the undeliberate and the deliberate, and drew their attention to their error and corrected them, displaying to His servants the right course to pursue. He did that with the Prophet when he made the formula of the salutation after making two bows in a prayer instead of four, and, again, after making a four-bows prayer instead of two.

Allah's censure took either the form of an address, as He had done with his Prophet in the case of Zainab, Mother of the Faithfuls, and her divorce from Zaid, and also in the case of Ibn Umm Maktoum, or the form of a worldly affliction,

(1) Sharh Shehabuddin, by Al-Khafagi, p. 337.

(2) "Al-Milal wal Ahwa' wal Nihal".

as it was the case with Adam and Yunus, may Allah's peace and blessing be upon both of them.

Unlike the prophets are the human-beings. We are not held responsible for forgetfulness nor for anything that we have done in search for the pleasure of Allah, but was in fact repugnant to His injunctions. On the contrary ; we will be given a reward for taking the second course.

And in making a mistake, Ibn Hazm goes on to say, never had a prophet intended to disobey a Divine order or drawn himself near a prohibition. The prophets were infallible, immune from the sin of disobedience. And whenever a prophet made a mistake, he made it in good faith, thinking that in doing so he was complying with Allah's orders and injunctions. In some such cases, a prophet would think that his action was permissible and that he had to exercise his reasoning faculty. The question he dealt with had neither been made binding nor was it made unlawful.

The Prophet Mohammad, Ibn Hazm says, had not been blamed for forgetfulness in performing a prayer, and in this, unlike other prophets who had done the same and were rebuked, Mohammad stands unique, because he was privileged by Allah Who covered for him his shortcomings in the past and those to come. (1)

(1) Al-Milal wal Nihal : p. 2.

12 — Ibn Taymiyyah states that the prophets were incapable of erring in their preaching and their delivery of Allah's Messages. Contrary to them are other humans, including the friends of Allah whom He honours with His love and favour.

Infallibility of cases other than those related to the delivery of Divine Messages was a controversy-subject among imams.

The majority of opinion, which coincides with the predecessors' judgment, is that the prophets were infallible against accepting or approving an error or a sin committed by anyone else. They had never overlooked such.

Those who opine that the prophets were incapable of erring are getting support from the ordinance that the prophets had to be followed and imitated by their followers. To be set as example, they had to be free of any shortcoming.

And it is true that imitation of the action and deeds of the prophets is legalised and validated, but only in matters that they had been approved to do, and not in that what they were prohibited to do. Allah's commandments and prohibitions are abiding but in not the abrogated verdicts. Abrogated verdicts are not to be observed rather than followed or obeyed.

This body of imams also opine that sins and mistakes are

inconsistent with perfection and that such would place the erring at a distance from other people.

And in our opinion this is again true, but only in case such errors or sins continue to be committed, otherwise sincere repentance, after which the erring is elevated to a status higher than that he enjoyed before, as some pious predecessors decide, will be of no avail.

Man is created by Allah without having any knowledge or learning. He was educated by Him later, changing position from a state of imperfection to another of perfection. And man is not judged by what he was in before, but by what he had reached later. And in the second stage, Yunus (Jonah) and other prophets procured the highest of status and perfection after repentance.

Whenever a prophet wronged, he would soon hasten to beseech repentance and forgiveness from Allah. Proof is given by the Qur'an. Never does it refer to a wrong made by a prophet without associating the case with penitence and forgiveness.

Adam and his wife said : " Our Lord ; we wronged our own souls. If Thou forgive us not and bestow not upon us Thy mercy, we shall certainly be lost. " (1) Noah would

(1) Surat Al-A'raf : 23.

also entreat Allah thus ; " O,my Lord ; I do seek refuge with Thee lest I ask Thee for that of which I have no knowledge. And unless Thou forgive me and have mercy on me, I should indeed be lost. " (1) Ibrahim also said : " And Who. I hope, will forgive me my faults on the Day of Judgment. " (2). Again, Moussa would beseech Allah thus : " O,my Lord ; I have indeed wronged my soul. Do Thou then forgive me." (3) And : " When he recovered his senses, he said : 'Glory be to Thee. To Thee I turn in repentance, and I am the first to believe. " (4) Dawoud also : " Asked forgiveness from his Lord, fell down, bowing (in prostration), and turned (to Allah in repentance). So We forgave him this (lapse). He enjoyed indeed a near approach to us and a beautiful place of (final) return. " (5)

And never had the prophets delayed expressing repentance. They were quick to regret their faults. He who delayed repentance was expiated by Allah by afflicting him with a tribulation, as it was the case with " Zul Noon, " Yunus, who was swallowed up by a whale, an incident that took place after he had received the Message, as opined by imams. (6)

(1) Surat Hud : 47.

(2) Surat Al-Shu'ara : 82.

(3) Surat Al-Qasas : 16.

(4) Surat Al-A'raf : 143.

(5) Surat Sad : 24-25.

(6) Read Verse 88 of Surat al-Anbiya', and 148, of Al-Saffat.

Had the incident taken place before having been entrusted with the delivery of his Message, then there was no need for tribulation and expiation.

The Qur'an and the Sunnah refer extensively to the question of repentance and forgiveness, but still there are some people, like " Al-Batiniyyah " (1) and others, who twist the meanings of the Qur'an and distort their implication.

Interpreting the verse : " That Allah may forgive thee the faults, of the past and those to follow " (2), for example, they opine that " forgive thee thy faults " refers to " the faults of your nation ". And this is incorrect, because as Allah says : " Every soul will be (held) in pledge for its deeds, " (3) and also : " But if ye turn away, he is only responsible for the duty placed on him and ye for that placed on you. " (4)

Not only that ; Allah differentiates between the faults of a Prophet and those of his nation. Allah says : " And ask forgiveness for thy fault, and for the men and women who believe " (5). How then could the faults of all the believers

(1) A sect that believes that the Shariat has its ins and its outs and interprets the Qur'an in a different way.

(2) Surat Al-Fath : 2.

(3) Surat Al-Muddathir : 38.

(4) Surat Al-Nur : 54.

(5) Surat Mohammad : 18.

be considered as faults committed by the prophets ?

When this verse " And ask forgiveness for thy fault, and for the men and women who believe " was revealed, some of the Prophet's Companions restricted their approach to their wives and began to establish regular and continuous prayers to Allah in the hope of coming closer to Him. But when the Prophet was informed of their behaviour he became angry, and said : " I perform prayer and do sleep ; and I fast and break fast ; I take women in marriage. Then whoever deviates from my path is not of me. " The Companions replied : " But we indeed are not like you, Messenger of Allah. Allah has forgiven your faults, of the past and of the future. The Prophet said : " I am more devout than you ; and I know Allah better than you do. " (1)

This clearly denotes that the wordings of the verse " And ask forgiveness " were addressed to the Prophet alone, and not to his nation.

The Sahih quotes the Prophet as having made this entreat : " May You, Allah, forgive me my fault and my glimmering and whatever you know more of me ; May You, Allah, forgive my talking lightly, my seriousness, and my faults made deliberately and undeliberately. And all these are attributes that I may be possessing ".

(1) Al-Bukhari.

According to the two Sahihs, the verse of Surat Al-Fath was revealed to the Prophet after his return from Al - Hudaibiyah. And after its revelation, the Prophet declared : " Revealed to me this night is a verse that I like more than all that is on earth ". Then he recited the verse to the Muslims. They said : " Congratulation, Prophet of Allah. Allah has announced how He is treating you ; but what about ourselves ? " Here, this verse was revealed : " That He may admit the men and women who believe to Gardens beneath, which rivers flow to dwell therein for aye, and remove their ills from them, and that is, in the sight of Allah, the highest achievement (for man) ". (1)

Al-Mughira is quoted by Al-Bukhari as having said that the Prophet would continue performing prayers until his feet or legs were swollen. And when he was asked why he was doing so since Allah has pledged to forgive all his faults, he said in reply : " Would not I be a perpetual grateful servant ? "

All these statements, and others, refute the allegation that the forgiven faults and sins, referred to in the verse, are those of the nation of the Prophet. (2)

(1) Surat Al-Fath : 5.

(2) Fatwas of Ibn Taymiyyah : vol. 2, pp. 282-294.

13 — All the reported and rational arguments, and also the facts and realities, assert that some of the ordinances had not been received and known except through revelation. In such a case the Prophet had to pass verdicts according to revelation ; and sometimes he waited until the revelation came with the awaited judgment. On several occasions, when no provision was available, the Prophet exercised his reasoning faculty, and when his reasoning was correct, it was approved by Allah, otherwise it was corrected by His inspiration.

After the Prophet's death, the Wise Caliphs sought verdicts in the Book of Allah and in the Traditions of His Messenger. Had a verdict been not found therein, they would exercise their judgment and consult with each other. (1)

And many were the statements which were made by theologians to refute the allegation of those who denied the Prophet his right to exercise judgment, and who claimed that his verdict on certain occasions, and his holding back of some other judgments to give way to some others' judgment, on other occasions, was an action that had been taken through a revelation. (2)

(1) Ijtihad by the Prophet's Companions : A'am al-Muwaq'in, by Ibn al-Qayyem : vol. 1, p. 244.

(2) Fawateh Al-Rahamut : vol. 2, pp. 267-268. Also Al-Musstafa, of Al-Ghazali : vol. 2, p. 356.

14 — Specimens of the Prophet's Ijtihad :

(a) The Prophet wished that the Sacred House be the Qiblah towards which he would turn his face in prayer. His aspiration was realised.

Al-Boukhari quotes Al-Barra' ibn 'Azeb as having narrated that at the outset, the Prophet turned his face in prayer towards Jerusalem, and this lasted for sixteen or seventeen months, but he was full of desire that the Sacred House should be the Qiblah. His desire was favourably responded to, and a Revelation came to him : " We see the turning of thy face (for guidance) to the heavens. Now shall We turn thee to a Qiblah that shall please you. Turn then thy face in the direction of the Sacred Mosque. " (1)

Ibn Magah quotes Abu Bakr ibn A'ash as having said : " We prayed with the Messenger of Allah with our faces turned towards Jerusalem for eighteen months, after which time the Qiblah was directed towards the Ka'bah. "

Another version of the story is giving by Ibn 'Abbas, as introduced by Ahmed. He said : " When the Prophet was in Makkah, he would turn his face in prayer towards Jerusalem, and at the same time, towards the Ka'bah because it was in the same direction. But when he migrated to Madinah,

(1) Al-Baqarah : 144.

and it was difficult for him to direct his face towards both the directions (for the change of the geographical position of Makkah), he turned his face only towards Jerusalem. The Prophet's desire to turn to the Ka'bah was prompted from the fact that the Ka'bah was the Qiblah of his forefather Ibrahim, and since he was entrusted with the revival of his faith and the reactivation of his Call, the Prophet desired that the Ka'bah should be his Qiblah. For the Ka'bah to be the Qiblah was more attractive and persuasive to the Arabs to embrace Islam. They were the nucleus of the religion who laid down the basis of the Call.

On this occasion, the revelation was reluctant in responding quickly to the Prophet's request, with the result that the Prophet began to exercise his reasoning faculty in the form of a desire and longing which were later responded to by Allah favourably. The subject in which he exercised reasoning became henceforth an established and legalised ordinance decreed by his Lord. (1)

(b) On certain occasions the Prophet decided to exercise reasoning in a certain matter but gave it up later, realising that it was better for him to stop.

One evening, the evening prayer was delayed a little while

(1) Fath Al-Bari : vol 1, p. 319.

by the Prophet for some reason, and when he came out to the mosque, he found the congregation reduced to a small number of worshippers. The Prophet, as Moslem says, became angry.

And as Al-Bukhari reports, (1) on the authority of Abu Hurayrah, the Prophet, referring to the incident, said : " By Whom in Whose hands is my soul, I was about to ask for some wood to be brought, to ask the Mu'azzin to call for paryer, to delegate someone to lead the prayer, then to slip behind and set fire to their houses and people therein (for not attending the prayer). By Whom in Whose hands is my soul ; had anyone of them been sure that he would find in the mosque a fat bit of meat or two nice boards for training on missile-throwing, he would have hastened to attend the evening prayer. " (2)

But the Prophet abstained from doing so, because might thought of some other action he should take in this regard, or because he might have received an inspiration preventing him from doing what he thought of.

(1) Vol. 2 (Section : Congregational Prayers, p. 102).

(2) According to Ibn Hajar, this is a denouncement of those who lag behind, taking no part in a congregational prayer, preferring to it search for something to eat or to play with.

Another example of self-restraint by the Prophet is this story :

" We were sent forth by the Messenger of Allah to do some work. He ordered us that as soon as we would see so and so, two men from Quraish, we had to burn them by fire. And when we came to bid him farewell before leaving, he said to us : " I had previously ordered you to cast so and so into fire ; but the fire is the chastisement which is inflicted by Allah alone. If you would take hold of them, kill them instead' . " Reporting the same story, Ibn Ishaq quotes the Prophet as concluding, " I have realised that no-one can punish someone else with burning except Allah. "

Commenting on this saying by the Prophet, Al-Hafez Ibn Hajar says in (Fath Al-Bari) that a Mujtahid can produce something through his exercise of reasoning, and abandon it later.

In (Al-Maghazi), Al-Bukhari quotes Maslamah Ibn Al-Akwa', may Allah be pleased with him, as having said : " Once we went forth to Khaybar with the Messenger of Allah. When we reached our destination, we laid seige to the people and continued to do so until we were afflicted with hunger. But when Khaybar surrendered to the Muslims, the Muslims lighted many fires in the evening ; and when

the Prophet enquired about what was going on, he was told : " We are cooking meat. " The Prophet asked : " Which meat ? " They said : " It is flesh of domesticated donkeys. " The Prophet said : " Throw it out and break the cooking-pots. " One of the Companions asked : But can not we throw down the contents and keep the pots after washing them instead of breaking them ? The Prophet agreed to the proposal. (1) Thus, the cherished objectives were achieved, to confirm the prohibition of eating the flesh of domesticated donkeys, and the preserve of utilities by not disposing with the pots that were difficult to replace while on journey.

The Prophet's verdict firstly was to break the pots, then he agreed that they could be kept intact, but cleansed properly, and this was in the common interest of the people.

(c) Prophet's Ijtihad in general prohibitions :

The Prophet is quoted by Al-Bukhari, (2) on the authority of Ibn Shuraih, as having said : " Makkah is sanctified by Allah, not by men. No man who believes in Allah and in the Last Day is allowed to shed blood or cut down a tree in it. "

(1) Khaybar Expedition : vol. 7, p. 375 (Al-Bahiyah Printing House, Cairo).

(2) Vol. 4, pp. 33 and 38. Also "Fath Al-Bari."

Another version of this Hadith is given by Ibn 'Abbas. The Prophet said : " This town is made sacred and inviolable the day Allah created the heavens and the earth ; and it will remain so till the Day of Judgment. No-one before me was allowed to fight inside it except myself ; and fighting had been allowed to me only for an hour in the day. No trees or any plant therein should be cut down ". Here, Al-'Abbas interrupted, saying : " Except Al-Izkhar, (1) O, Messenger of Allah. It is used by the craftsmen and in erecting the houses of the people ". The Prophet agreed, saying : " Except Al-Izkhar. "

In generality, Al-Izkhar, treated as any other plant, was ordered not to be cut down, and on finding that it was utilised extensively, its cutting down was made lawful.

(d) Jaber Ibn 'Abdullah is quoted by Al-Bukhari as saying that when the Prophet went forth to Hajj with his Companions, no-one had with him an offering for sacrifice except the Prophet and Talha. (2) Companions having no offering were

(1) Al-Izkhar is a plant known to the residents of Makkah. It has a sweet smell, used with timber in erecting roofs of houses and also in making fire.

(2) According to Moslem and Ahmad, those who brought offering, other than the Prophet, were Abu Bakr, 'Umar and some of the wealthy.

permitted by the Prophet to make the journey for 'Umrah, to circumambulate the Ka'bah, to cut small parts of their hair and to doff their Ihram garbs, But these men disliked to go afterwards to Mena after having been allowed to do everything, and to approach their wives and enjoy all lawful pleasures. When the Prophet was informed of this complaint, he said : " Had I acted as before, I should not have made the offering, and it not been for the offering that I had, I would have ended my Ihram. "

The Companions abode by the Prophet's command ; and those who had no offering ended their Ihram.

(e) Another example is the grief the Prophet felt after going inside the Ka'bah. (1)

'Aisha, may Allah be please with her, is quoted by Ahmad in his " Musnad ". and by Ibn Dawoud, Al-Tirmidhi and Ibn Magah, as having said : " Once, the Prophet left my chamber fully happy, but when he came back, he was sad. I enquired : O, Messenger of Allah ; you left me and you were full of happiness ; what has happened ? He said : 'I entered into Ka'bah and wished that I should not have done so. I am afraid that my nation would be seized with fatigue (in following suit) after me. "

(1) Nayl al-Awtar, of al-Shawkani ; vol. 5, p. 84.

This story denotes that the Prophet had entered the Ka'bah by his own judgment, but he later wished that he should not have done so lest his nation would follow his example after his death. He regretted his action ; and this was another exercise of judgment by him.

These examples, however, produce the evidence that the Prophet had exercised his reasoning faculty in various issues of religion and legislation.

Any of his judgments, which were approved by Allah, have become a law binding on his nation. The Qur'an itself speaks of his Ijtihad and how some of it was approved, and some others corrected. It talks of the captives of Badr, the story of Ibn Umm Maktoum and of Zaid ibn Haretha and his wife, as well as his permission to some of the Hypocrites to stay at home and not join the Muslims in going forth for the Battle of Tabuk. This authorisation was given not by way of inspiration, but of exercising his own judgment.

Books of Sunnah present much of the Prophet's Ijtihad, such as his reasoning with his Companions in the manner how " Azan " should be performed, calling people to prayer and also in the way the idolaters were persuaded to embrace

Islam (1) by accepting their unfair conditions. Included in this category is the Prophet's prohibition of man making sexual intercourse with his wife during the period she is suckling a baby, and the cancellation of his verdict later. (2)

The Prophet's judgment that " a woman is not to be taken in marriage if the husband is already married to her aunt (paternal or maternal) or her neice, lest ties of kinship are cut off " was made in conformity with the Qur'anic text prohibiting taking two sisters in marriage by one man at the same time. Similar to this verdict is the other Prophetic ruling that " a male and a female who had suckled from one woman are not to marry each other, exactly as it is the case with kins subject to this rule. " This verdict, and Allah knows better, was passed in judging a thing to which there is no direction in the Qur'an with comparison to another thing having a provision in the Book. This opinion is endorsed by the report of Umm Salamah, may Allah be pleased with her, when she quoted the Prophet as having said : " I exercise

(1) Al-Fath al-Rabbani ; vol. 1, p. 92. And Nayl al-Awtar, of Al-Shawkani ; vol. 7, p. 199.

(2) Or, as Ibn Al-Sukkait says, when a wife is suckling a baby and is pregnant at the same time. The Prophet feared that the suckling infant might be harmed in a way or another.

my reasoning faculty and pass judgment to you in matters not covered by revelation" (1).

15 — Qiyas is a process of deduction by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of the text.

The Prophet had exercised his reasoning and resorted to Qiyas in several matters, either of this worldly life or the Next.

(a) 'Umar is reported to have told the Prophet once : " O, Messenger of Allah ; I have done today something grave. I kissed while I was fasting ". The Prophet said " Then rinse your mouth with water. " Here, he opined that the kiss did not violate the fasting since it entailed no spermatisation, and this was likened to rinsing the mouth with water, which did not go the stomach.

(b) Ibn 'Abbas reports this story : A woman from the tribe of Juhaina came to the Prophet, saying : " My mother vowed to Allah that she would perform Hajj, but did not

(1) Al-Mustasfa, of Al-Ghazali ; vol. 2, p. 255 ; and The Prophet's Ijtihad, by the late Shaikh Abdel Jelil Issa.

fulfil her promise and died. Can I discharge the obligation in her favour ? " The Prophet said : Yes, can. If your mother was in debt and you wanted to pay it, would it not be accepted from you ? " The woman said : It will. The Prophet said : " Then Allah is more deserving, and He will accept the repayment (of your mother's debt) ". Here, a debt of a man is likened to that of Allah ; both of them are to be re-paid.

(c) Once a bedouin approached the Prophet, saying : " My wife gave birth to a black child, and I disowned it. " The Prophet asked the man : " Have you camels in your possession ? " The man said. Yes. The Prophet enquired : What are their colour ? The man said : They are reddish. Then the Prophet asked him : Is there some with brown colour ? The man replied in the affirmative. The Prophet asked : How had the camels got this colour ? The man replied : It might have come from previous camels of the same lineage. The Prophet then said : And the colour of your child might have been got in the same way.

(d) Al-No'man ibn Bashir is quoted by Al-Bukhari as having said : Once I heard the Prophet tell this story. Those who abide by Allah's laws and those who disobey His commandments are like two groups of people, the first was

on board a ship, and the second in its hull. The latter would tell the former : To get our need of water, we will make a hole in the hull and get it through it. If the former leaves the latter to do what they thought of, all the passengers will be drowned, and if they prevented them from doing so, everyone will be saved.

According to this Qiyas, any community has the right to resort to an action by which they would repel evil and harm.

(e) Al-Bukhari, Moslem and Ahmad quote the Prophet as having ordered : " Do not milk an animal that is not yours unless you are permitted by its owner to do so. Do anyone of you like to see someone else seizing illegally what he had deposited in his safe ? Udders of cattle are the property of their owners, "

Here, udders are likened to safes (1) If Qiyas is resorted to by the Prophet of an ordinance likened to a doctrine or belief, the verdict is correct, because in this case, the-

(1) Fath Al-Bari (Section : Qiyas) ; vol. 7, pp. 68-69 ; and vol. ; 8, p. 215 ; and vol. 12, p. 142. Also A'lam al-Muwaq'in ; vol. 1, pp. 238-239. Also "Qiyas by al-Nabi al-Moustafa," by Imam Nasihuddin al-Ansari, alias Ibn al-Hambali, d. in Muharram, 634, A.H.

ordinance has become a doctrine. Ijtihad by the Prophet can never be disputed or rejected by Ijma. " (1)

16 — Following are examples of the Prophet's verdicts :

(a) Al-Bukhari, Moslem and Malek quote the Prophet as having said : " I am amortal. Two disputants may come to me for decision, and one of them might have stronger evidence, and as a consequence, I pass a judgment in his favour, under the impression that he was truthful. If anyone is thus given a right. Not of his but of his brother, let him not take it, because in such a case he is given by me a portion of fire. "

In this, the Prophet sets of himself a good example for litigation. He would hear both the parties' evidences and pass his judgment on the strength of evidence and the pleas of adversaries. He also warns against usurpation of others' rights even if a favourable judgment was passed to this effect.

(b) In " Al-Muwatta ", Malek says that once a she-camel of Al-Barra' ibn 'Azeb broke into a garden of another man, destroying all the plant therein. The Prophet's verdict was

(1) Al-Mustasfa, of Al-Ghazali ; vol. 2, pp. 355-356 ; and Fawateh al-Rahamut, pp. 366-367.

this : gardens are to be protected by their proprietors during the day, and if cattle break in and destroy their harvest in the night, compensation must be paid by the owners of the cattle.

(c) 'Aisha is quoted by Abu Dawoud as having said : no cook was better than Safiyah. Once she prepared a dish and sent it to the Prophet while he was in my chamber. I was full of jealousy and I broke the plate into pieces. Then I asked the Prophet : "What is the expiation of my act ?" "You should bring back a similar plate, and a similar food," he said.

(d) In a book compiled, Ibn Abu Shaibah quotes Jaber as having narrated this story : A woman from the Ansars was presented a plot of land with palm-trees by one of her sons. When she died, his other brothers wanted to have their share in the inheritance. The donor protested. "But I had given the garden to her in charity during her life-time", and when the Prophet was approached for a decision, he decreed that the garden had become her's, either during her life-time or after her death. Therefore, it had to be given in shares to all the heirs.

(e) The same book, and other books of Seerat, tell the following story : A detachment seized some money which

was kept by Abu al-Aasi, husband of Zainab, daughter of Prophet. The man fled the place, but to return later in the night, seeking refuge and protection with Zainab, trying to get back his money. When the Muslims were called to perform their dawn-prayer, Zainab shouted, as was the custom of women, saying : " O, people ; I have given protection to Abu al-Aasi". When the Prophet ended his prayer, he came out to the people, enquiring : Have you heard the same that I have heard ? They said : Yes. He said : " By Whom in His hands is my soul, I did not know anything of this until I heard what you yourselves have heard. Anyone, whatever inferior he might be, is to be given protection by the Muslims if they had been asked for. " Then the Prophet entered Zainab's residence, saying : Extend to him hospitality, but be careful that he is no more your husband. The Prophet returned to the Muslims, telling them : " If you give him back his money, and this is only what he aime at, it will be an act of benevolence on your part ; and if you refuse to do so, you are entitled to keep the money as a spoil of war ". His money was then returned to him, and when Abu Al-Aasi went forth to Makkah, he paid all his debts to the Quraish. And when they expressed their thanks, describing him as faithful and generous, they were surprised to hear him say : " I bear now witness that there

is no god but Allah, and that Mohammad is His Messenger. By Allah ; I have not withheld my conversion to Islam, while with him except for fear that you might think that by so doing I wanted not to pay you your money. But now, that your debts have been re-paid to you by the will of Allah, I declare that I am now a Muslim. " Then he left the place and headed to meet with the Prophet.

On another occasion, when Umm Hani, daughter of Abu Taleb, told the Prophet that in the year Makkah was conquered by the Muslims she had given protection to a man, the Prophet replied : " We had done the same previously, O, Umm Hani. "

17 — Numerous were the decisions made by the Prophet on the belief itself and also on the Shariat, among which are the following. They guide the Muslims to their well-being, either in this worldly life or in the Next.

When the Prophet was asked once about kindness, he said : " It is to serve Allah as if you see Him in front of you ; if you do not see Him, He is seeing you. "

And when he was asked on another occasion about those to whom this verse is referring, " And those who dispense their charity with their hearts full of fear ", he said : " Those

are who fast, establish prayer and give in charity and fear lest their hearts be not good enough to be accepted by their Lord. "

Once, when a sheep, slaughtered without permission of its owner, was presented to him, he ordered that it should be offered to the prisoners of war.

Once again, he was asked for a decision regarding a woman who pledged to go forth for Hajj on foot. Bare-footed and unveiled. He ordered that she must go riding on a beast, putting a veil, and then fast three days.

A man told the Prophet once that he vowed to Allah to sacrifice some camels at a certain place called Bawanah. The Prophet enquired : " Had in this place been an idol which was worshipped in the pre-Islamic days of ignorance ? " The man said : No. Then the Prophet asked : Had its people observed one of their feasts ? The man said No. The Prophet said : Then you can effect your vow to Allah, because vows are not to be carried out in matters repugnant to Allah's commandments or in things not owned by the man making the vow.

Once the Prophet was asked by a man : Shall Allah forgive me my faults if I am killed struggling for His cause,

courageously and resolutely ? The Prophet said : Yes. And when the man repeated his query more than once, the Prophet said : Yes ; except in case of a debt which is to be re-paid. This was revealed to me through Gabriel."

A bedouin asked the Prophet : Is it permissible that we treat our illnesses by ourselves ? The Prophet said : Yes ; and for any illness caused by Allah there is a remedy prescribed by Him. Such remedy is known to some, and blacked out from some others.

And when the Prophet was asked on another occasion : O, Messenger of Allah : Would our fate destined by Allah be changed after invocation of a holy name, after remedy we take to cure an illness, after a prayer we perform so that an ailment is healed ? The Prophet replied : But these are also destined by Allah.

And when the Prophet was asked once about the responsibility of a doctor, he decreed that anyone who pretends to be able to practise medicine, with no knowledge of the art at all, must be held responsible for his acts. This verdict denotes that if the man was really a doctor, and has made a mistake in treatment, he is not held responsible for his fault.

A man told the Prophet once that he saw in a vision as if he was beheaded and was running after his head. The Prophet told the man : Do not tell people of the devil's tampering with you in your sleep.

And when, on another occasion, he was asked about the meaning of this verse : " For them are glad tidings in the life of the present and in the Hereafter," the Prophet replied : " It is a good vision that a virtuous man sees, in his dream, or that which is seen of him by another dreamer."

18 — Conclusion :

In sum, the following points are to be taken into account :

- I - that the Prophet Mohammad, may Allah's peace and blessing be upon him, was authorised by Allah to exercise his reasoning faculty in matters of worship.
- II - that he exercised judgment in the affairs of this life as well as of the Next, and that he was not to wait for a revelation. If his verdicts were sound and correct, they got the approval of Allah, otherwise they were corrected through revelation. Not had an error been approved by revelation.

III - that his Ijtihad covered worships, such as the prayers, the fast and the Hajj, and all affiliated subjects pertaining to supplication and forgiveness.

IV - that his opinion was sought in divination and matters of the unseen, such as the destiny of non-Muslim infants in the Hereafter, and Allah's punishment He inflicted on peoples of yore, and their transformation into animals. When he was asked whether these creatures could breed, the Prophet said that they could ; but later, he abrogated his judgment. The abrogated verdict had of course come out either through another exercise of reasoning or through inspiration.

V - in some cases, it is established that after passing a certain verdict, on a given issue, reached through reasoning, the Prophet incorporated another which he deemed corresponding. This means that the first verdict was rectified by a revelation. Some reports quote the Prophet as having sometimes told his Companions that a certain verdict was transmitted to him through Gabriel on certain issues pertaining to religion, legislation, worldly affairs and divination.

VI - that the rectification of an incorrect verdict of the Prophet was received through inspiration in no fixed time. If a correction was not received at all, then the judgment was left to the Prophet to pass. Some of this incorrect judgments had never been rectified by inspiration, as it was the case with his reasoning in trimming and pruning of palm-leaves.

VII - that since the visions seen by prophets, including Prophet Mohammad, in their sleep were a sort of inspiration, these visions were certainly projecting realities, treated exactly as a revelation. Imam Ahmad quotes Samra ibn Jundub (1) as having told that in a vision, the Prophet saw an old man with young children inside a rosy garden. The Prophet construed that the old man was the Prophet Ibrahim and that the young children were the newly-born infants, in godly nature, with which all men were created. The green garden was Paradise, in which they were residing. The Companions asked : " But what about the young children of the idolaters ? " The Prophet said : " They will be treated as the other infants. "

(1) Musnad Imam Ahmad ; vol 5, p. 9.

VIII- that whenever a judgment was made by his Companions in his presence, without having been commented on by him, the judgment had not necessarily been taken as correct or approved. He might have kept quiet, without any comment, because he might not have liked to deny or refute the decision, or because he was waiting for a relevant revelation. (1) The Prophet's abstinence from making any comment on a judgment made by someone else might have been due to his desire to make things easy and to draw people to Islam, assuredly aware that the person involved will abide later by his Traditions and behaviour. This happened, as reported by Imam Ahmad, (2) on the authority of 'Uthman ibn Abi al-Aas, when the Prophet accepted conversion to Islam by the Tha'qif delegation on their own conditions. Again, this is seen in the story of the wife of Safwan ibn al-Mu'attal, (3) who came to the Prophet to complain

(1) Fath al-Bari ; vol. 13, pp. 276-279, quoting Al-Bukhari as reporting on the authority of Mohammad ibn al-Munkadir, his saying : "I heard Jaber ibn 'Abdullah swear by Allah that Ibn al-Sayyad is the Pretended Christ. I interrupted : Do you swear by Allah ? He replied : I heard 'Umar Ibn al-Khattab take the same oath when he was in the presence of the Prophet. The oath had not been remonstrated by the Prophet.

(2) Vol. 4, p. 218.

(3) Fath al-Bari : vol. 8, pp. 371-372.

that whenever she performed a prayer, she was beaten by her husband, and that whenever she fasted, she was forced to break her fast. Safwan, the husband, was present at the meeting, and when he was asked to justify his behaviour, the man said : " I beat her in her prayer because she insisted on reciting the verses concerning the lies concocted against 'Aisha by some mischievous persons. I prohibited her from reciting these verses in her prayer. (1) As to her statement that I had compelled her to break her fast, this was because since I am a young man, I could not abstain from making sexual intercourse at any time. And when she says that I do not perform my dawn-prayer except after sun-rise, I would like to protest, because it is known to everybody that all the members of our family, and myself inclusive, do not get up except after sunrise."

This story was reported by Abu Dawoud, Al-Bazzar, Ibn Sa'ad, Ibn Hayyan and Al-Hakem. And to Al-Hafez ibn Hajar, the transmitters of this statement are known to be truthful and strict in reporting.

(1) Al-Nur ; 11-23. It was this Safwan, who was in the rear of the caravan, who carried 'Aisha on his camel and caught up with the rest of the people. 'Aisha was slandered by some of the Hypocrites who spread false reports about her.

And no-one has reported that even one word was uttered by the Prophet in comment on Safwan's justification. He might have kept silent in a bid to encourage him to remain firm in his faith and also to facilitate the obligations of the religion to him, believing in the meantime that he would later comply with his Traditions and behaviour.

Winding up my treatise, I entreat Allah to lead us to the proper path. Glory be to Him highly exalted be He. Who knows everything better than anyone else.



TOPIC II



The Flexibility Of Shari'ah
(Islamic Law)

In The Name OF Allah, The Beneficent, The Merciful

Introduction :

Allah, the Almighty, said :

” One day We shall raise from all peoples witness against them, from among themselves. And We shall bring you as a witness against your people. And We have sent down to you the Book explaining all things, a guide, a mercy, and glad tidings to Muslims. (1)

Imam Malek, in al-Muwatta’, reported the Prophet, peace be on him, as saying :

” I left with you two things, you will be guarded against misguidance so long as you hold fast to them : The Book of Allah and the Traditions of His messenger ”.

We note here that to say that the Book of Allah is explaining all things, as it is stated in the verse recited above, does not mean that the Qur’an includes all the details and cases of things. In fact, the Qur’an does not engage much in such details. Its rules came in the form of general principles and all-inclusive laws that may be applied on the details of the daily life of people. What the Qur’an introduced in detail was few in certain legal rules concerning such

(1) Surat Al-Nahl : 39.

matters as the laws of worship, inheritance, family rules, and the punishment of certain crimes. So the general principles of the Qur'an are immutable laws which cannot be violated, and can be applied in all cases and circumstances.

The Holy Qur'an is the first source of legislation in Islam. It explains all things in the meaning that it includes in general the principles which are the basis of all laws and orders.

The Holy Qur'an orders justice, consultation in the matter of government ; it removes difficulty in its ordinances, establishes the observance of the rights of all peoples, and the returning of due trusts to their people, reference to the people of knowledge in their speciality.

The Holy Qur'an is explaining all things because it contains all purposes for which Allah, ta'ala, sent down all His previous laws, and which was concluded in His last Book.

These purposes for which all the Divine legislations came, aim to keep and preserve religion, life, reason, posterity, and property. In each divine legislation there were different methods to safeguard those purposes, and strengthen their foundation, and defend them against the factors of decay in order that those fine purposes may function properly.

The Prophetic Tradition comes second after the Holy Qur'an

to explain and complete it. It lays down examples to deduce more legal rules by way of (Ijtihad). Such examples are made easy for the concerned people of authority to apply them on whatever of cases that may happen. The Tradition establishes, moreover, reasoning, analogy, and setting of examples.

The Prophet, peace be on him, explained by his actions and sayings the rules of what may happen to people of all cases. The Prophet received such explanation either from the divine revelation or from his own reasoning. The legal rules which resulted there of were a solution to the problems of the temporary situations in his time, or were mostly general principles and laws that suit all ages.

The Traditions laid down valuable ethical rules, different forms of worship, laws pertaining to the construction of family, to the different human transactions to the criminal justice, and to the international relations. All these were set in such a wonderful system which establishes the internal and international peace and order.

As to as the personal behavior, we find in the Traditions of the Prophet good examples in the moral ways of eating, drinking, cleansing, sleep, salutation, conversation, traveling, residence, health, sickness, riches, poverty, war, and peace.

All these forms of morality are to be found in the Tradition in full detail and valuable examples.

The Prophet, peace be on him, used the method of analogy and reasoning. For this purpose he knew how combine the similar cases together, to differentiate among distinct things, and to join the details of rules to their respective original laws. He used to do this in the field of legislation, directing the attention — as did the Holy Qur'an — to the wisdom behind the legal rules.

This is really a flexibility in the Islamic law which guaranteed for it the eternity that comprehends all new cases and circumstances.

Fundamental Legal Principles in the Qur'an and the Traditions:

If we look to what is given in the Qur'an and the Traditions of legal general principles, we fully realize that these principles do not allow any violation regarding the aims of the Islamic Law. They only allow certain flexibility in some questions which soon cease when are fulfilled. As examples about that is the amount of price in sale or the fixation of term in debts, and such matters which are related to the parties of contracts, and which do not affect the original principles of transaction as explained in the Qur'an and the Traditions.

So the fundamental legal principles in Islam have the merit of firmness and durability, and thus they are far from change which causes confusion in transaction and prevent trust among people. These principles, at the same time, are flexible enough to meet the ever changing cases and circumstances.

The Islamic Law, in this way, preserves its fundamental principles, and protects the society from the danger of the wrong development that does not suit its original interests. Flexibility comes only regarding minor questions and under the necessity of changing times and customs.

In this respect, Al-Sha'tiby, said in his famous book (Al Muwafaqa't) (1) :

“ The events of daily life are of two kinds : the first are those which do not differ in time, place, and circumstances, such as eating, drinking, joy, sorrow, sleep, awakesness, love, hatred, resort to lawful pleasures and keeping away from painful and unlawful things. The second are the events which differ in time, place, and circumstances such as the ways of dress, residence, leniency and roughness, slowness and haste in dealing with situations and such like. ”

This saying of alSha'tiby is true since the instinct in man is unchangeable. What actually changes with him are the ways and means of this dealing with things in his daily life.

It is out of question to think that the flexibility of Islamic Law means that it approves every kind of customs and transactions. In fact some of these customs and transactions are harmful and do not suit the aims of Islam and the interest of Muslims.

In this way the Islamic Law fulfill its role in guarding Humanity against misguidance and immorality. The flexibility of Islamic Law is still precise and well established. Therefore it realizes for society the way of good development which is free from the factore of decay and deviation.

(1) Vol. 2, p. 297. (Cairo : Al-Maktaba Al-Tijariyya). Edited by Abdullah Diraz.

This characteristic of the Islamic Law is far supreme above what the jurists of positive laws are inclined to manage regarding the development of justice and its criterion in all times. Those jurists subject legislation to every kind of social ills and to all types of deviations. As a result of such tendency we find, for example, that some states established rules regarding abnormal sexual behavior and even approved it together with other forms of immorality. This was based upon what they called the right of legislators to legislate. This idea destroys the social interests which the Islamic Law preserves and guards.

The firmness of the principles of the Islamic Law did not lead to rigidity in application because of its flexibility and convinience. Therefore, the Muslim imams knew how to set for people a middle course in legal rules, avoiding all kinds of trouble and difficulty.

It was through the control of the high aims of the Islamic Law over the individual events in society, that good intention and mutual trust prevailed among people, and that transactional relations with convinience were established in a way that is not to be found in the materialistic positive systems of our time. These systems are lacking the religious authority which fills the hearts of Muslims in submission to the rule of Islam.

Examples from the General Principles of the Qur'an and the Traditions :

If we look to the Book of Allah and what it contains of general principles, we find among them what may be explained in the following verses :

Allah, the Almighty, said :

" O you who believe, eat not up your property among yourselves in varieties, but let there be among you traffic and trade by mutual good-will, nor kill or destroy yourselves. For verily Allah has been to you most Merciful. If any do that in rancour and injustice soon shall We cast them into the Fire ; and easy it is for Allah " (1).

He, the Almighty, said :

" And give the women (on marriage) their dower as a free gift ; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer" (2).

He, also, said :

" If any one transgresses the prohibition against you, transgress you likewise against him. And fear Allah, and

(1) Surat Al-Nisa' : 29-30.

(2) Surat Al-Nisa' : 4.

know that Allah is with those who restrain themselves (1)

He, also, said :

" There is no soul takes sin instead another's " (2).

He, the Almighty, said :

" Man can have nothing but what he strives for " (3).

He, also, said :

" On no soul does Allah place a burden greater than it can bear. It gets every good that it earns, and it suffers every ill that it earns " (4).

He, Subhanah, said :

" Allah puts no burden on any person beyond what He has given him " (5).

And :

" You are being but requited for all that you did. " (6)

With regard to convenience in charging with responsibility when difficulty arises, Allah, the Almighty, said :

(1) Surat Al-Baqara : 194.

(2) Surat Fatir : 18.

(3) Surat Al-Najm : 39.

(4) Surat Al-Baqara : 286.

(5) Surat Al-Talaq : 7.

(6) Surat Al-Tahrim : 7.

" Any one who, after accepting faith in Allah, utters unbelief except under compulsion, his heart remaining firm in faith " (1).

And :

" Except under compulsion of necessity " (2).

And :

" If one is forced by necessity without wilful disobedience, nor transgressing due limits, then is he guiltless " (3).

And :

" He has imposed no difficulties on you in religion ". (4)

In the Traditions of the Prophet, peace be on him, we find such general principles as these contained in the following sayings :

" Let be no inflicting harm or meeting harm with harm ". (5)

And :

" Deeds are judged by intention, and for each person what he intends ". (6)

(1) Surat Al-Nahl : 106.

(2) Surat Al-Anaam : 119.

(3) Surat Al-Baqara : 173.

(4) Surat Al-Hajj : 78.

(5) Reported by Malek in (Muwatta'), ibn abi-Shayba in (Musannaf), Al-Daraqotni, in (Sunan), and ibn Majah.

(6) Reported by Al-Bukhari and others.

And :

" Muslims are bound by what they stipulate of conditions except a condition that may forbids a lawful thing or allows a forbidden thing " (1).

And :

" The contract of sale is under mutual agreement. " (2).

And :

" The wound which is inflicted by animal goes with no responsibility on any one ". (3)

These are examples from the Holy Qur'an and the Traditions considered as texts laying down fundamental legal rules which may comprehend more of endless cases.

(1) Nayl-ul-Awtar : Vol. 5, p. 254.

(2) Reported by ibn-Majah through Abu-Sa'id al-Khudri, and by al-Tirmidhi as is written in the book entitled (al-Bayan and al-Ta'rif) by ibn-Hamza al-Husseiny al-Hanafi. Vol. 2, p. 89.

(3) Reported by Malek, Abu-Dawud, al-Tirmidhi, al-Nasai', ibn-Majah, and Ahmed.

The important characteristics of the Islamic Law :

Considering what we said above we can mention in brief the following :

First :

What Allah, the Almighty, laid down of rules in the Holy Qur'an and what He inspired to the Prophet, peace be on him, and what He approved of the Prophet's sayings and actions which came from his own reasoning — all this is a divine law.

But those rules which were introduced on the part of the companions of the Prophet through their own reasoning and judgment, or on the part of the generation following the companions and other scholars of (Ijtihad), those rules are man-made laws if we consider the efforts of the people of (Ijtihad) in their deducing such rules, the same rules are also considered as part of the divine law if we look to their origin and source. Therefore, the rules of the Islamic Law are either directly divine or considered as such.

Second :

Keeping in mind what we said above that the legal rules of the Qur'an are mostly durable and general with no much engagement in detail — we may now differentiate between

two kinds of legal rules : The first kind are the forms of worship, family laws, inheritance, and some criminal rules. These are mentioned in Qur'an in full details, or given such details in the Tradition of the Prophet.

These forms of worship are like prayer, alms, fasting and pilgrimage. The reason for detailing such rules is that they are matters of worship. These matters are sometime beyond the comprehension of man, are not subject to the development of society, and are not affected habits and customs. The other kind are the civil, constitutional, criminal, administrative economic, and international rules. These rules come mostly in general terms under fundamental principles with no much dealing in details, because such matters are ever development and changing according to the development and changing according to the development of human society. Therefore, the Qur'anic texts regarding such matters are given in form of basic rules in order that the people of authority and government can legislate within the framework of those basic rules whatever they need of laws that suit the respective needs.

Third :

The flexibility of Islamic Law :

This is our main topic :

Flexibility is an important mark of Islamic Law — this Law which details that it is not subject to change, and generalizes what it is changeable as a clear sign of its eternity and comprehensiveness.

In this respect, Allah, subhanah, said :

“ This day have I perfected your religion for you, completed My favor upon you, and have chosen for you Islam as your religion ” (1).

Explaining this verse, Imam Shatibi in his book (Al-I'tisam) said :

“ No rule needed in the necessary matters, in the questions of daily life, and in the complementary things but is fully explained. What is left for scholars of (Ijtihad) is to derive

(1) Surat Al-Ma'ida : 3.

details from general rules. This is approved for scholars by the Qur'an and the Traditions. The scope of (Ijtihad) is in minor questions, where there is no text in the Qur'an and the Traditions ; the perfection of religion in the verse does not mean that the Qur'an mentions every detail in human transactions since these are endless, it means only that the Qur'an introduces the general and fundamental principles from which infinite number of cases are derived ”. (1)

The evidences of the flexibility of the Islamic Law :

First :

The Holy Qur'an :

The rules of the Holy Qur'an in the field of transactions are general and good for all times. (2)

They only introduce the fundamentals, not details, except in few cases.

We mentioned above some examples regarding this subject. We may add here some more :

(1) Vol. 1, pp. 197. Al-Manar Press, Cairo, 1913.

(2) The “generality” of rules here does not mean the technical meaning with the scholars of the science of (Usul-ul-fiqh).

(A) In constitutional questions, Allah, the Almighty, said :

“ And consult them in affairs (of moment) ” (1).

And :

“ They conduct their affairs by mutual consultation ” (2).

These two verses lay down the principle of consultation as a broad basic law with no mentioning of ways and means of consultation. They do not mention who are the people of (Shura) or consultation, and whether such democratic method of government is absolutely necessary or not. This is another sign of eternity of Islamic Law which can operate in all times and places. It is really mercy for mankind, it enables men to choose of the form of government whatever they see fit so long as there is a basis of consultation and democracy on which the state is established.

(B) In the economic matters we read in the Holy Qur'an :

“ Of their goods take alms, that so you might purify and sanctify them ” (3).

And :

“ And those in whose wealth is a recognized right. For

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- (1) Surat Aal'Imran : 159.
 - (2) Surat Al-Shura : 38.
 - (3) Surat Al-Tawba : 103.

the needy who asks, and him who is prevented (for some reason from asking) ” (1).

These two verses establish the right of the needy and the fulfilment of this need according to the difference in time and place and according to the requirement of interest and justice.

We also read :

“ Allah has permitted trade and forbidden usury ” (2).

And :

“ O you who believe, fulfil all obligations ” (3).

And :

“ Fulfil every engagement, for every engagement will be enquired into on the Day of Reckoning ” (4).

Here we see that permitting of trade and forbidding of usury are given without mentioning the conditions which must be present in order to make the contract of trade valid, regarding the object of trade, the price, the form of the-

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- (1) Surat Al-Ma'arij : 24-25.
 - (2) Surat Al-Baqara : 275.
 - (3) Surat Al-Ma'ida : 1.
 - (4) Surat Al-Isra' : 34.

contract, and so on. The verse does not also speak about the essence of usury and its forms. The other verses above does not mention a precise form of contracts and engagements or what they require of special conditions. They just left such topics to the nature of each contract such as the contracts of trade, rent, bail or other contracts within the general rule which is established by the Hadith of the Prophet, peace be on him, when he said:

“ Muslims are bound by their stipulations, except a condition that forbids what is lawful or permits what is unlawful ” (1).

This Hadith and others like it indicate that the social and legal situations in Islam are subject to the order of Allah in His Holy Book and to the Traditions of His messenger, peace be on him. These situations are also surrounded by the legal framework of the Islamic aims. So we see, for example, that though Muslim imams differ in accepting the different kinds of conditions in contracts, they all are unanimously agreed that no condition is accepted if it violates the aims of the Islamic Law.

(C) Criminal punishment :

(1) Reported in al-Tirmidhi. See al-Shawkani (Nail-al-Awtar) vol. 5, p. 254.

The Holy Qur'an orders definite punishments for certain crimes, and the blood-money in some cases for murder, but it does not mention the amount of stolen goods in the crime of theft, the amount of the blood-money, or the way of litigation and forms of evidence in such crimes, the Traditions explained all that as a mercy from Allah and as a convenient way to apply different cases on the general rules.

Second :

The Traditions and the flexibility of the Islamic Law :

(A) The Prophet, peace be on him, said :

“ Whoever reforms a barren land of no owner he owns it ” (1).

The imams differ whether this saying is a general statement, so that who does such reformation owns the land without a special permission from authorities. Or the saying is a personal declaration from the Prophet as the head of the state, so that the reformer of land needs the permission of authorities. The majority of the imams went to the first idea,

(1) Reported by Ahmad in his (Musnad), Abu-Dawud, and Al-Tirmidhi.

while Imam Abu-Hanifa adhering to the other view (1).

(B) The Prophet, peace be on him, said :

“Whoever kills an enemy in the battlefield, he is entitled to his salab” (2).

Salab means what the killed enemy warrior carries on his body of clothes, tools of war and other items.

The imams also differ in this regard according to their understanding of this Hadith. Some believe that the Muslim warrior is not entitled to the (salab) of his enemy, except under permission from authorities. Others understand the saying of the Prophet as a general statement and thus there is no need for permission. The famous imam al-Kamal ibn-ul-Humam said in this respect : “Muslims are agreed that the Prophet, peace be on him, said that i. e. the above Hadith. The difference among the scholars is whether the Hadith is a general rule for all times, or it was said in one instance to incite the warriors to do their best in

(1) See al-Zaila'i (Tabyeen al-Haqa'aq) vol. 6, 35, and al-Qarafi (el-Furuq) vol. 1, pp. 207-208 (Dar Ihya al Kutub al-'Arabiyya) 1344 A.H.

(2) Al Bukhari and Muslim through Abu-Qatada. See (Zad-ul-Ma'ad) vol. 2, p. 457.

fighting ” (1).

(C) The authors of the (Sunan) reported Ayisha, may Allah be pleased with her, as saying :

“Some people came from the nomad tribes at the time of Eid-ul-Adha, so the Prophet, peace be on him, said regarding the sacrificed animal : (Store up from its meat up to three days and give some away into charity). I said : O Messenger of Allah : People were used to get benefit of the meat of their sacrificed animals as they liked and store up their grease and make up containers for water out of their skin. The Prophet said : (So what ?). I said : Now you have allowed such use for three days only. He said : I had forbidden it, i. e. the storing and distributing of meat after three days, for the sake of the people who came from the nomad tribes. Now I say ; eat of the meat, give in charity, and store up as you like) ”. So we see in this Hadith that Ayisha complained to the Prophet about what the people may fall into hardship, thinking that the order of the Prophet was general, forever. The Prophet thereupon explained for her the reason for which he gave the first order,

(1) Fath-ul-Qadir , vol. 4, p. 334-335. See also al-Qarafi : (alFuruq) vol. 4, p. 7-9, and ibn-ul-Qayyem (Zad-ul-ma'ad) vol. 2, p. 457.

that is to consider the interest of the poor people who came from the nomad tribes during the Feast of al Adha. Ibn Omar reported the Prophet, peace be on him, as saying : " I forbade you to the use of the meat of the sacrificed animal beyond three days in order that the meat suffice your needs. Now Allah sent goodness, so eat of it, give in charity, and store up as you like. These days, i. e. the days of the feast are days of eating and drinking and remembrance of Allah, the Almighty " (1).

(D) The change of rules according to the change of time and place is a mark for the flexibility of the Islamic Law :

In this respect ibn-ul-Qayyim said :

" This is a useful topic, often misunderstood and leads to confusion and trouble. The Islamic Law is established on wisdom and realization of interest. It is all mercy, all justice, all utility, and all wisdom. Any question departs from justice to injustice, from mercy to cruelty, from benefit to harm, and from wisdom to foolishness, is alien to the-Islamic Law ".

(1) (Kanz-ul-'Ummal) printed on the margin of the (Musnad) by Imam Ahmad, vol. 2, p. 377. See also (Al-Lu'lu' and al - Marjan fi mat - tafaqa'alayh - Shaykhan) under the subject of (al-Udhiya).

Then ibn-ul-Qayyim gave example to support his statement. Among them are :

The Prophet forbids cutting hands in punishment of theft while the criminal in battle in holy war. For this may lead to greater harm, that is, the warrior may join the enemy and escape from battle.

Also :

Omar ibn-ul-Khattab, did not apply the punishment due for theft in the year of famine. It is reported that he said : " No cutting of hand in a bunch of dates in time of famine. Al-Sa'adi said to Ahmed ibn Hanbal : Do you rule according to this Hadith ? He said : Yes. It is also according to the case of Omar with the servants of Hatib. The case is that those servants stole a camel from a man from Muzaina tribe. They were brought to Omar for punishment. They confessed so he ordered their hands to be cut off but soon he changed his mind and said to their master Abdul-Rahman ibn-Hatib : " I have learned that you put these boys to hard work suffering hunger so that if one of them would have eaten unlawful meat, it would be lawful out of necessity. Were not for this, I would have ordered their hands to be cut off. I swear by Allah since I did not execute this punishment, I put on you a heavy fine " Omar then ordered him to pay

double the price of the she-camel to its owner as a fine (1).

The Islamic Law is flexible enough to consider the prevailing custom within the limits of its broad principles. Muslim imams considered custom as a source of legal rule since the early Islam. They adopted in this respect such maxims as : " Custom is arbitrated " and " What it is established by common usage is like what is established by Holy Texts ".

The Scholars of the science of the origins of Islamic Law (Ussul-al-fiqh) say that basic rules may be ignored because of common usage. So the imams allow the contract of exception (istithna') which runs in contraction to the general principles that declares void the sale of non-existent objects. They allow such contract, in submission to common usage, especially if it does not lead to dispute between the parties of the contract. Al Qarafi referred to custom and its consideration in legal rules and litigation. He noted that the people of fatwa must observe common usage regarding the words used in the declaration of divorce and other matters in which common usage differs widely among different peoples, irres-

(1) Ibn-ul-Qayyem : (I'lam-ul-Muwaqqi'in) vol. 3, p. 27. Kurdi press, Cairo, 1335 A.H. See also (Kurzul- 'Ummal) vol. 2, p. 436, (printed on the margin of the Musnad of Imam Ahmad).

pective of the country of the judge or the mufti. (1)

As a more evidence about the flexibility of Islamic Law is the change of rules according to the change of interest. Examples about this from the Tradition — other than that we mentioned above — are :

Al Bukhari and Muslim reported, through Aysha, the Prophet, peace be on him, as saying :

" Were not for your people having been recently idolatrous, I would have been ordered the Ka'ba on the foundations laid by Ibraheim ".

Here the Prophet said that to rebuild the Ka'ba on the ancient foundation of Ibraheim is required, but he did not do it, for what it may cause of embarrassment to the Quraish tribe who were acquainted with the foundations present in their time. Otherwise the change of the foundations to the old ones might lead to acts of idolatry.

Again, al-Trimidhi, through Zaid ibn-Khalid, reported the Prophet, peace be on him, as saying :

" Were it not for the hardship that may fall on my nation, I would have ordered the time of the 'isha' prayer to be

(1) Al-Qarafi: (al-Furuq) vol. 1, p. 44. See also Ibn-'Abdeen (Nashr al-'Arf) vol. 2, of his collection of essays.

delayed to the end of the first third of the night, and I would have ordered cleaning mouth with brush before every prayer.”

Another Hadith in this respect reported by Muslim and others through Jaber regarding the execution of the hypocrites in which the Prophet said : “ I am afraid if I did it, people would transmit the rumour that Muhammad kills some of his companions ”.

These two Hadithes indicate that the Prophet did not apply a due rule and went to another rule which is more convenient and interesting.

Sometimes the Prophet prohibited or allowed things, and later changed his rule when the companions complained to him from a difficulty that resulted from the first order or prohibition, or he may make a necessary exception as in the Hadith pertaining to the plant of (idhkhir) which was written in al-Bukhari in the topic of pilgrimage.

We read also a Hadith reported in al-Bukhari through Salama ibn al-Akwa' that the Prophet, peace be on him, noticed an ignited fire during the day of Khaybar. The Prophet asked about it and the companions answered that the fire is to cook the meat of domestic donkeys. The Prophet said : “ Break the utensils and spill off the meat ”. They said : “ Is it possible just to spill off the meat and wash up the-

utensils ”. He answered : “ Wash them up ”. We see here that the Prophet changed his order from smashing the utensils into washing them as a matter of convenience, for they may not find other utensils since they were on a journey having no other choice.

These are example from the Traditions indicate that some rules are liable to change according to the change of circumstance.

Many cases were also reported about the companions of the Prophet to the same effect which gives a proof that they considered the change of time and circumstance in laying legal rules, even if these rules were sometimes different from those of the time of the Prophet. This is not to be understood as deviation from the Law of Allah or abstaining from the following the guidance of the Prophet. It was rather a good understanding of the nature of the Islamic Law. The generation after the companions and the scholars of (Ijtihad) allowed the fixation of prices of goods, though it was not allowed by the Prophet, because there was no need for it during the time of the Prophet, but the situations after him required it. Omar ibn Abdul-Aziz, for example, is reported that he said : “ There are cases happen

to people as many as their ill ways and deviation away from goodness. " (1).

The change of rules must not be taken as their "Abrogation". Abrogation is nullification, and once a rule is abrogated it cannot be operated at all, while a change of rule goes according to the necessity of circumstances ; a rule here may be suspended but not nullified.

Ibn-ul-Qayyim said about this subject :

" Such change is partly a method of administration according to the difference of interest and time ".

Some wrongly took the changeable rules as permanent principles, but these scholars are still deserving a reward because they paid their effort of reasoning after all. Whoever pays such effort deserves one reward or two according to the conclusion of their judgment. The people of (Ijtihad) administered the interest of the Muslim nation in this regard within the limits they understood from the Holy Qur'an and the Traditions as permanent principles or changing command " (2).

(1) Al-Qarafi : (al-Furuq) vol. 4, p. 179.

(2) Ibn-ul-Qayyim (al-Turuq al-Hukmiyya) p. 18.

Al-Shatibi also said :

" The difference of rules according to the difference in common usage is not coming the difference in text, for the law is laid down as eternal. In fact, such difference is understood as returning each common usage to a legal reason by which a rule can be put for it ". (1)

The summary of this important subject is given by Ibn-ul-Qayyim. He said :

" Legal rules are of two kinds : One is permanent under no change in time, place, or personal reasoning. This is like the definite obligations and prohibitions and the fixed punishments for certain crimes. The other kind is changeable rules according to different interests in different times and places. This is like the punishment of the offences which is known as (ta'zir). This subject of changeable and unchangeable rules is a large one in which many fell into confusion (2).

We cite here a good example in constitutional issues. The companions of the Prophet unanimously agreed about the way of electing the head of the state (the Caliph) three

(1) Al-Muwafaqat : vol. 2, p. 285.

(2) Ibn-ul-Qayyim : (Ighathat-ul-Lahfan) vol. 1, p. 331-338

times, each time was different in form from the other. Abu Bakr is elected in a special manner. Omar was elected by approval from Abu-Bakr. Omar chose certain people from whom one may be elected and he was Othman. Ali Ibn Abi Taleb declared himself a Caliph and the people accepted him. (1)

It appears from this that the companions did not adhere in this constitutional matter to a previous method of agreement.

It may be also said that what was reported from the sayings and actions of the Prophet in the context of legislation is permanent principle and eternal law such as making something obligatory and something prohibited, and detailing the general terms of the Holy Qur'an, and his maximum like "No harm to be done and no meeting harm with harm" (2).

On the other hand what the Prophet said or did in his capacity as the head of the state is to be considered as temporary law based upon a transient interest in his time.

This is like conclusion of treaties, administration of fiscal matters, distribution of the spoils of war, and such governmental issues which come under constitutional and administrative law.

(1) Ibn Sa'd (al-Tabaqat-ul-kubra) vol. 3, p. 61 Bairut 1957.

(2) Reported by Malek and others.

ministrative positive laws of our modern times, and which are changeable in nature.

Likewise are those rules which are reported from the Prophet in his capacity as judge. Litigations depend upon the claims and counter claims of the disputants, and thus the Prophet, peace be on him, said, as reported by Malek and Ahmad and others through Umm Salamah, as saying: "I am a human being and when you come to me to give you decisions in your disputes, some of you may be more eloquent and best expressive in his evidences. I rule according to the best of what I judge. If I give one some right he does not deserve on this account, he is taking a piece of fire, so let him take it or better leave it".

This Hadith indicates that what was reported from the Prophet in the cases of litigation as decisions and rules were obligation according to what appeared to him in every situation of proofs and evidences. Similar cases ought to be referred, in other times, to the courts again (1).

From the same sort are those rules which were legislated in the context of changeable environment such as the Hadith which says :

(1) Al-Qarafi : (al-Furuq), vol. 1, p. 205-209. Dar ihya al-kutub al-'arabiyya, 1344 A.H. see also his book (Al-Ihkam fil farq bainal fatwa wal ahkam) pp. 23.

"Be different in appearance from the idolaters : shave moustaches and grow birds." (1).

This Hadith indicates in its tone that it is a temporary legislation, for the dress of nations are ever-changing. The Prophet meant by such order to incite Muslims to be recognized in their looks and appearance.

It is clear then that the texts of the Traditions does not stand against the flexibility of legal development. When there is an evidence that rules were legislated for a temporary reason, such rules are always present when the reason required them.

This reason or benefit is spoken of by Imam al-Ghazali when he said :

"The interest in this meaning is to observe the aim of the Islamic Law. This aim is to preserve for every person his religion, soul, reason, progeny, and property.

"Any thing that keeps and guards these five things is benefit and anything goes to the contrary is harm" (2). The benefit has three categories : the benefits pertaining to necessary things, those related to the needs of the daily life, and those which are connected with morality and good

(1) Reported in Bukhari and Muslim.

(2) Al-Mustasfa vol. 1, p. 140 (printed 1937).

manners. All these benefits are no more than a convenience, happiness, and good relationship.

We must notice that there is difference between the legal texts in the Holy Qur'an and the Traditions and the sayings of the imams. The first are the origins of legislation and the proofs of the flexibility of the Shari'ah. The latter are personal reasoning subject to different circumstances, they are observed only within the needs of people.

Among the marks of the flexibility of Islamic Law is its universality, being good for every state and every time.

Another mark is convenience, as Allah, the Almighty, said :
"Allah intends every facility for you. He does not want to put you to difficulties." (1)

"And has imposed no difficulties on you". (2).

The essence of these two verses is permeating in the whole body of Islamic Law. Therefore, when action is done according to a certain text, then a difficulty has resulted from the application of such text another easy rule must be applied instead, in compliance with these two verses as a general principle.

Still another mark is moderation. Islamic Law is far from exaggeration and excessiveness. Allah, the Almighty, said :

(1) Surat Al-Baqara : 185.

(2) Surat Al-Haj : 78.

“Thus have We made of you an Ummah justly balanced” (1).

Many other verses call to moderation and following the middle course in everything even in working and charity.

Gradation in legislation is another characteristic of the Islamic Law. It is another way of moderation. It is also a facility and was a means of the success of the Islamic Call. We know different examples for gradation such as the cases of the prescription of prayer, forbidding wine, and abolishing the slavery.

The most conspicuous quality of Islam is mercy in the person of its messenger. Allah, the Almighty, said :

“ We did not send you but a mercy for mankind”.

Mercy required, of necessity, the flexibility of the Law of Islam.

So, all the characteristics of the Islamic Law carry the certain proofs about its flexibility with no deviation from its basic principles. It is a Law for all man’s needs in this earth :

“ Who, for a people whose faith is assured, can give better judgment than Allah ? ” (2).

(1) Surat Al-Baqara : 143.

(2) Surat Al-Ma’ida : 50.

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