

THE ORIGIN OF SHĪ'Ī USŪL AL-FIQH  
AND  
ITS SYSTEMATIZATION UP TO 5TH CENTURY, A.H.

by  
M. AFTAB UDDIN AHMAD

ABSTRACT OF THE THESIS  
submitted to the  
Faculty of Graduate Studies and Research  
in partial fulfilment of the requirements  
for the degree of Master of Arts

Institute of Islamic Studies,  
McGill University,  
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#### ABSTRACT

The thesis aims at studying the growth and systematization of Shī'ī Uṣūl al-fiqh in the fifth century, A.H. The attempt involves an analysis of the background against which this systematization developed and takes into account the two major works of the period, representing this systematization. The first is al-Dharī'ah of Sharīf al-Murtaḍā (d. 436/1044) and the second, 'Uddat al-Uṣūl of Shaykh Abū Ja'far al-Ṭūsī (d. 460/1067).

The analysis of the books attempts to trace the pattern of development each writer has followed, the methodology of each and, ultimately, the basic principles each evolved as a basis for his uṣūl al-fiqh. A certain amount of emphasis has been laid throughout the work, on determining what distinct concepts were being developed, as compared to the Sunnīs. The main themes investigated are khabar, ijmā' and ijtihād and how they affected the systematization.

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## PREFACE

This thesis was formulated under the supervision of my Research Advisor, Professor M. Y. Hā'irī. I wish to express my deep gratitude to him for his valuable suggestions, his criticism, and his constant and vital interest throughout the writing of this thesis.

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Lastly, a word about the technicalities involved in the thesis. The transliteration system is the one followed by the Institute of Islamic Studies, McGill University, a table of which has been appended. Where I have been unable to find a proper English equivalent, I have used the Arabic term throughout, e.g., uṣūl al-fiqh, khavar, etc. Translating Arabic Legal Terminology is a complex task and here I have felt that in some cases it is better to leave the term untranslated. All the dates mentioned are according to both the Islamic and Christian calendars.



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## INTRODUCTION

With the steady increase in interest on Shī'ī studies in general, we find also a close study of the development of Twelver Shī'ī<sup>1</sup> thought, as evidenced, for instance, by the recent work of Henri Corbin.<sup>2</sup> However one is struck by the lack of any proper study, particularly in a western language on the legal development among the Twelver Shī'ah.<sup>3</sup> Though during the eighteenth and nineteenth centuries many books were written by Iranian Shī'ī scholars on uṣūl al-fiqh few works deal with the important period of its development and systematization.<sup>4</sup>

To appreciate the growth of Shī'ī uṣūl as a distinct development from the Sunnī uṣūl, it is essential to investigate when the earliest Shī'ī scholars first attempted to systematize their uṣūl; who were the figures responsible for it; and how this systematization actually came about. No recent research, as we shall see, has dealt with this in any

detail. What is more, no detailed study has so far been made of the works of Abū al-Qāsim Sharīf al-Murtaḍā (d. 436 A.H./1044 A.D.) and Muḥammad ibn al-Ḥasan ibn ‘Alī Abū Ja‘far al-Ṭūsī (d. 460/1067),<sup>5</sup> two of the greatest Shī‘ī scholars of the fifth century of the Hijrah. A study of al-Murtaḍā's al-Dharī‘ah ilā Uṣūl al-Sharī‘ah and al-Ṭūsī's ‘Uddat al-Uṣūl can help in understanding the development of Shī‘ī legal thought in the fifth century of the Hijrah and especially the process of the systematization of uṣūl al-fiqh.<sup>6</sup> It should be noted here that as long as there was an imām among the community the need for a systematized law was not felt. The traditions came to be collected in the fourth century of the Hijrah and the uṣūl al-fiqh developed after the ghaybah (concealment).<sup>7</sup> This thesis, therefore, aims at a brief discussion of the origin and systematization of Shī‘ī uṣūl al-fiqh in the fifth century of the Hijrah as illustrated in the two above-mentioned works. The study is especially aimed at investigating the main themes developed in these two books, such as khabar (tradition), ijmā‘ (consensus), and ijtihād (personal reasoning) and how these themes affected the systematization, and the lines along which it developed.

### A. Survey of Previous Works on the Problem

During the last thirty-five years, a few works on the history of Shī'ī uṣūl al-fiqh have been produced by Muslim scholars. The first which is worthy of mention is Ḥasan Ṣadr's Ta'sīs al-Shī'ah. This book attempts a brief history of Islamic sciences such as ḥadīth (tradition), tafsīr (exegesis of the Qur'ān), fiqh (jurisprudence), kalām (theology), etc.<sup>8</sup>

The author attempts to show that the Shī'ah are the forerunners in all branches of Islamic science. In his opinion, Muḥammad al-Bāqir (d. 114/732)<sup>9</sup> and his son Ja'far al-Ṣādiq (d. 148/765)<sup>10</sup> were the first Shī'ī scholars who dictated jurisprudence and its principles to their companions, and from their notes books were written on this subject by later scholars. The author of the work claims that one such book is Kitāb Uṣūl Al al-Rasūl, a collection, collected by al-Khānsārī al-Iṣfahānī (d. 1313/1895) in the fourteenth century of the Hijrah. With regard to the earliest works on the subject, he states that the first scholar was Hishām ibn al-Ḥakam<sup>11</sup> (d. 199/814), who wrote Kitāb al-Alfāẓ. After him came Yūnus ibn 'Abd al-Raḥmān Mawlā āl-Yaqṭīn<sup>12</sup> (d. 208/823), who wrote Ikhtilāf al-Ḥadīth. Ḥasan Ṣadr also mentions that

al-Murtaḍá wrote a work on uṣūl al-fiqh in two volumes named al-Dharī'ah. He adds that no book had been written previously which contained a systematized and elaborate discussion of the subject and that this book is a definitive source.<sup>13</sup> Ḥasan Ṣadr, however, does not discuss how al-Murtaḍá systematized his work.

In addition to Ḥasan Ṣadr's book, we have also Muḥāḍarāt Uṣūl al-Fiqh al-Ja'farī by Sayyid Abū Zahrah.<sup>14</sup> This book deals with the development of uṣūl al-fiqh in general, and its development under the Shī'ah in particular. After that, he discusses sources according to the Shī'ah. He often quotes the opinions of al-Murtaḍá and al-Ṭūsī. He does not go into detail about his sources and speaks only of the Qur'ān and sunnah of the Prophet as forming the main bases of fiqh. It appears that since he has a Sunnī bias, he attempts to refute the claims enunciated by Ḥasan Ṣadr in the above mentioned work.<sup>15</sup> He feels that none of the early Shī'ī scholars had attempted a full-fledged study of the uṣūl al-fiqh as al-Shāfi'ī had done and states further that it was only al-Murtaḍá who produced a work, al-Dharī'ah in which a systematization was presented.<sup>16</sup>

There is also Shihābī's Taqrīrāt al-Uṣūl.<sup>17</sup>

This book deals with the history and development of uṣūl al-fiqh among the Sunnīs and Shī'ah. Shihābī mentions the early writings of the Shī'ah, which are known as uṣūl al-arba'ah (the four principles).<sup>18</sup> He also discusses the reason why the Shī'ah felt the necessity of formulating their own uṣūl al-fiqh and the differences of opinion about the Shī'ī usūliyyūn (scholars skilled in the science of uṣūl) and akhbārīyūn (traditionists).<sup>19</sup> For him the starting point of Shī'ī uṣūl al-fiqh is the period of the concealment of the twelfth imām. Al-Murtaḍā's book al-Dharī'ah, in his opinion, is the first well organized book, but again he does not say anything about its methodology.<sup>20</sup> His sources are not well documented, and the study of his works is thereby complicated.

In addition to the above, the subject has also been dealt with in general histories of Shī'ī jurisprudence. Hāshim Ma'rūf al-Ḥusaynī has produced two works, Ta'rīkh al-Fiqh al-Ja'farī and Mabādī al-'Ammah li al-Fiqh al-Ja'farī,<sup>21</sup> in which he deals with the history of Shī'ī jurisprudence and its uṣūl. In the former book he mentions Muḥammad al-Bāqir and Ja'far al-Ṣādiq as the two distinguished scholars who

developed Islamic sciences such as fiqh, uṣūl al-fiqh and ḥadīth. He deals mainly with how Ja'far al-Ṣādiq opposed qiyās (analogy); he mentions Ja'far al-Ṣādiq's debate with Abū Ḥanīfah and also explains what, according to the Shī'ah, were the basic principles of jurisprudence, but he does not mention its systematization. The author mentions 'Alī ibn Abī Ṭālib (d. 40/660) as the starting point of Shī'ī jurisprudence, followed by Abū Rāfi', the secretary of 'Alī and his close companion. The book of 'Alī which he mentions is called al-Ṣaḥīfah al-Ṣādiqah.<sup>22</sup>

In terms of material to assist this study, it is apparent that none of the above works has much to offer. The same situation prevails when we turn to remarks in books on Muslim jurisprudence in general. Among these works, the first worth mentioning is the Ta'rīkh al-Tashrī' al-Islāmī by Khudārī Bek.<sup>23</sup> In this book there is a section on "uṣūl al-fiqh" and a sub-section on "al-Shī'ah al-imāmīyah" in which the author considers Muḥammad al-Bāqir and Ja'far al-Ṣādiq as the "fountains of knowledge". He mentions among the early fuqahā' (jurists) and usūlīyūn, Muḥammad ibn al-Mas'ūd al-'Ayyāshī<sup>24</sup> and Ibn al-Junayd (d. 381/991).<sup>25</sup> He does not, however, deal with the systematization of

the subject.

In Dr. Yūsuf Mūsá's book al-Fiqh al-Islāmī,<sup>26</sup> there is a chapter on "madhāhib al-Shī'ah", in which he mentions that Mūsá al-Kāẓim (d. 183/799)<sup>27</sup> was the first to write on imāmī jurisprudence.<sup>28</sup> The title of his book was al-Ḥalāl wa al-Ḥarām and his son, 'Alī al-Riḍā (d. 203)<sup>29</sup> is said to have written another book, Fiqh al-Riḍā.<sup>30</sup> Dr. Mūsá states that the first to write on Shī'ī jurisprudence in Iran was Abū Ja'far Muḥammad ibn al-Ḥasan al-Furrūkh al-Ṣaffār al-A'raj al-Qummī<sup>31</sup> (d. 290/902). He adds that the reason the Shī'ī scholars wrote uṣūl al-fiqh was because they considered the gate of ijtihād open before them. So after the concealment of the twelfth imām, they felt the need to establish a basis for their jurisprudence.<sup>32</sup> He gives a list of the works produced by the early Shī'ī scholars, but oddly enough he does not mention al-Dharī'ah of al-Murtaḍā.<sup>33</sup>

Another work on the history of jurisprudence called Ta'rīkh al-Tashrī' al-Islāmī<sup>34</sup> has been written by three Egyptian scholars, namely Muḥammad al-Subkī, Muḥammad 'Alī al-Sā'is and Muḥammad Yūsuf al-Barbarī, In this book the authors have mentioned Ja'far al-Ṣādiq as the most prominent scholar of the Shī'ah,<sup>35</sup> but



there is no further elaboration of the systematization of Shī'ī jurisprudence.

Another notable work is Falsafat al-Tashrī' fī al-Islām written by Ṣubḥī Maḥmaṣṣānī,<sup>36</sup> In this book the author has dealt with the sources of jurisprudence according to the Shī'ah. He has mentioned Ja'far al-Ṣādiq, but he says nothing about the origin or the systematization of the uṣūl.<sup>37</sup>

A. A. A. Fyzee has touched upon the subject of the development of Shī'ī law in an article and also to some extent in his work, Outlines of Muhammadan Law.<sup>38</sup> But in the course of the discussion, the emphasis falls on the problem of imāmah and upon some aspects in which the Shī'ah differ from the Sunnīs. He mentions Zayd ibn 'Alī<sup>39</sup> as the first authority on Shī'ī law and refers to his book Majmū' al-Fiqh, but he offers no further details.<sup>40</sup>

Among Western scholars, Schacht's Origin of Muhammadan Jurisprudence<sup>41</sup> has some remarks on Shī'ī law in general in which he concludes that neither Ja'far al-Ṣādiq nor Mūsá' al-Kāẓim were, as alleged, the founders of Shī'ī law. In his opinion, authentic Shī'ī literature came into being only towards the end of the third Islamic century.<sup>42</sup> He

also has some doubts about the Majmū' being the earliest work on Zaydī jurisprudence.<sup>43</sup>

In view of the nature of the works discussed above, it is clear that the present study is meant to cover ground which has not been hitherto explored to any substantial degree. The contribution of this study, it is hoped, therefore lies in its being the first survey of the origin and systematization of Shī'ī uṣūl al-fiqh.

Prior to outlining the scheme of the study, we shall trace briefly the meaning and significance of uṣūl al-fiqh in Islam in general.

#### B. The Importance of the Study

A scientific study and elucidation of the sharī'ah (revealed law of Islam) is called fiqh which means ratiocination; i.e. the use of human reasoning as opposed to 'ilm (knowledge) based solely on revelation.<sup>44</sup> Fiqh is divided into two branches; uṣūl, or the logical principles and bases of jurisprudence, and furū', the branches, or substantive law.<sup>45</sup> Thus uṣūl al-fiqh means the doctrine of the sources of Muslim jurisprudence. The uṣulīyūn define it as the methodology of Muslim jurisprudence; i.e. the

science of the proofs which lead to the establishment of legal standards.<sup>46</sup> This science provides a knowledge of such rules and principles as form the basis of reasoning in the science of fiqh. It discusses the nature of the sources of the authorities in fiqh and what pertains thereto, and the various degrees of the legal effect of a source which are determined by the nature of the source itself.<sup>47</sup>

The function of uṣūl al-fiqh is then to prepare the premises which are to be used in fiqh in establishing the shar'ī provision in a particular case. In other words, uṣūl al-fiqh provides certain universal propositions (al-qawā'id al-kullīyah) to be used in fiqh as fundamental provisions applicable to particular cases. For example it is in uṣūl al-fiqh that the reasons are shown for ijmā' as a basis to establish a shar'ī value under certain conditions. Fiqh, on the other hand takes this proposition as a premise to declare certain acts, e.g., the practice of istithnā',<sup>48</sup> (exemption), as lawful because there is an ijmā' to that effect.<sup>49</sup>

Whereas fiqh merely states the shar'ī value of a certain act (sometimes it states the reason of such evaluation) the discussion of details and the

classification of such values is the subject matter of uṣūl al-fiqh. Uṣūl al-fiqh sets the standards on the basis of which the shar'ī judgements are made. It provides the principles of how to evaluate and qualify a piece of evidence found in the shar'ī sources and the nature of the legal effect of such a piece of evidence. For example, the Qur'ān is a source of sharī'ah for a legal judgement, but every bit of evidence found in this source cannot have the same legal effect. For instance, a command in the Qur'ān can be an 'amr (a positive command), or a nahī (prohibition), an 'āmm (a universal command) or a khāṣṣ (a particular command). It is the subject matter of uṣūl al-fiqh to deal with such fundamental details.<sup>50</sup>

We should remember here that every branch of knowledge has three components:

- (a) Mawdū'āt (subject matter)
- (b) Mabādī (principles which demonstrate the main problem)
- (c) Masā'il (problems taken as examples of application of the principles).

Some of the topics included in the science of uṣūl al-fiqh deal with those subjects which are the

bases of the principles of jurisprudence and other subheadings deal with what the uṣūlīyūn called masā'il. The mabādī (basic concepts or principles) include discussions which are really pertinent to the realm of semantics. Among the topics treated are 'āmm (general concepts) and khāṣṣ (particular concepts), muṭlaq (absolute concepts) and muqayyad (confined concepts). These analytic concepts can be applied to all branches of knowledge and are not confined just to the principles of jurisprudence. Other branches of the subject deal with logical problems; the chapter: "Dalālat al-laḥẓ 'alā ma'nāh". (indication by a word of its meaning). This kind of discussion is not applicable to the Arabic language alone but may be applied to any language. This problem is exactly the same as we get in the principles of jurisprudence. One topic of the uṣūl is entitled istiṣhāb al-ḥāl. This signifies the extension of a previously known state in the context of a legal problem, to any existing state of ignorance.<sup>51</sup> Another question discussed is ḥujjīyat al-ẓawāhir: this term signifies that in any given statement from which a legal rule is to be derived, only the apparent meaning has jurisprudential force; any allegorical or hidden meaning cannot be

construed to have this force.<sup>52</sup>

The main object of this science is to establish an organised system for the deduction of judgements (aḥkām) from the basic sources.<sup>53</sup> The help of some other Islamic sciences is required in order to attain this desired systematisation. These sciences include: theology, philology, logic and philosophy. In fact, the principles of jurisprudence comprise propositions borrowed from other sciences.<sup>54</sup> For example, if one considers the saying of the Prophet, "If the water reaches up to the measure of a kurr (a measure equal to six ass loads), nothing can make that water unclean,"<sup>55</sup> it is not possible to deduce any legal judgement unless one knows the meaning of these words, particularly the meaning of the word kurr, the relation of the minor premise to the major premise and the construction of the sentence. Thus, these and other philological, theological and logical propositions have been discussed in uṣūl al-fiqh, but not as its principal subject of study but rather as prerequisites to the study of its real areas of interest.

The relation of one branch of knowledge to another may lie in either mabādī or masā'il or mawḍū'āt. Theology is related to uṣūl with respect

to mawdū'āt, but the other sciences are related with respect to mabādī, a point to be discussed later on in this study.<sup>56</sup> For an example of the latter, with regard to the problem of whether khavar al-wāhid (single individual tradition) is acceptable or not, it becomes necessary to discuss the science of rijāl (genealogy). Similarly, the problem of whether positive and negative commands are identical or not.<sup>57</sup> is inseparably linked with the problems of philosophy, because a resolution of this problem requires investigation into whether two essences can be identical in one existence or not. If this is possible, then positive and negative commands can be identical. Thus uṣūl is also related to philosophy with respect to mabādī.

What has been discussed above regarding the main scope of uṣūl al-fiqh and its relation to other sciences is by way of establishing a general framework within which the study of al-Murtaḍā and al-Ṭusī can be conducted. The outline of the matter studied in the science of uṣūl al-fiqh applies to all study of uṣūl in general, and it will permit us to pinpoint more clearly the relationship of these two scholars' works to the science in general and will also enable

us to see more clearly how this science has been related to other sciences in their works.

Hence, the lines along which the thesis will proceed are a discussion of the origin and systematization of Shī'ī uṣūl al-fiqh in the fifth century A.H. as illustrated in the works of al-Murtaḍá and al-Ṭūsī. The study will concentrate on the following works: al-Dharī'ah ilá Uṣul al-Sharī'ah of al-Murtaḍá and 'Uddat al-Uṣūl of al-Ṭūsī. The problem which forms the subject of our inquiry involves, in fact, two basic questions: Why did al-Murtaḍá and al-Ṭūsī attempt to establish uṣūl al-fiqh as an independent science for the Shī'ah?; and, What were the ideas and principles upon which they sought to base their uṣūl al-fiqh? Chapter I will attempt to deal with the first problem.

Chapter II will provide a brief account of al-Murtaḍá's views about some of the linguistic issues that enter into the problems of uṣūl al-fiqh, his ideas about khabar, whether khabar al-wāḥid (a single individual tradition) is acceptable in shar'ī matters or not, his ideas about ijmā' and ijtihād, and the difference between ijtihād and qiyās,

Chapter III essays a detailed account of



al-Ṭūsī's life and his ideas about khavar al-wāḥid, which in his opinion is a basis for Shī'ī uṣūl al-fiqh.

### C. Sources

The sources utilized for the present study can be divided into materials dealing with uṣūl al-fiqh in general and materials dealing with the biographies of these two Shī'ī scholars. These can be further subdivided into: Materials dealing with purely Shī'ī uṣūl of the early period, which we have called original or primary sources, and materials helpful in studying the works of the two scholars, which we have termed 'secondary sources'. A further group of subsidiary sources we can call "reference works." The sources, therefore, can be classified as follows:

- (i) Original or Primary
- (ii) Secondary
- (iii) Reference

#### (i) Original or Primary Sources

There are only a few works which fall into this category:

1. Al-Kāfī by Muḥammad ibn Ya'qūb ibn Ishāq al-Kulaynī (d. 329/940).<sup>58</sup> In this book, there are traditions regarding the rejection of qiyās and

the reasons why general ijmā' is not acceptable to the Shī'ah. Al-Murtaḍā and al-Ṭūsī base themselves on these traditions in their arguments refuting qiyas and general ijmā'. The book is, therefore, important in determining the sources from which the two writers have derived their materials.

2. Al-Dharī'ah ilá Uṣūl al-Sharī'ah, written by al-Murtaḍā in 430/1038, six years before his death, was published, together with an introduction by Dr. Abū al-Qāsim Gurgī, Since this book is the first one on Shī'ī uṣūl al-fiqh, it forms the basis of any study on the subject.<sup>59</sup> In the opinion of the author himself the book was meant to form for the first time a basis for a distinct Shī'ī school of thought. Other later Shī'ī writers have also spoken of the pioneering nature of this work of al-Murtaḍā,<sup>60</sup>

3. 'Uddat al-Uṣūl, written by al-Ṭūsī,<sup>61</sup> forms the second major source. It must be noted that al-Ṭūsī, too, maintained that his work was the first one of its kind. The extent of al-Murtaḍā's influence on the work will be discussed in its proper place.<sup>62</sup> Regardless of the relation between the two, the book, being of the same period and milieu, is an illuminating complement to al-Murtaḍā's work.

4. Talkhīṣ al-Shāfiʿī.<sup>63</sup> This was originally the work of al-Murtaḍā, written in answer to allegations by the Muʿtazilī Qāḍī, ʿAbd al-Jabbār al-Hamadānī, and al-Ṭūsī has in fact condensed the arguments in this book. One section of the book dealing with the important question of why the Shīʿah do not accept the ijmāʿ of the generality is relevant for our study.<sup>64</sup>

5. Māʾālim al-Uṣūl,<sup>65</sup> a much later work by Abū Maṣṣūr Jamāl al-Dīn Ḥasan ibn Zayn al-Dīn (d. 1011/1602) is important because of the comprehensive approach of the writer to the works of the two major figures in our study and the considerable light thrown on some of the problems involved.

6. Qawānīn al-Uṣūl, was written by Miṣṣā Muḥammad Ḥasan (d. 1231/1815).<sup>66</sup>

7. Farāʾid al-Uṣūl was written by Shaykh Murtaḍā ibn Muḥammad Amīn Shūshtarī (d. 1281/1864).<sup>67</sup> He and Mirza Ḥasan quote the ideas of the previous uṣūliyyūn and particularly of the two central figures in our study.

#### (ii) Secondary Sources

The Secondary Sources, which form our second group of source materials, comprise mainly those works

which are useful inasmuch as they help us to understand the development of uṣūl al-fiqh in general and the conceptual background against which the Shī'ī development can be studied.

The earliest is the important work Uṣūl al-Sarakhsī,<sup>68</sup> which deals with uṣūl al-fiqh as related to the Sunnī Ḥanafī school. Al-Ghazzālī's (d. 505/1111) al-Mustaṣfā<sup>69</sup> also gives some insight into the above development. Then there is the Kashf al Asrār of 'Abd al-'Azīz Bukhārī (d. 730/1329)<sup>70</sup> and Amidī's (d. 631/1233) Iḥkām fī Uṣūl al-Aḥkām,<sup>71</sup> and finally Ibn Khaldūn's al-Muqaddimah.<sup>72</sup>

Modern studies dealing with the subject and its background have already been touched upon earlier. In addition to Schacht's work, Coulson also has a general survey of Islamic Law. Then there are the works of Aghnides,<sup>73</sup> Khaddūrī,<sup>74</sup> Fyzee,<sup>75</sup> Maḥmaṣānī<sup>76</sup> and Kemāl Fārūkī,<sup>77</sup> The historical background is traced in the works of Donaldson<sup>78</sup> and also in recent articles by Watt<sup>79</sup> and Gibb.<sup>80</sup>

### (iii) Reference

For the life and works of al-Murtaḍā and al-Ṭūsī, we have used certain biographical, bibliographical and historical sources which we have listed in the Bibliography of the thesis.

## CHAPTER I

### THE ORIGIN OF SHI'Ī UṢŪL AL-FIQH

#### A. Historical Background

##### 1(a) History of Sunnī fiqh

Uṣūl al-fiqh as a special science came into being in the early part of the 'Abbāsid period. This science was known as 'ilm al-uṣūl (the science of Islamic jurisprudence) while fiqh was known as 'ilm al-furū' (the science of Islamic substantive law). The science of Islamic substantive law developed in all its essentials before the theory of 'ilm al-uṣūl was established as a special science. Its pattern of development can be compared to that of Arabic philology. Arabic literature was well established prior to the creation of an Arabic philology. People at first were not concerned with formulating the rules of philology, but later when the need arose of explaining the literature, the science of philology

came into being. Uṣūl al-fiqh did not come into existence before the second half of the second century of the Hijrah, because during the first century philological principles for the interpretation of the Qur'ān and sunnah were not considered necessary.<sup>1</sup> The Companions of the Prophet were mostly Arabs, and they had a good grasp of the application of the Qur'ānic verses and the sunnah of the Prophet. In the second century of the Hijrah, however, Islām expanded, and many non-Arabs entered its fold. The need to systematize an approach to philological problems was then felt to enable the people to understand the Qur'ānic verses and the exact meaning of nuṣūṣ, (the established text of the Qur'ān and the sunnah of the Prophet).

The Qur'ān was the first source for uṣūl al-fiqh.<sup>2</sup> Qur'ānic legislation was not disconnected from its historical context. Schacht states that the reasons for Qur'ānic legislation were:

- (1) Dissatisfaction with the prevailing condition; and
- (2) The need to deal with newly arising problems.<sup>3</sup>

Nevertheless, historically speaking, very

soon the Qur'ānic precepts fell short. The need to supplement them was met by recourse to ḥadīth.<sup>4</sup> The term ḥadīth at that stage, was not as clear as it afterwards became. The words ḥadīth, sunnah, khabar and āthār were interchangeably used. The term sunnah was applied to both the practice of Muḥammad and the usage of Medina. In this period, the attitude of the fuqahā' towards this ḥadīth material, including well known sayings of the Prophet, varied according to their understanding and interpretation. Shāh Walī Allāh quotes many instances from this period to show the differences.<sup>5</sup>

The main stay of the legal development, however, was the sunnah, the customs, not because they were followed by ancestral use as I. Goldziher seems to point out,<sup>6</sup> but because of their established character as a determining factor. D. B. Macdonald stresses four elements which constituted legal norms (sunnah) for the legislation in these days: common law, the usage of Muḥammad, the usage of Medina, and equity. A further conclusion drawn by J. Schacht is that the legal practice during the Umayyad period also came to be known as sunnah. Furthermore, the common usage and social institutions of the conquered

territories, like Mesopotamia and Syria, where Roman and Sassanid laws were in practice, were also maintained.<sup>7</sup>

It was initially an administrative policy, mostly in Syria and Mesopotamia, to leave many previously established institutions substantially as they found them. Once established, they came to be accepted as "legal norms." The best illustration is Qāḍī Abū Yūsuf's stand on a non-Arab sunnah. He held that if there existed in a country an ancient non-Arab sunnah which Islām had neither changed nor abolished, the caliph was not authorized to change it even if the people complained that it caused them hardship.<sup>8</sup>

There were however areas where the local practices were not so strikingly different from those in Ḥijāz as, for example, in Syria and Iraq. The social conditions in these areas were not changing in such a way as to pose a challenge to the sunnah/ḥadīth. This situation existed in areas which had the same social conditions as Ḥijāz (the centre of sunnah and ḥadīth) or which were isolated from the centres of the government. The jurists in such areas could afford to dismiss the need of seeking new bases of reasoning in fiqh. They sought in ḥadīth a "palladium" for fiqh.



They generally called themselves ahl al-ḥadīth and their opponents ahl al-ra'y.<sup>9</sup>

The Mesopotamians were generally ahl al-ra'y, while those of Syria and Hijāz were mostly ahl al-ḥadīth. The schools of Mālik (d. 179/795),<sup>10</sup> Awzā'ī (d. 157/773),<sup>11</sup> Thawrī (d. 161.777),<sup>12</sup> and Dā'ūd (d. 270/883)<sup>13</sup> were among the ahl al-ḥadīth and they referred to their opponents, the followers of Abū Ḥanīfah (d. 150/767),<sup>14</sup> as tārikū al-sunnah, those who forsook the sunnah.

Al-Shāfi'ī, who unlike Mālik, was strongly in favour of unifying the legal practice, realized that the cause of schism and disagreement lay in the fact that authority in legal matters was not well defined. He had studied both Ḥanafī and Mālikī reasonings. He attempted to reconcile the two, so that the analogical method (of the Ḥanafīs) might be used to supplement the traditional method (of the Mālikīs) in the development of legal thought.<sup>15</sup>

Al-Shāfi'ī resolved to compile a legal compendium which would survey the whole of contemporary legal material based on his own method. This was his book al-Umm.<sup>16</sup> In its last part he has discussed the causes of disagreement among contemporary legal

schools. The treatise that positively furthered jurisprudential structure, however, was his al-Risālah. This work is regarded as the first work in the field of uṣūl al-fiqh.<sup>17</sup>

1(b) The History of Sunnī uṣūl al-fiqh.

Ibn al-Nadīm mentions in his al-Fihrist that al-Shaybānī (d. 182/798)<sup>18</sup> wrote several books on uṣūl al-fiqh, e.g., Kitāb al-Istiḥsān, and Kitāb al-Ijtihād wa al-ra'y. Ibn al-Nadīm also says that al-Shāfi'ī stayed with al-Shaybānī for an entire year and took materials for his Risālah from all al-Shaybānī's books. Al-Shāfi'ī, himself, appears to have admitted this fact as Shihābī points out.<sup>19</sup> As Ibn Khallikān tells us, Abū Yūsuf<sup>20</sup> also wrote a book on the subject.<sup>21</sup> Since these books are now extinct, the only systematized book from the early time remains the Risālah of al-Shāfi'ī.<sup>22</sup> For this reason it is recognized as the first on the subject, though others may have been written prior to it.

1(c) The Systematization of uṣūl al-fiqh by al-Shāfi'ī

Among the reasons that prompted al-Shāfi'ī to systematize uṣūl al-fiqh were 1) the fact that during the time of al-Shāfi'ī, a quarrel had arisen among scholars regarding the basis of fiqh,<sup>23</sup> and

2) al-Shāfi'ī found some contradictions<sup>24</sup> in the sunnah of the Prophet collected before his time. These contradictions made it necessary to find out a way of giving preference to part of the reported sunnah and abrogating the rest. 3) In the latter half of the second century, non-Arabs entered into Islām in large numbers, and they found it difficult to understand the predominantly Arabic oriented scholarship of the time, as well as the Qur'ān itself.<sup>25</sup> These factors compelled al-Shāfi'ī to introduce some rules and regulations into shar'ī principles. Khaddūrī, in his introduction to the Risālah says that any great jurist was necessarily drawn into the ikhtilāf (disagreement) or controversy among the schools of tradition and personal opinion. What was to be the position of tradition in relation to the Qur'ān and other sources of the law? What was to be the position of ra'y and qiyās in relation to the Qur'ān and tradition? At a time when scholars were raising such questions, al-Shāfi'ī came forward and took part in the controversy between the advocates of tradition and the advocates of opinion in order to defend the former's claim to supremacy.<sup>26</sup>

In constructing his theory of uṣūl al-fiqh,

al-Shāfi'ī looked to previous developments, i.e., to the basic sources of legal evidence in the Qur'ān, and the sunnah, and then to general consensus and analogy. He deduced rules on the basis of these four sources. He then turned to study the meanings of words. Al-Shāfi'ī explained that such study was necessary because one depends upon knowledge of the conventional meanings of single or composite utterances for deriving ideas in general. The philological norms needed in this connection are found in the sciences of grammar, inflection, syntax and style. Now, when speech was a habit of those who used it, these linguistic matters were neither sciences nor norms. At that time, jurists did not need them because linguistic matters were familiar to them by force of habit. But when the habit of the Arabic language was lost, the experts, who made it their speciality, determined it once and for all with the help of sound tradition and of sound rules of analogy which they evolved. Linguistic matters thus became sciences and the jurists needed to master them in order to know the divine laws. Hence, al-Shāfi'ī felt it necessary to introduce these linguistic matters in his new science.

Al-Shāfi'ī has given special emphasis to

bayān (exposition), sunnah and qiyās. Bayān is a discussion of the legal provisions of the Qur'ān. It is a collective term which includes general principles of law as well as detailed rules. The term bayān has been discussed by several jurists, but al-Shāfi'ī seems to emphasize the legal content of the provisions on the grounds that all Qur'ānic communications are clear, We shall refer to this again in the course of our discussion of al-Murtaḍā and al-Ṭūsī's systematization. However, the chapter on bayān was apparently introduced only as an introduction to a fuller treatment of the Qur'ān, from a juristic viewpoint, and subsequent chapters of his Risālah. Al-Shāfi'ī's critical study of the Qur'ān, from a juristic viewpoint, led him to the keen observation that the Qur'ānic rules and principles fall into various categories. To begin with, he divides them into general and particular rules.<sup>27</sup>

#### Al-sunnah

Al-Shāfi'ī defines sunnah as a source of law and as the usage of the Prophet. Al-Shāfi'ī taught that the precepts of the Qur'ān were given greater precision by the Prophet's sayings and decisions which

clarify the meaning of a particular piece of Qur'ānic legislation or an ambiguous text. He proclaimed that authority in legal matters belongs only to the Prophet.<sup>28</sup>

Al-Shāfi'ī made it clear that only an authentic tradition from the Prophet is binding and constitutes an authoritative source of legislation. Al-Shāfi'ī distinguished between an authentic tradition of the Prophet and a narrative tradition which embodies the opinion of a companion or a leading jurist. He said that the latter may be useful in clarifying the meaning of a text, but is not as binding as a tradition of the Prophet.

He also emphasized the importance of reliability on the part of the transmitter. Hence he devoted a large portion of the Risālah to studying what constituted an authentic tradition and what ought to be the rules of transmission.<sup>29</sup>

### Qiyās

Al-Shāfi'ī devotes much less space to qiyās, ijmā', and to ijtihad than to Qur'ān and sunnah. However, he applied qiyās extensively. To him qiyās is essentially the old method of ra'y which he adopts

here under this less ominous name, but with a certain limitation of the process. Al-Shāfi'ī further endeavoured to lay down definite rules for its use; he succeeded only to a small extent, however, and even in later times, in spite of limitations in its method, qiyās still had not overcome the vagueness which caused it to lack a power of conviction comparable to that of the other uṣūl.<sup>30</sup>

Al-Shāfi'ī often uses the terms qiyās and ijtihād interchangeably,<sup>31</sup> but it is obvious that he permits personal reasoning only through analogy.<sup>32</sup> To him analogy is of two kinds: 1) if the case in question is similar to the original meaning of the precedent, no disagreement on this kind of qiyās is permitted, 2) if the case in question is similar to several precedents, analogy must be applied to the precedent nearest in resemblance and most appropriate.<sup>33</sup> He tried, however, to limit the use of analogy to matters of details; it can never supersede an authoritative text. Neither should it be based on a special or an exceptional precedent; analogy must conform to the spirit and to the general rules and principles of the law. In taking such a position, al-Shāfi'ī established a balance between those who

used analogy extensively as a source of law and those who rejected it altogether.<sup>34</sup> Al-Shāfi'ī does not reckon qiyās as one of the sources but considers it derivative (far'). Qiyās must be based on the Qur'ān, the sunnah or consensus; it cannot supersede them, but it may be superseded by them. Prophetic traditions are not subject to analogical reasoning, and their wording must not be interpreted by way of qiyās. For al-Shāfi'ī consensus of the Muslims decides which qiyās is right and which is wrong.<sup>35</sup>

Al-Shāfi'ī's most important methodological rule regarding the use of qiyās is that it cannot be based on a special case which constitutes an exception from a general rule; in other words, exception cannot be extended by analogy. Even so, for al-Shāfi'ī qiyās often meant not a strict analogy, but consistent systematic reasoning in a broad sense. In summing up the sources of law at the end of the Risālah al-Shāfi'ī says: "Although I have made discussions on the basis of consensus and analogy, just as I have made discussions on the basis of the Book and the sunnah in the case of consensus and analogy, the principle on which I made my decision varies."<sup>36</sup>



(a) History of Shī'ī fiqh

According to Shī'ī sources, the compilation of Shī'ī fiqh began from 'Alī (d. 40/660). 'Alī is said to have collected the traditions about ḥalāl (permitted) and ḥarām (prohibited) which he heard from the Prophet. This booklet was called al-Ṣaḥīfah al-Ṣādiqah.<sup>37</sup> Bukhārī, in his Ṣaḥīḥ al-Bukhārī, has preserved a tradition where Abū Juḥfah asked 'Alī about the existence of any written book of rules. 'Alī replied that he had the Qur'ān, his own knowledge, and that which was in his Ṣaḥīfah (booklet).<sup>38</sup> Muḥammad al-Bāqir claimed possession of a booklet al-Jāmi'ah, said to have been written by 'Alī, and said that it consisted of all kinds of knowledge, rules of judgement, laws of inheritance, etc. Ja'far al-Ṣādiq claimed to have the above booklet in his possession, and he showed it to his disciples stating that the booklet was in 'Alī's handwriting.<sup>39</sup>

Ḥasan Ṣadr and Hāshim Ma'rūf list some of the Shī'ī jurists before and after the time of Muḥammad al-Bāqir and Ja'far al-Ṣādiq, among whom was Ibn Abī Rāfi,<sup>40</sup> who is said to have written books on sunnah, qaḍā' and aḥkām. His books consisted of discussions on prayer, fasting, pilgrimage, and zakāt.

Another Shī'ī scholar, Rabī' ibn Samī' is said to have written a book on the taxation of camels. Al-Najāshī mentions both as being among the first group of jurists of the tābi'ūn (successors of the companions).<sup>41</sup>

Then comes the mention of Muḥammad al-Bāqir and Ja'far al-Ṣādiq. These two imāms later became the main sources for the development of Shī'ī thought and were considered as the "two heads of Shī'ī law." Ja'far al-Ṣādiq was the more famous, and after him Shī'ī law came to be known as al-fiqh al-Ja'farī.<sup>42</sup>

Later writers, as well as modern Twelver Shī'ah, claim that fiqh literature originated in the third decade of the first Islamic century,<sup>43</sup> but the authentic literature had its beginning only towards the end of the third century of the Hijrah.<sup>44</sup> When the twelfth imām Muḥammad al-Muntaẓar al-Qā'im went into concealment in the year 260/873, the community felt the necessity of a codified law for their guidance. First of all, the scholars thought it necessary to collect the sayings of their imāms. For this reason, major works of fundamental significance on Shī'ī theology, jurisprudence and traditions were produced during the third and fourth centuries A.H.

by Shī'ī scholars, commonly known as the people of the fourth generation, ṭabaqāt al-rābi'ah, those whose source of knowledge was the sixth imām Ja'far al-Ṣādiq. The most important works of this period are the four hundred principles, sometimes called uṣūl al-arba'a mi'ah. In the early fourth century, they were collected in the form of books like Amālī, Khiṣāl, 'Uyūn al-Akhbār, and Madīnat al'ilm.<sup>45</sup> The most famous works of this period, however, are the "Four Books", which are uṣūl al-arba'ah (the four principles).<sup>46</sup>

The first collection of Shī'ī traditions is al-Kāfī by al-Kulaynī (d. 328/939).<sup>47</sup> Ibn Bābawayh (d. 381/991) took things one stage further by collecting all those traditions and sayings of the imāms regarding aḥkām in the book Man lā Yaḥduruhū al-Faqīh. Then the well-known Shī'ī scholar, al-Ṭūsī, wrote his two books on jurisprudence, Tahdhīb al-Aḥkām and al-Istibṣār. These four books became the sources, not only of jurisprudence but of other sciences as well, for they represented exegesis and explanation by the imāms, who had applied their own ijtihād, thus precluding the need for individual ijtihād. The religious law left by the imāms was considered by the

Shī'ah to be like the nuṣūṣ. Also at this time, the Shī'ah turned to writing theological works, and we know of a considerable number of books by their scholars in this period.<sup>48</sup>

After the collection of Shī'ī akhbār and traditions we may distinguish two groups of scholars, the akhbārīyūn and the uṣūlīyūn. The first group considered the akhbār and instructions received from their imāms, sufficient for their guidance and saw no need to apply their own ijtihād. This group is called muḥaddithūn (the traditionists). They followed the Qur'ānic verses and akhbār of their imāms. Al-Kulaynī belonged to this group. The other group thought it necessary to resort to their own ijtihād for solving new problems since the imāms were no longer among them and only the akhbār remained. They thought it important to study the akhbār carefully and to try to understand their real application by using individual ijtihād. It also seemed wise to find some rules and principles which would form the uṣūl for the law of the Shī'āh community. To these ends scholars of the fifth century utilized the collected akhbār and created the science of uṣūl al-fiqh.

There were many points of difference between

these two groups as we learn from Khānsārī who quotes from 'Abdullah ibn Ṣāliḥ al-Samarqandī, e.g.;

1) The usūliyyūn consider ijtihād as obligatory, while the akhbārīyūn consider it unlawful because preservation of the traditions of the infallible imāms is obligatory upon them; and

2) The uṣūliyyūn considered the sources of fiqh to be four: kitāb, sunnah, ijmā' and 'aql; while the akhbārīyūn considered only kitāb and sunnah to be the true sources.<sup>49</sup>

As a result of the disagreement, some Shī'ī scholars of the fourth century set out to write on the science of uṣūl al-fiqh. The first man who wrote a complete book on the subject was Shaykh al-Mufīd. The name of the book was Kanz al-Uṣūl. This book does not exist today, but it is referred to in al-Murtaḍā's al-Dharī'ah.<sup>50</sup>

#### B. The Question of the Origin of Shī'ī Uṣūl

Shī'ī scholars of the twentieth century generally consider 'Alī to be the starting point of their uṣūl al-fiqh. He is followed by the fifth and sixth imāms, Muḥammad al-Bāqir and Ja'far al-Ṣādiq. Al-Ṭūsī cites a tradition from 'Alī in which he said

that were ra'y (meaning the application of reason) to be the basis of religious law, then the sole of the socks deserved to be commanded<sup>51</sup> to be wiped (mash) [(in tayammum) which gets more unclean than the upper part of the sock which are the shar'ī commands to wipe].

Ḥasan Ṣadr's view is that the Shī'ah are pioneers in the field of uṣūl al-fiqh. He states that the first man to lay down the fundamentals of uṣūl was Muḥammad al-Bāqir, the fifth imām; next came his son, Ja'far al-Ṣādiq. These two imāms dictated rulings to their disciples.<sup>52</sup> Hishām ibn al-Ḥakam, a disciple of Ja'far al-Ṣādiq is alleged to have written a book on the subject called Kitāb al-Alfāz wa Mabāḥithihā. During the imāmah of Mūsā al-Kāẓim, the seventh imām, Yūnus ibn 'Abd al-Raḥmān is said to have narrated traditions from him. Ḥasan Ṣadr also mentions Ismā'īl ibn 'Alī ibn Abī Sahl Faḍl ibn al-Nawbakhtī (d. 311/923).<sup>53</sup> His books are: Kitāb al-Khuṣūṣ wa al-'Umūm, Kitāb Ibtā'āl al-Qiyās, Kitāb Naqd al-Ijtihād wa al-Ra'y. Ibn Sahl was a contemporary and a disciple of the eleventh imām Ḥasan al-'Askarī (d. 260/873).<sup>54</sup> Ḥasan Ṣadr also claims that al-Nawbakhtī was one of the greatest Shī'ī scholars and

the shaykh of the Shī'ī theologians.<sup>55</sup>

Let us now look at Ḥasan Ṣadr's construction of this history to determine how far it may be correct. On considering his views we find that the tradition credited to 'Alī cannot be said to constitute a distinctive Shī'ī law. Its context is too general, and it is difficult to imagine that 'Alī conceived of his saying as forming part of law for a distinct group of his followers. As for the statements regarding the fifth and sixth imāms and the later scholars, it is true to say that these two imāms were great scholars who had discussed the unacceptability of qiyās but this was done for special reasons, i.e., they discussed a particular problem but did not write full systematic treatises. During the time of Ja'far al-Ṣādiq, Ibn Abī Laylah and Abū Ḥanīfah had favoured personal reasoning, while the Shī'ah, because of the existence of an imām whom they considered the sole authority on the law of the community, felt no necessity of exercising their individual judgement on issues which the imām could decide. Muḥammad al-Bāqir and later Ja'far al-Ṣādiq denied the resort to analogy and personal reasoning. Ja'far al-Ṣādiq is alleged to have said to Abū Ḥanīfah that the first man to use it

was Iblīs. This is a clear denial of qiyās.<sup>56</sup> Also among the early Shī'ī uṣūliyyūn who have so far been mentioned, we find two kinds of scholars. In the first place, there are theologians like Hishām ibn al-Ḥakam and al-Nawbakhtī who discussed uṣūl al-fiqh on a theological pattern which we shall discuss in the last section of this chapter.<sup>57</sup> Their discussion follows lines similar to those of Sunnī scholars. It would not be proper, therefore, to consider them as purely Shī'ī uṣūliyyūn. The second category of scholars are the jurists, who, along with the discussion of fiqh, considered the uṣūl as well, e.g., Ibn al-Junayd.<sup>58</sup> These scholars were influenced by Shī'ī law already extant and formulated. Therefore, up to the time of concealment of the twelfth imām, the discussion of uṣūl by Shī'ī scholars cannot be called complete. The science did not have an independent status. Some scholars had discussed the denial of qiyās and others had written on 'umūm and khuṣūṣ and still others on khabar al-wāḥid. We cannot, however, call these works a science of uṣūl for the following reasons:

1. From the pattern of discussion of the Shī'ī scholars of that time, it is evident that their concern concentrated on the denial of qiyās, which



represented their rejection of the Sunnī position. This denial was important for the preservation of the Shī'ī doctrine of imāmah as we have said earlier. This should be interpreted to reflect a defense against the threat to their position rather than any preconceived ambition at systematization. The other major subject of discussion was 'umūm and khuṣūṣ or mabāḥith al-alfāẓ (semantic discussion). This kind of discussion was not related purely to uṣūl al-fiqh. Such discussions have become a mabādī in the course of time, as we have mentioned in the Introduction, but these subjects are common to both uṣūl al-fiqh and philology. Shī'ī scholars investigated these matters in order to understand the Qur'ān and the sunnah, not to construct a systematic set of uṣūl.

2. The Shī'ī imām was the sole authority for any kind of injunction. Now, as long as the imām was present, the Shī'ah felt no necessity of codifying a law. Conditions necessitating full-fledged works on Shī'ī uṣūl existed only after the concealment of the twelfth imām and more so after the passing away of the four agents of the twelfth imām.<sup>59</sup>

3. Most of the Shī'ī scholars who wrote up to the beginning of the fourth century were not

uṣulīyūn but theologians or philosophers. Such was the case with the Sunnī scholars also. Therefore, we cannot consider them as uṣūl writers. However, these people did not try to find independent uṣūl for themselves.<sup>60</sup>

4. Whatever concepts of uṣūl the early writers may have had were designed to fit into the existing body of law, rather than forming bases for the development of such a law. There was no attempt to define an independent basis at all.

## 2. The need for Shī'ī uṣūl

The books extant today on uṣul al-fiqh of the earliest period are al-Dharī'ah of al-Murtaḍā and after that 'Uddat al-Uṣūl of al-Ṭūsī. Al-Murtaḍā, both a theologian and a jurist, distinguished himself more as a jurist and legal thinker of the Shī'ī community of the fifth century. During this time Shī'ī literature had received a great impetus. The political condition of this period was favourable for Shī'ī literary activities, and al-Murtaḍā became the champion of the Shī'ī cause.

The Buwayhids (320/932 - 447/1053) in Baghdād inclined strongly towards the Twelvers.<sup>61</sup> The pressure of persecution on Twelvers was now relaxed

and they were able to expand their fields of activity. The Buwayhids also made up for lost time by encouraging progress in all walks of life; political, religious and literary. Shaykh al-Mūfīd, the foremost theologian whose scholarship was accepted even among the Sunnīs, was highly respected by the Buwayhids. ‘Aḍud al-Dawlah, the Buwayhid Amīr, frequently paid visits to the Shaykh's house. In fact, at this time, Baghdad was one of the centres of knowledge, where in different mosques or at scholars' homes, thinkers of different schools of thought gave lectures in their special fields. The Buwayhids supported the Shī‘ī ulamā’ very firmly. It was at this time that the four remaining Sunnī schools<sup>62</sup> were beginning to be considered as exclusively orthodox. The Buwayhids perhaps wished to see their form of Shī‘ism recognized in the heart of the ummah as a fifth authorized school.<sup>63</sup> This favourable political condition was one of the factors which enabled the Shī‘ah to introduce various Islamic sciences of their own. After the greater concealment of the twelfth imām, the Shī‘ī scholars felt the necessity of using their own ijtihād, and they wrote treatises on some of the problems of uṣūl al-fiqh. As yet, however, these did

not form a complete science of uṣūl al-fiqh.<sup>64</sup>

Another reason for rapid Shī'ī advance at the time was their attitude to the state. After the 'Abbāsids had disappointed their Shī'ī supporters on coming to power, the Ithnā 'Ashariyah, unlike groups such as the Ismā'ilīs, developed a quiescent attitude. For this reason they posed no threat to the 'Abbāsids and were left alone to continue their actions in non-political fields.<sup>65</sup> During the Buwayhid regime, a distinctive Shī'ī community with a non-political basis developed, although the Buwayhids, themselves, gave ceremonial allegiance to the caliphs in Baghdad.<sup>66</sup>

We have already mentioned the abundance of scholars in Baghdad. Moreover, some of the early Shī'ī scholars studied with scholars of different schools, specifically with Shāfi'ī, Mu'tazilī, Zaydī and Ḥanafī scholars.<sup>67</sup> Al-Murtaḍā's study with these various groups must have tempted him to pay attention to uṣūl al-fiqh, and this was probably one of the reasons why he was able to produce a well organized book on the subject and develop some distinctive ideas about uṣūl al-fiqh.

We said earlier that the basis of Shī'ī

knowledge is the akhbār collected in the four uṣūl books. These four books were used by Shī'ah as the uṣūl al-dīn (principles of religion). In them, uṣūl al-fiqh was linked to the sciences of ḥadīth and fiqh, and was not a separate science. Analysis of the traditions in Uṣūl al-Kāfī and Man Lā yaḥduruhū al-Faqīh will clearly show this. What the Shī'ī scholars claimed was that every injunction of the imām implied a certain aṣl. Al-Murtaḍā wanted to separate uṣūl al-fiqh from uṣūl al-dīn, consequently by his own efforts, he composed his book al-Dharī'ah in the year 430/1038.

In writing this book, al-Murtaḍā claims that he did not borrow from the uṣūl of other sects, since their opinions on every problem were completely different in furū'. It followed, therefore, that their uṣūl, too, would be different. Moreover, he says that they differ in their arguments and in their deductions. For example, in the application of amr (positive command) the Shī'ah have their own views, differing from those of the Sunnīs. Al-Murtaḍā's writings represented a different direction.<sup>68</sup> In his method he changed the akhbārī pattern of writing; i.e., the straightforward quotations of akhbār. Al-Murtaḍā

also took the help of rational arguments. Also, his being a theologian may have determined his more reasoned approach to his subject.

To sum up, al-Murtaḍá felt the necessity of writing this subject for two reasons: 1) The use of ijtihād was needed after the concealment of the imām and he considered the gate of ijtihād open and 2) to make a distinction between uṣūl al-dīn and uṣūl al-fiqh.

We have mentioned earlier that Shī'ī scholars produced their theological literature before writing on uṣūl al-fiqh. Ibn Bābawayh, Shaykh al-Mufīd and al-Murtaḍá wrote a number of books on theology, because of the fact that opposing groups were attacking them on the question of imāmah and the Shī'ī i'tiqādāt (fundamental beliefs), there was need to reply to those attacks. Al-Murtaḍá's book al-Shāfī is a clear example of this.<sup>69</sup>

As we have mentioned earlier, theology has a relationship with uṣūl in its subject matter. In showing the relationship between these two sciences, we should look into the subject matter of these two sciences.

The subject matter of uṣūl is "the proofs relating to fiqh", which are applied to deduce

regulations, while the subject matter of theology is i'tiqādāt; i.e., what does and does not constitute belief. However, what should be believed in is the Qur'ān and the sunnah. In other words, we can say that theology makes the Qur'ān a proof of uṣūl al-fiqh. It also makes the sunnah serve as a proof for it and so on. The uṣūlīyūn were able to make the Qur'ān into a proof on the basis of a theological conviction. Theology provided the subject matter of uṣūl al-fiqh; thus the relationship between these two sciences was established.

#### The Dependence of uṣūl al-fiqh on Theology

Theology starts with the claim that faith should be based on "reason". According to the theologians, the veracity of revealed knowledge is based indirectly on rational evidence. Abū al-Ḥusayn al-Baṣrī remarks:

And as to what is known by reason alone, it comprises of everything to which the reason provides indication. The knowledge of the veracity of shar' depends on the knowledge of such matters as knowledge of God and his attributes and that He is independent; He does not commit evil. As regards our saying that knowledge of the veracity of shar' depends on the knowledge of it; this is because we have known the truthfulness of the Prophets. Their truths are known to us through miracles, because we know that it is not likely that

God makes it appear through the hands of an untruthful person. This is known because we know that its appearance by such people is evil, and He does not commit evil.<sup>70</sup>

Al-Ghazzālī also believes in this function of reasoning. He says: "The reason establishes the truthfulness of the Prophet and then withdraws itself. It admits that it will accept what the Prophet says about God and the hereafter into which reason has no vision".<sup>71</sup>

That shar' depends on reason for its veracity but reason is in itself incapable of apprehending the matters which are told by shar', is an ambiguous circle of argument.

This becomes quite obvious when we study jurisprudence, and find it struggling between the authority of reason and revelation. This was because of its theological character.

Observing this aspect predominant in Muslim Jurisprudence, Santillena concluded that every "legal question is in itself a case of conscience and Jurisprudence points to theology as its ultimate base."<sup>72</sup>

According to Goldziher and Macdonald, in earlier days "fiqh" comprised of theology and canon law as opposed to 'ilm that comprised of only tradition.



Then "fiqh" broke off from theology and theology came to be called the "greater fiqh".

Although the problems such as the nature of human acts, (ḥusn and qubḥ of af'al), the capability of man (his inclination towards evil) infallibility of Basic sources, God's Attributes and His Unity, etc. are not part of Jurisprudence and fall in the domain of theology, they form a basis for uṣūl al-fiqh. The whole structure of uṣūl al-fiqh stands on theological grounds.

The Medieval Jurists were so committed to this fact that almost all of them explained this inter-relation in the foreword of their books. We will give a summary of al-Ghazālī's discussion on this point. He divides the sciences into two types - secular or purely rational like medicine and mathematics; and religious like kalām, fiqh and ḥadīth. Each of these sciences falls into either or two main categories - ilm al-kullī (general) and ilm al-juz'ī (particular). Among the religious sciences, kalām is the representative of al-kullī, and the other sciences of al-juz'ī. A jurist looks into the basis of legal injunctions in particular, while a theologian looks at things in general. Theology establishes the premises of all religious sciences. A jurist is mainly occupied with

the words of the Prophet; he accepts the explanation of the Qur'ān by the words of the Prophet. Theologians establish the veracity of the words of the Prophet.<sup>73</sup>

The Jurisprudence as such, has its roots very deep in theology. It starts with certain pre-suppositions which are pre-established by theology. Opinions which are not textually (manṣūṣ) supported become reliable if they have been referred to, deduced or derived from the text. This presupposition goes back to the concept of knowledge which is one of the subjects discussed in theology. Again, jurisprudence deals with man in relation to law as mukallaf (responsible). This definition of man stems from a supposition that man is capable of acts (mukhtār) and is responsible for their consequences. The question raised here, the issue of free-will and pre-destination, is a subject of theology. Furthermore, the five categories of aḥkām, wājib (obligatory) mandūb (recommended), mubāḥ (neither obligatory nor forbidden), makrūh (disapproved) and maḥzūr (prohibited), presuppose that things are not good or bad in themselves, rather they are derived from the imperatives of the law-giver. This again is a matter discussed in the science of theology. Al-Murtaḍā's

theological debates and disputes with his opponents encouraged him to systematize the legal thinking of the Shī'ah community. By virtue of a wide and thorough knowledge of contemporary schools of theology and law, he was in a much better position to undertake this task as a detailed analytical study of his works will show.

## CHAPTER II

### THE SYSTEMATIZING WORK OF AL-MURTAḌĀ

#### A. His Life and Works

This chapter discusses the development of Shī'ī uṣūl al-fiqh as reflected in the work of al-MurtaḌā. We shall try to find out how al-MurtaḌā systematized the new science of uṣūl al-fiqh. First, however, we shall give a short biography and indicate the extent of the works in various sciences written by al-MurtaḌā. We shall discuss in detail those concepts such as khabar, ijmā' and ijtihād, which have special significance for his systematization of uṣūl al-fiqh.

#### 1. His Life

It is clear from our previous discussion that the fourth century Hijrah was the most glorious period for the development of Shī'ī literature because of the favourable political conditions of this period.<sup>1</sup> It is to this century that al-MurtaḌā belongs.

Al-Murtaḍā al-Sharīf Abū al-Qāsim ‘Alī ibn Ṭāhir Abī Aḥmad al-Ḥusayn ibn Mūsā ibn Muḥammad ibn Mūsā al-Kāẓim, commonly known as ‘Alam al-Hudā,<sup>2</sup> "the champion of guidance", was born in 355/966 in Baghdad. Nothing is known about his early education except that at the age of fifteen he studied Arabic literature with Ibn Nubātah.<sup>3</sup> Thereafter, his mother sent him to Shaykh al-Mufīd where he remained until the Shaykh's death, al-Murtaḍā himself then occupied the place of Shaykh. He had a grand library of his own that consisted of 80,000 books, and for this reason it was called "thamānīnī".<sup>4</sup> He had studied all the contemporary Ḥanafī, Shāfī‘ī and Mu‘tazilī works on fiqh and was involved in public discussions with those opposing groups. Soon al-Murtaḍā achieved great fame in Baghdād. Abū al-‘Alā al-Ma‘arrī<sup>5</sup> (d. 449/1057) came to Baghdād and sometimes used to attend al-Murtaḍā's majlis and exchange views with him. Abū Ishāq al-Ṣābī<sup>6</sup> (d. 388/994) and ‘Uthmān ibn al-Jinnī (d. 392/1001)<sup>7</sup> also used to attend the meetings of al-Murtaḍā and debated with him. He became a well known scholar of the period. He held independent views, in support of which he had debated with his teacher Shaykh al-Mufīd.<sup>8</sup> Rāwandī's book

al-Ikhtilāf bayn al-Shaykh al-Mufīd wa al-Sayyid al-Murtaḍā is an apparent example of this.<sup>9</sup>

The Buwayhids who were at the helm of affairs in Baghdād, paid due respect to his scholarship. Sharīf al-Raḍī,<sup>10</sup> and al-Murtaḍā were, up to the fifth Islamic century, the real masters of the city of Baghdād, acting as intermediaries between the Buwayhid Amīrs and the populace. At the same time, they were renowned Shī'ī scholars and traditionists.<sup>11</sup> This great scholar died in the year 436/1044 leaving behind him many works.<sup>12</sup>

As we have emphasized earlier, he was the first Shī'ī scholar who, in the light of a comparative and comprehensive study of contemporary legal thought, succeeded to a systematized methodology for legal reasoning. In this field, he wrote a number of books which show the patterns along which he developed his legal approach. His main work on the subject is al-Dharī'ah ilā uṣūl al-Sharī'ah.<sup>13</sup>

Since it is the fundamental source of Shī'ī .. uṣūl al-fiqh, we shall give a preview of the book's contents to help in appreciating the organum of his systematization.

In the preface of the book, al-Murtaḍā says

that the main problem of uṣūl al-fiqh is the question of what constitutes ʿilm (knowledge) and what constitutes ẓann (speculation). Obviously, the former is more reliable than the latter, being impeccably based on khiṭāb (command), and thus more valid. Khiṭāb, therefore, is the basic matter to be discussed in uṣūl al-fiqh. He first discusses the rules of khiṭāb and then its categories. According to him, any khiṭāb in general can be of two kinds:

1. Muhmal (absurd) and
2. Mustaʿmal (applied)

Muhmal is that kind of khiṭāb which is not used in the Arabic language for understanding anything or drawing any conclusions. Muhmal cannot exist since this type of khiṭāb would be based on words that are patently absurd in the Arabic language. For example we can take the word ʿain (eye) and read it backwards naiʿ. Such a word does not exist, therefore, it is not possible to draw a benefit from it.

Mustaʿmal, on the other hand, is that kind of khiṭāb which is used for understanding something and deriving some benefit from it. Mustaʿmal has been divided into two types:

1. That whose meaning is clear, but of no

great importance; and

2. That whose meaning is clear as well as being of great importance.

Haqīqah (using a word in its primary meaning) and majāz (using a word in its secondary meaning), fall under the scope of this second category.<sup>14</sup>

### B. Methodology

Al-Murtaḍā makes frequent references to the opinions of all the important schools of thought by always mentioning the following: Abū Ḥanīfah (d. 150/767), al-Shāfi'ī (d. 204/819), Abū 'Alī al-Jubbā'ī<sup>15</sup> (d. 303/951), Abū Hāshim<sup>16</sup> (d. 321/933), Abū al-Ḥusayn al-Baṣrī<sup>17</sup> (d. 436/1044), al-Naẓẓām<sup>18</sup> (d. 230/845) and Abū Bakr al-Fārisī<sup>19</sup> (d. 377/987). Only when he has considered prior authorities does he express his own point of view. In some cases, he agrees with the opinion of the other scholars. In general, however, he mentions the views of other scholars, but then expresses the Shī'ī position. For example, analogy is not acceptable to the Shī'ah. In discussing this problem he, at first, gives the Sunnī point of view concerning it and then brings arguments in favour of and against it, eventually to reject it.<sup>20</sup>



### Terminology

The book al-Dharī'ah deals not only with legal nomenclature, but also with literary and philological terminology. Al-Murtaḍā defines important terms and explains technical words. It may be useful to discuss briefly the meaning of some cardinal terms and expressions. Three sets of terms need particular examination.

In the first set, there are general terms which need elucidation, such as khiṭāb (command), 'ilm and bayān (exposition).

By khiṭāb, al-Murtaḍā means khiṭāb of Allāh or of the Prophet which helps in understanding sharī'ah. However, in the beginning he explains the various connotations of khiṭāb in a general sense before defining the term in the technical sense in which he proposes to use it.<sup>21</sup>

By 'ilm he means legal knowledge derived from the authoritative sources of law, from the Qur'ān or from akhbār of the Prophet or of the imāms.<sup>22</sup>

By bayān he means the Qur'ānic declaration embodying a rule or a principle of law. The term is frequently used in the book either in the sense of mere declaration, embodying a rule of law, or in the

sense of clarifying the meaning of a certain rule of law.<sup>23</sup>

The second set of terms is that which al-Murtaḍā uses in explaining the Qur'ānic legislation. They are the terms 'āmm and khāṣṣ<sup>24</sup> as applied to rules, and the terms ḥaqīqah and majāz, muṭlaq and muqayyad. If a word is applied by a single application to many things not limited in numbers, and includes every thing to which it is applicable, it is called 'āmm. If a word is applied by a single application to a limited number of things, including everything to which it can be applied, say one or two or a hundred and so on, it is called khāṣṣ. If a word is used in its original or primary application, it is called ḥaqīqah and if it is used in a sense other than the original by reason of some connection between the two meanings, it is called majāz. If by a generic noun is meant the thing named without any limitation, it is called muṭlaq, otherwise it is called muqayyad. Al-Murtaḍā also uses the term naskh or abrogation of Divine legislation, which was well known to contemporary jurists as the repeal of legislation. A precise discussion of this term will come later in its proper place.

In the third set of terms, al-Murtaḍā uses the term af'āl (actions), and akhbār. Af'āl is applied to such actions of a mukallaf that can be qualified as "permissible", or "prohibited". Al-Murtaḍā uses it also for the model behaviour of the Prophet and of the imāms.<sup>25</sup> The term akhbār means the sayings or actions of the Prophet or of the imāms as narrated by the imāmī isnād.<sup>26</sup>

#### B. His Systematization of uṣūl al-fiqh

1. The question of the interpretation of the text (philological discussions).

In view of what appears from the contents, it becomes clear that a large portion of the book contains philological discussions. The importance of these discussions in relation to uṣūl al-fiqh has been explained by al-Murtaḍā in the preface of the book. He says that study of uṣūl al-fiqh actually entails consideration of the adillāt al-fiqh (proofs for fiqh) which lead towards the knowledge of the aḥkām (rules of law).<sup>27</sup> Those proofs are the Qur'ān, the akhbār, and ijmā. To use those sources as dalīl for fiqh, one has to understand their contents, and for understanding their contents, it is necessary to be aware of the

rules and regulations of the language. These rules therefore form an important subject of discussion. As an example, al-Murtaḍā cites the Qur'ānic commandment "aqīmū al-ṣalāt", (establish prayer) in which the word aqīmū is a command. It is, therefore, necessary to know what a command signifies and what its effects are, that is to say, whether it signifies obligation or permission. Once it is ascertained that a command signifies obligation, it can be established that prayer is obligatory. Hence these philological discussions are necessary in the formulation of uṣūl al-fiqh. Similarly, one should know the nature of khabar, otherwise, it is not possible to make it a dalīl for fiqh. Such is the case with ijmā' as well. Uṣūl al-fiqh is meant to show, for example, that under certain conditions ijmā' will constitute ḥujjah (an evidence) for establishment of a ḥukm.<sup>28</sup>

Al-Murtaḍā goes on to say that these adillāt al-fiqh themselves constitute uṣūl al-fiqh, and a discussion of them depends on the discussion of khiṭāb. Because ahkām have come through khiṭāb, he starts his book with the discussion of khiṭāb and its rules.<sup>29</sup> He includes ḥaqīqah and majāz, amr and nahy

under khiṭāb as some of its modes. The second important matter of discussion after khiṭāb is knowledge of aḥkām al-af'āl (the rules of action), because this knowledge will help in understanding which action should be taken and which should be avoided. These actions are dealt with under the heading af'āl al-nabī (prophetic actions). The other modes of khiṭāb, like 'umūm and khuṣūs, mujmal and bayān, muṭlaq and muqayyad and its rules, are fully discussed in this book. Moreover, some other related aspects of khiṭāb like naskh are also discussed at length. We shall mention here a few points of importance concerning these problems.

In his discussion of ḥaqīqah and majāz, al-Murtaḍā expresses the view that if a word has two meanings, one of which is primary while another is secondary or metaphorical, then both these meanings can be intended at the same time. For example, if one were to say to another man, "lā tankiḥ mā nakaḥa abūka" (do not marry those ladies whom your father has married), here the word nakaḥa can have two meanings: the contract; i.e., "do not perform a contract of marriage with a lady whom your father has contracted for marriage." The second meaning is that of "sexual

intercourse"; i.e., "do not have intercourse with those with whom your father has had intercourse." He argues that if it were not possible to derive two meanings at the same time, then this rule could only be substantiated by finding fault either with the text or with the one who expresses it. Al-Murtaḍā further argues that it was well known that in the Arabic language one can intend two meanings simultaneously, and also that one can use signs instead of words to intend two meanings at the same time. In that case it could be concluded that it was not impossible to derive two meanings from a single word. Here, al-Murtaḍā was at variance with the views of other scholars.<sup>30</sup>

Another matter worth mentioning is the problem of a word having two meanings (mushtarik). In such a case, the use of the word in either of the meanings will be ḥaqīqī, unless there is some indication to the effect that one of them is majāzī. For example, a command may indicate a unique obligation or a repeated obligation.<sup>31</sup> Command, in either of these two meanings in al-Murtaḍā's opinion is not to be considered secondary; rather it retains its primary meaning unless we get some indication to the effect

that one of these meanings is majāzī.<sup>32</sup>

Al-Murtaḍā also states that infidels are mukallaf, i.e., obliged to observe the principles of Islamic law in the uṣūl, like tawhīd (unity of Allāh), as well as in furū' (substantive law) like prayer.<sup>33</sup> This is true because the condition of taklīf applies to them as well, and they too have the capacity to observe the religious duties, but due to their infidelity the habit of perfecting religious observances is absent in them. In this problem he opposed most of the fuqahā' and mutakallimūn in the following way:

1. Infidels are like Muslims in as much as they can be converted at any time. So capacity for taklīf exists in them.
  2. The khiṭāb of Allāh is for all mankind.
  3. Since they are under obligation to obey, they need to believe in the mission of the Prophet.<sup>34</sup>
- In addition, he cites the verse, "What has brought you in Hell? They will say: We were not of those who prayed".<sup>35</sup>

With regard to the problem of command, a crucial point arises whether any prerequisite (muqaddamah) is incumbent to establish the obligation

of a command.<sup>36</sup> Al-Murtaḍā very wisely classified the muqaddamah for an obligation of command into two types:

1. Either the muqaddamah is a sabab (cause) and in this case, it is obligatory like the command or
  2. The muqaddamah is a shart (condition), in which case it is not obligatory like the command.<sup>37</sup>
- In discussing this problem, al-Murtaḍā maintained that there are two types of command in sharī'ah - one which necessitates obedience to the command itself, but does not necessitate the muqaddamah, as in the case of ḥajj. If one has money, ḥajj is obligatory, but this does not imply that the earning of money is obligatory. The other kind is that in which the muqaddamah is also obligatory like the original command; e.g., in prayer where ablution is as obligatory as the prayer.

Further, for al-Murtaḍā, qadā' (postponing of an action) is subordinate to 'adā' (performing it punctually). That is to say, if a man cannot perform his prayer on time, the deferred action cannot be based on the same command which made it obligatory at a certain time, because, he says, when the action was ordered, it was also linked with specific attributes.



But since the time has changed, the attributes have also changed. This in itself necessitates change of the action.<sup>38</sup>

Another important point that needs to be singled out is his discussion of bayān. Since the command of God can only be known through a declaration of the command, it becomes necessary to define bayān and study its relationship with command. In discussing bayān, he offers the definitions of several leading scholars such as Abū Hāshim, Abū 'Alī al-Jubbā'ī and al-Baṣrī, some of whom stated that bayān means a declaration embodying certain legal provisions. To others it is a new 'ilm (knowledge) which not only declares legal provisions but also makes them clear.<sup>39</sup> Al-Shāfi'ī says that bayān is a collective term which includes general principles of law as well as detailed rules.<sup>40</sup>

Al-Murtaḍā discusses the way the bayān is formulated. He says that in shar'ī matters, it has been made by Allāh through speech and writing; i.e., Allāh dictated and the Angels wrote down what was said. Then the Angels conveyed this to Muḥammad, who obtained it by way of speech. As regards the Prophet's method of bayān, al-Murtaḍā says that it is of various

kinds: by speech, by writing, by indication, by action and by ijtihād.<sup>41</sup>

Another problem that is raised in this connection is whether bayān can be delayed from the time of khiṭāb up to the time when bayān becomes incumbent.<sup>42</sup> For al-Shāfi'ī, Abū Ḥanīfah and their followers, delay is permissible, but for Abū 'Alī, Abū Hāshim and the Zāhirites it is not permissible. Al-Murtadā distinguishes between bayān in the cases of mujmal<sup>43</sup> and 'umūm. In case of mujmal, delay is permissible, but in case of 'umūm, if the matter can be understood without bayān, the delay is permissible, but if the matter cannot be understood without bayān, then delay is not permissible. The reason for permitting delay is the public benefit.<sup>44</sup> He cites the example of delaying bayān from the Qur'anic incident of "the cow" in which bayān did not come for a span of time.<sup>45</sup>

The other proof for the delay of bayān which he cites is 'rational argument ! Suppose that a king beckons his governor, saying, "I am offering you the sole authority of a certain city. Go there, and I will inform you of the details when you are there." The case with a shar'ī bayān is exactly similar.<sup>46</sup>

As another proof he argues that every scholar accepts that Allāh can delay a declaration changing a particular state of affairs for as long as the necessity of changing it does not arise. This is considered wise. Such is the case with the delaying of bayān also.

## 2. The problem of naskh (abrogation).

After the discussion of bayān, al-Murtaḍā goes on to discuss the principles of naskh (abrogation). Naskh means superseding or supplanting a shar'ī rule by means of a later shar'ī provision with the aim of easing the law for the people, making possible progress in legislation in order to **adapt** the rules governing transactions to the changing times. Naskh is of several types: the supercession of one Qur'ānic verse by another or by a khābar, supercession of a khābar by another khābar or by a Qur'ānic verse etc. The principle of abrogation was a controversial issue, the supercession of one Qur'ānic verse by another being accepted by the great majority of jurists. But the supercession of one khābar by another is acceptable to al-Murtaḍā only when the nāsikh is khābar al-maqtū', because khābar al-wahid is not acceptable to him.<sup>47</sup> The supercession of a Qur'ānic verse by a khābar,

however, was a controversial issue. Al-Shāfi'ī and Aḥmad ibn Ḥanbal both rejected the notion that the khavar could supersede the Qur'ān. For these people also, the Qur'ān cannot supersede a khavar.<sup>48</sup>

Al-Murtaḍā holds the same opinion as Abū Ḥanīfah, Mālik and some followers of the Zāhirī school. He said that it was possible for khavar al-maqtū' to supersede the Qur'ān and vice versa, on the grounds that it is like the Qur'ān, a dalīl (proof) for aḥkām. Thus, this supercession is sanctioned by reason in addition to the fact that it did actually occur.<sup>49</sup>

Now the critical point is the discussion of whether ijmā' and qiyās can abrogate the Qur'ān or the akhbār, and also whether ijmā' and qiyās can be abrogated by the Qur'an or by the akhbār. The power of qiyās to abrogate is flatly rejected. Since al-Murtaḍā does not accept qiyās as a principle of jurisprudence, the question of its ability to abrogate Qur'ān and akhbār does not arise. Even those jurists who accept qiyās as a principle of jurisprudence, like the Ḥanafī jurists, stated that it could neither abrogate the Qur'ān and khavar al-maqtū' nor could it be abrogated by the Qur'ān and by the khavar.<sup>50</sup> As

regards ijmā', all jurists agree with al-Murtaḍā that ijmā' cannot be abrogated, i.e., it cannot be mansūkh since the Qur'ān and the akhbār came into existence before ijmā'. Al-Murtaḍā moreover also believes that ijmā' cannot abrogate the Qur'ān or the akhbār.<sup>51</sup>

### 3. Akhbār

Khabar is the most important source of uṣūl al-fiqh because the true interpretation of the Qur'ān and the sharī'ah can only be known through the tradition of the Prophet and of the infallible imāms. The Prophet left many things in a general form, which were subsequently explained in specific detail by the imāms, and many things that had been implicit were made explicit by them. Consequently, the Shī'ah give great importance to akhbār, at the same time accepting only those whose chains of authority go back to the family of the Prophet.

Akhbār, according to the Shī'ah, is a wide term comprising those sayings, deeds, or tacit approvals which are related from the Prophet. The akhbār also include the sayings, deeds or tacit approvals of their imāms. Narrations of the imāms from the Prophet and the imāms' own sayings are equally valid proofs, because of their infallibility. Moreover, the imāms

were said to have derived their knowledge from the Prophet. It is for this reason that the traditions narrated in the Shī'ah books do not necessarily go back to the Prophet but may stop with one of the imāms. The Shī'ah differ from the Sunnīs on the following points:

1. The Sunnīs accept only those traditions attributed to the Prophet. These include sayings, deeds, or tacit approvals reported of the Prophet.

2. The Sunnīs hold that the narrator of a khābār must be reliable and preferably a non-Imāmī.

In line with these differences, the traditions in the six authentic collections of the Sunnīs go back to the Prophet, and the narrators are non-imāmī. The Sunnī ḥadīth collections, therefore, are completely different from the akhbār books of the Shī'ah.<sup>52</sup>

Al-Murtadā defines khābār, in general, as a message which is either true or false. In other words, it is a message which is ~~either~~ worth accepting or worth rejecting. For example, the message "telling a lie is good," is false. On the other hand the message "Allāh is the creator of the universe," is true. Some scholars define khābār as a message which

has both the possibility of truth and of falsehood. This definition, however, is not acceptable to al-Murtaḍā because some khābār are completely true such as those of God, or of the Prophet, which are the sources of sharī'ah.<sup>53</sup> These latter do not have the possibility of falsehood.

Khābār is divided into three categories:

(1) Where it is known that the real occurrence is in accordance with it. This category is called true: khābār.

(2) Where it is known that the real occurrence is not in accordance with the khābār. This is called false khābār.

(3) Where it is not known whether the real occurrence is in accordance with the khābār or not.

Now the question arises as to how one can know whether the real occurrence is in accordance with the khābār or not. There are two ways of knowing this:

(1) Ḍarūrī (essentially). That is to say, that we can know the truth of a khābār by the standard of the khābār itself, as in the case of a khābār coming from various narrators without any contradictions; and

(2) Muktasab (by way of acquisition). That is to say, that we can know a khābār is true by acquiring

knowledge of its truth through khavar al-mutawātir, or by khavar from God or the Prophet or the imāms that a particular khavar is true or false. The khavar about the miracles of the Prophet and the imāmah of 'Alī, for instance, are true.<sup>54</sup>

As regards the third category there is no way of knowing its truth or falsehood, one cannot ascertain its validity. To Al-Murtaḍā, khavar al-wāḥid falls under this category, because according to him, the main purpose of khavar is to convey knowledge. In al-Murtaḍā's systematization, khavar is the basis for knowledge; and in the discussion with his opponents he maintains that in the course of human experience it often happens that one obtains information which only later proves to be correct by our verifying the information.<sup>55</sup>

In the discussion on the categories of khavar, al-Murtaḍā has established that only one kind of khavar constitutes knowledge, namely that which is in accordance with real occurrence. This kind of khavar is divided into two types:

(1) Every intelligent man who hears the khavar, gets knowledge through it, and no one doubts it. For example, the khavar that Baghdad is a big city; and



(2) the second category of khābār giving knowledge is that where the people who obtain it attempt to verify it by investigating the veracity of the informant. If the informant proves trustworthy, the khābār is accepted as true. An example of such a khābār is that regarding the imāmah of 'Alī. Of these two categories of khābār, the first according to the Mu'tazilah gives 'ilm al-darūrī (essential knowledge), but according to Abū al-Qāsim al-Balkhī,<sup>56</sup> it does not give essential knowledge but rather acquired knowledge. Al-Murtaḍā, however, states that it may yield either of the two. In such a case, he argues, postponement of a decision is better and when one gets more information, then he can categorise the knowledge as acquired.<sup>57</sup>

It would, therefore appear, that only the following akhbār are acceptable to al-Murtaḍā:

- 1) Khabar of Allāh in the Qur'ān;
  - 2) Khabar of the Prophet based on an imāmī isnād;
  - 3) Khabar of the infallible imāms; and
  - 4) Khabar which is universally acceptable.
- Khabar al-wāḥid.<sup>58</sup>

Al-Murtaḍā's views on khābār al-wāḥid are

completely different from those of contemporary and later Shī'ī scholars. Khabar al-wāḥid is not acceptable to him until its authenticity is proven by some other indication. Since most other Shī'ī scholars accept khabar al-wāḥid, al-Murtaḍā paid special attention to it and, in fact, wrote several treatises on the problem, such as the A'māl bi Khabar al-Wāḥid. Al-Murtaḍā's main argument is that though one could argue in favour of the acceptability of khabar al-wāḥid, this argument could never be proved to be conclusive, and thus the only khabar that can be regarded as acceptable is khabar al-Mutawātir.<sup>59</sup> For this reason he does not in this book discuss the problem of ta'ārūḍ (contradiction) and tarjīḥ (preference).<sup>60</sup> Qur'ānic verses of universal import ('umūm) cannot be made specific by khabar al-wāḥid.<sup>61</sup> As a result of his distrust of khabar al-wāḥid, he advised people not to accept the traditions collected in al-Kāfī, the basic book of tradition among the Shī'ah. He is even alleged to have said that to avoid al-Kāfī is obligatory.<sup>62</sup> If the narrator of a khabar al-wāḥid is a reliable person, then such a khabar will constitute speculation but not knowledge. This means that in case the narrator is unreliable, the

khavar carries no value at all. In the view of al-Murtaḍā religious observances cannot be approved by khavar al-wāḥid. It cannot therefore be considered as a basis for religious law. To be acceptable a tradition must be transmitted by at least two reliable witnesses. Abū 'Alī al-Jubbā'ī holds the same view.<sup>63</sup> Al-Murtaḍā's argument in this respect is that a religious observance can be acted upon when the following two conditions have been met:

(1) The observance must be approved by the religious law, not by rational argument.

(2) It must take into account the Public Benefit (maṣlahah).

These two conditions constitute knowledge. Since khavar al-wāḥid does not constitute knowledge, it does not oblige one to act upon it. Hence it is not acceptable for giving validity to religious observances.<sup>64</sup>

We should remember that there are differences of opinion among the scholars with regard to the traditions of the Prophet. If a tradition is narrated by one of the infallible imāms, then, even if it is khavar al-wāḥid, it will be acceptable to all Shī'ī scholars, including al-Murtaḍā, because he holds

the sayings of the infallible imāms to be proofs for the community. They are protectors of the sharī'ah and the rightful authorities for giving explanations and solutions in shar'ī matters raised by the Prophet. Ergo, their narrations from the Prophet are preferable to those of others, and their explanations are considered as if they were given by the Prophet. For this reason a khavar al-wāḥid from an infallible imām constitutes knowledge. If the tradition is narrated by anyone other than an infallible imām, the Shī'ah differ among themselves about its authority. The two Shī'ī scholars studied here hold opposite views on this problem. Al-Murtaḍā rejects such a khavar al-wāḥid completely while al-Ṭūsī accepts it.<sup>65</sup> Al-Murtaḍā rejects such traditions regardless of whether the narrator was an imāmī Shī'ah or a non-imāmī. However, he is alone among the Shī'ah scholars in holding this view. Al-Shadīd al-Thānī relates two arguments used by al-Murtaḍā to support his position. He argued: 1) that the ijmā' of the scholars up to his time was that khavar al-wāḥid should be rejected and 2) that khavar al-wāḥid is similar to qiyās, and hence constitutes speculation and not knowledge.<sup>66</sup> These arguments have been refuted by the other scholars on

the ground that these arguments themselves are based on khavar al-wāḥid. On the basis of his own principles, therefore, his stand is to be rejected.<sup>67</sup>

a) Ijmā'

Out of the two basic material sources for law and theology, namely, the Qur'ān and khavar, there emerged another source - the ijmā'. Its validity has been accepted by the majority of jurists. This section deals with the ijmā' of the Shī'ah.

Right from the earliest period when it was first employed, there have been different views as to the nature of ijmā'. The Shī'ah differ from the Sunnīs, and the latter differ among themselves. Mālik gave preference to the ijmā' of the people of Madīnah; Ibn Ḥanbal to the ijmā' of all the Companions; while al-Shafī'i and Abū Ḥanīfah accepted as binding the ijmā' of all Muslim scholars of all times and all areas.<sup>68</sup> For the Shī'ah ijmā' is confined to the scholars of their own community and even there, it refers narrowly to agreement on a saying of one of the imāms regarding the issue in question. Ijmā' is acceptable to them on the ground that it clarifies the opinion of their infallible imām on a problem. Ijmā' therefore is a valid proof for the Shī'ah, but

it does not constitute an independent proof, that is, it is not the ijmā' itself which is important but only the fact that it confirms a saying of the imām.

Let us now examine al-Murtaḍā's position on this problem. His views appear somewhat broader than those of the Shī'ah generally, for he states that ijma' may consist of the consent of the whole community (ummah), that of the believers (mu'minūn) or that of the Muslim scholars. In every case, the report of an infallible imām must be included in it. If the ijmā' is that of the ummah as a whole, then the imām is a member of the ummah; if it is that of the believers only, then he is the most distinguished among them; and if it is that of the Muslim scholars, then he is the most excellent of scholars. Since the imām is infallible, his sayings are considered as valid proofs. In the absence of the imām, therefore, his report must be included in the elements that form the ijmā'. In fact, the only reason for the ijmā' being a proof at all is the imām. There is no effective ijmā' as the result of the unanimous opinion of the scholars alone. The contrary view, however, was accepted by the Sunnīs. They believe an individual scholar capable of giving a wrong judgment, but all scholars taken together cannot be

conceived to have agreed upon a wrong conclusion.<sup>69</sup>

The basic arguments of the Sunnīs to support ijmā' is the Prophetic tradition: "My ummah will never agree upon an error,"<sup>70</sup> plus a few Qur'ānic verses such as "you are the best of ummahs and it is your duty to order Man to do what is right and to forbid them from practicing what is wrong."<sup>71</sup> Al-Murtaḍā deals with the Qur'ānic verses by interpreting in a fashion different from that common among the Sunnīs. The argument from tradition he seeks to refute in two ways:

1) by arguing that the tradition is a khābar al-wāḥid which does not constitute a proof in his opinion.

2) by adopting a reading of the tradition different from that accepted by sunnīs. He reads it as follows:

"Oh my ummah! Do not agree upon what is wrong."<sup>72</sup>

Moreover, the Sunnī arguments based on the tradition maintaining that an individual could give a wrong judgment, but the collective body could not, was in al-Murtaḍā's opinion wrong. He cites the symbolic example of thirty black people who, though individually

black, can never constitute whiteness altogether.<sup>73</sup>

In the same way collectivity is no guarantee of the validity of ijmā' which has no value for him without the imām. Al-Murtaḍā does not limit ijmā' to a given period because in every age there will be an infallible imām. Ijmā' may be taken as a proof when either of two conditions is met: 1) that the ijmā' includes the statement of a living imām or 2) if the imām is in ghaybah, a statement from him on the matter in question shall be part of the general agreement.<sup>74</sup> He points out that it is theoretically possible for scholars of different sects to get together and achieve ijmā', although they hold different views.<sup>75</sup> Whether such a consensus was practically possible or not, however, remained a vital question. Al-Murtaḍā believes it possible and cites the example of discussions on the problem of wine. All Muslim scholars of the world agree upon the issue and hold that wine is forbidden.<sup>76</sup>

The breadth of scholarship characteristic of al-Murtaḍā becomes evident when his views regarding the context of ijmā' are analyzed.

To al-Murtaḍā ijmā' as a jurisprudential principle has some limitation. This limitation explains his concept of ijmā' and its validity as such.



Concepts such as tawhīd, ‘adl etc, that came into existence before ijma’ became a principle, do not fall under its subject matter. Further matters that can be resolved by deductive reasoning also do not come under ijmā’. However, shar‘ī matters that were obligatory before the establishment of the imāmah, may require an ijmā’ since there may be a saying of an imām with regard to these matters.<sup>77</sup>

Finally there is the matter of the authorities whose concerted opinions constitute ijmā’. Al-Murtaḍā's view on this matter has already been indicated above. For him it is the decision of the imām which is determinative, and no ijmā’ is truly an ijmā’ which does not include the imām's decision among the concerted opinion.<sup>78</sup>

#### 4. Ijtihād

Ijtihād has played quite an important role in the history of Muslim religious thought in general and among the Shī‘ah in particular. It has served as the medium for the deduction of legal rules from the basic sources and as the means of achieving the necessary flexibility for dealing with the changing situations and needs of society. Ijtihād was, therefore, an essential ingredient in the growth of Shī‘ī

law. It is a master science and the key to a deep and academic understanding of the Islāmic sciences as a whole. The exercise of ijtihād is not exclusively relevant to the interpretation of Islāmic traditions or Qur'ānic verses; rather it deals mostly with common language and human expression as such.<sup>79</sup> It is not, however, an independent source of uṣūl al-figh for the Shī'ah, but a means of using other sources like kitāb, sunnah and ijmā'. Ijtihād is thus only a method which operates on a substance derived elsewhere.

In discussing the definition of ijtihād al-Murtaḍā states that the term ijtihād has a wider implication than qiyās. Ijtihād is the disciplined exertion of one's self to understand the meaning of the Sharī'ah and to form an opinion in a case or as to a rule of law. Its use implies that there is no clear text regarding the particular problem. The only way of knowing the rule of law, therefore, is to use ijtihād. The difference between qiyās and ijtihād is that qiyās is based upon a special principle, from which a far' was deduced while ijtihād has no such special basis. Al-Murtaḍā, in his discussion, provides two definitions:

1) Colloquially speaking, a mujtahid (a qualified lawyer who uses ijtihād) is one who bases himself on speculation in establishing shar'ī rules.

2) Strictly, according to Shī'ī rules of law, a mujtahid is one who tries to determine sharī'ah by establishing the proofs.

The other difference between qiyās and ijtihād that al-Murtaḍā cites lies in the fact that Allāh has likened ijtihād to an act of worship.<sup>80</sup> As we saw above, 'ibādāt or religious observances cannot be made obligatory on the basis of qiyās, whereas they can be imposed by ijtihād. The authority here comes directly from Allāh in the case of the qiblah (the direction of Mecca) when He ordained ijtihād regarding the qiblah. This reference is to the verse, "Indeed We see the turning of Thy face to heaven, so We shall surely make thee, master of the qiblah, which thou likest, turn then thy face towards the Sacred Mosque. And wherever you are, turn your faces towards it."<sup>81</sup> In al-Murtaḍā's opinion, this verse indicates that Allāh ordained the Prophet and his companions to turn towards the Masjid al-ḥarām. Then Allāh says, "And from whatsoever place thou comest forth, turn thy face towards the Sacred Mosque."<sup>82</sup> This verse indicates

that in case the worshippers be far away, they should try to turn towards the Mosque but not necessarily exactly to it. In this respect, they were allowed to use their own ijtihād and were commended as correct in doing so. Another example that al-Murtaḍā cites is that of two men reaching an unknown place where there is no way of knowing the qiblah. Each of them performs his prayer facing a different direction; and in this case, both would be considered right. There are thus a number of occurrences in which Allāh has made ijtihād an act of worship. Ijtihād therefore, emerges as a stronger jurisprudential principle than qiyās in al-Murtaḍā's systematization.<sup>83</sup>

Perhaps the major contribution of al-Murtaḍā, if we take an overall view of his attempts at systematization, is the approach he develops towards the subject. In his analysis, uṣūl al-fiqh is not concerned only with the so-called sources of fiqh, the Qur'ān, sunnah, etc. Rather, he views uṣūl al-fiqh as defining those principles which can be applied to the sources in order to derive a body of law from them. As a result the main thrust of his systematization is towards analysing semantic, philological, theological and related problems.

What this reflects about the Shī'ah would thus seem to be extremely important, that is the pre-occupation of al-Murtaḍā is not with sources, rather it is with principles, not with substance but with the method. If one may use an analogy, the sources constitute the raw material and the really fundamental object of uṣūl al-fiqh is to give shape and meaning to these sources so that they can be translated into the active life of the community.

In terms of advancing Shī'ī scholarship, al-Murtaḍā stands as the master architect in the field of uṣūl al-fiqh. He was the first to study it in any detail and at length. One of the important points of difference with al-Shāfi'ī's uṣūl that he develops has to do with the question of qiyās. Al-Murtaḍā rejects qiyās and replaces it with 'aql as we have seen reflected in his support of the principle of ijtihād.<sup>84</sup> The Qur'ān, the sunnah of the Prophet and the imāms emerge as the major sources, supplemented by ijmā' and 'aql. His other great contribution lay in his definition of 'ilm, as opposed to ẓann. He made 'ilm the gauge for acceptance of any khābar and thus linked it to the imāmah which had always been for the Shī'ah the primary source of

knowledge.

His influence on later Shī'ī scholars was tremendous,<sup>85</sup> as we shall see particularly in the case of al-Ṭūsī to whose systematization we now turn.

## CHAPTER III

### THE SYSTEMATIZING WORK OF AL-ṬŪSĪ

#### A. His Life and Works

In this chapter, we shall discuss al-Ṭūsī and his systematization of uṣūl al-fiqh.

#### 1. His Life

The man next in importance after al-Murtaḍā for the organization of the science of uṣūl al-fiqh among the Shī'ah was Shaykh al-Ṭā'ifah Muḥammad ibn al-Ḥasan ibn 'Alī Abū Ja'far al-Ṭūsī. He was born in Ṭūs in 385/995. Little is known about his early life and early education. In Ṭūs he studied with Muḥammad ibn Sulaymān.<sup>1</sup> Most probably, al-Ṭūsī did not work with ibn Sulaymān for more than five or six years. Afterwards, al-Ṭūsī studied with Shaykh Aḥmad ibn Muḥammad ibn Mūsā ibn Ṣalt al-Aḥwāzī.<sup>2</sup> The exact period of his study under al-Aḥwāzī is a matter of dispute.<sup>3</sup> In fact, the exact dates of his periods of study with most of his various teachers are not known to us.<sup>4</sup> After finishing his early education, al-Ṭūsī

went to Baghdad in 408/1017. At that time he was a young man of twenty-three. In Baghdad he came in contact with Shaykh al-Mufīd and studied with him until the latter died. Then he launched into study with al-Murtaḍā for a lengthy twenty-three years during which he had the opportunity of access to al-Murtaḍā's personal library. He had acquired a wide knowledge of popular disciplines with a number of teachers, thirteen of whom were non-Shī'īs.<sup>5</sup> As we have mentioned earlier, Baghdad had become an important centre for learning during the Buwayhid regime; scholars of different schools of thought gave lectures in their special fields. The concept of sectarian education seems to have been unknown in this period. Students attended lectures of many different scholars. Al-Ṭūsī studied with Shāfi'ī, Mu'tazilī, Zaydī and Ḥanafī scholars alike, but always with an inquisitive and assimilative mind, as is manifest in his legal methodology.<sup>6</sup>

Al-Ṭūsī was fifty years old when al-Murtaḍā died. Though this is not specifically mentioned, it is very likely that al-Ṭūsī was occupied during this period with compilations and research work; for instance his books al-Nihāyah and Tahdhīb al-Aḥkām



were certainly written during the lifetime of Shaykh al-Mufīd; i.e., before 413/1022.<sup>7</sup> In 436/1044 he was seated in his teacher's place. In view of his distinctive and comprehensive knowledge of kalām, tafsīr, akhbār and fiqh, he was very soon surrounded by students and seekers, both Sunnis and Shī'ahs. Al-Ṭūsī was domiciled in the Karkh quarter<sup>8</sup> of Baghdad, which was the intellectual as well as the religio-political centre of the Shī'ah since Abū Naṣr Shapūr Ardashir, a minister of the Buwayhid Amīr Bahā al-Dawla had established a grand library there in 381/991 on the pattern of Bayt al-Ḥikmah. The library consisted of approximately ten thousand basic books, mostly in the handwriting of the authors themselves.<sup>9</sup> From 440/1048 onwards came a period of turmoil. In 441/1049 Karkh was terribly affected by Sunnī and Shī'ah riots, but real disaster struck when the Saljūqs overwhelmed Baghdad and in 448/1056 Tughril Beg entered the city. The Saljūqs were known for their adherence to the Sunnī school, and as they were fighting against the Buwayhids, the Sunnī inhabitants of Bāb al-Baṣrah felt encouraged to destroy Karkh and wreck its store-house of knowledge. Al-Ṭūsī was deeply disappointed and left Baghdad for good.

In 450/1058 he came to Najaf to pass the rest of his life near the tomb of 'Alī. With him the centre of studies also moved from Baghdad to Najaf, where he occupied himself for a time in reproducing some of his books which were destroyed during the sack of Karkh.<sup>10</sup> Those were the busiest days of his life. Al-Ṭūsī, who was both a theologian and a jurist, achieved distinction for himself more as a jurist and a legal thinker, who by virtue of a wide and thorough knowledge of contemporary schools of law, was in an excellent position to systematize the whole of Shī'ī legal thinking. He died in 460/1067 in Najaf at the age of seventy-five.<sup>11</sup>

## 2. His Works.

Al-Ṭūsī left behind innumerable works in almost every branch of Islamic learning. Of his works only forty-seven survive. Among these, only twelve have been published, and the rest are still in manuscript form.<sup>12</sup> He was the second Shī'ī scholar to devise a systematic methodology for legal reasoning after comparative and comprehensive study of contemporary legal thought. Apart from two small treatises, Tamhīd fī al-uṣūl and Mas'alah fī 'amal bi khabr al-wāḥid, his main work on the subject is

'Uddat al-Uṣūl.<sup>13</sup>

B. The Systematizing Work of al-Ṭūsī

In the systematization of uṣūl al-fiqh, al-Ṭūsī has followed the way of his teacher, al-Murtaḍā. In many places his ideas resemble those in al-Dharī'ah. He has adopted the same pattern of quoting the opinions and arguments of his opponents, refuting these arguments and finally giving his own views on the problem. It would, therefore, be in order if we focus in his work on a problem about which he differs substantially from al-Murtaḍā. Such a problem is the status of khavar al-wāḥid which forms an important basis of fiqh for al-Ṭūsī. Therefore we shall discuss his views regarding the divisions of khavar in general and khavar al-wāḥid in particular.<sup>14</sup>

In the preface of 'Uddat al-Uṣūl al-Ṭūsī says that this branch of knowledge requires the earnest attention of scholars, because Religious Law is entirely based upon it. If he does not know the fundamental principles of a science, one can only become a reporter of the opinions of others, not a scholar in the real sense. The fundamental principles of law, with which the science of jurisprudence deals, are divine commands

(khiṭāb). Having a divine origin, these commands lead to a preliminary discussion on the nature of knowledge, because they in themselves constitute our source of knowledge. Thus in the beginning, he discusses these questions of 'ilm and khiṭāb and their subdivisions. Then he proceeds to a discussion of the materials that support the divine commands, namely the khabar of the Prophet and the imāms, and finally rounds off his systematization by discussing the ways and methods that lead to the confirming of a divine command, namely ijma' and ijtihād.

#### 1. Division of a khabar.

Khabar is the main stay of Shī'ī law and uṣūl al-fiqh for al-Ṭūsī. Unlike other contemporary jurists, Shī'ī imāms either depended exclusively on the traditions which were undisputedly accepted among them or based their decisions on the knowledge which they had inherited from the Prophet.<sup>15</sup> However, the later divisions of a khabar were not known in al-Ṭūsī's days.<sup>16</sup> Al-Ṭūsī made only two divisions: mutawātir and aḥad (isolated tradition).<sup>17</sup> Although he uses the terms sunnah and khabar interchangeably, yet it is possible to distinguish a difference between them. The traditions that are definitely known as

genuine statements from the Prophet he calls invariably sunnah al-maqtū', or khavar al-maqtū'. This is why, contrary to the opinions of his contemporaries, he does not consider khavar al-mutawātir as necessitating the essential knowledge,<sup>18</sup> because the sources which yield 'ilm al-ḍarūrī are the two bases; i.e., the Qur'ān and sunnah al-maqtū'. To determine the validity of khavar, al-Ṭūsī, though he believes in the usefulness of the rijāl method,<sup>19</sup> stresses internal criticism.<sup>20</sup> For instance, he holds that traditions serving an ideological or religious purpose, if they are not related by other narrators, are not reliable.<sup>21</sup> If a khavar contradicts the Qur'ān and sunnah al-maqtū', it is not reliable.<sup>22</sup> He does not agree with his opponents in accepting the reliability of all the companions of the Prophet because he believes their complete reliability to be impossible. It is incredible to him that each one of so large a group of men could be entirely scrupulous in transmitting the traditions.<sup>23</sup>

However, in al-Ṭūsī's opinion khavar al-mutawātir constitutes 'ilm and not ẓann under three conditions:

- (a) The narrators must be persons of

unspecified number, whose agreement upon a lie is inconceivable. Here the Shī'ī scholars differ from the Sunnīs. According to the latter a huge gathering of persons cannot agree upon a falsehood, while the Shī'ah consider such an agreement possible. The Shī'ah say that if the individuals included in the ijmā' are not reliable, then they may agree upon a falsehood as we have already stated in the discussion on ijmā'.<sup>24</sup> The basic difference lies in their respective views of consensus. For the Sunnīs consensus makes it impossible that agreement should occur regarding a false statement. The Shī'ah, however, consider consensus to be invalid. Therefore, al-Ṭūsī makes it a condition for the validity of a khavar al-wāḥid that the individuals concerned should have a degree of character that makes it impossible for them to tell a false statement.

(b) A khavar constitutes 'ilm in the sense that the narrators do not agree on falsehood. It is a condition that there must be definite proof that nothing has compelled any of the narrators to agree with a falsehood. The ijmā' of the Companions of the Prophet on the occasion of the Thaqīfah Banī Sā'idah<sup>25</sup> where Abū Bakr<sup>26</sup> wanted to become the Caliph is

considered as false. As a result, it is concluded that the intention of Abū Bakr nullified the ijmā' since he should not have had such an aim.

(c) Khabar must be very clear, without ambiguity. This condition clearly indicates that a consensus of many narrators by itself alone has no validity.<sup>27</sup> Akhbār al-mutawātirah is an important basis and constitutes a proof for the Shī'ah that 'Alī is the best among mankind by the tradition stated by the Prophet at the time of Ghadīr al-Khumm.<sup>28</sup> Al-Ṭūsī, quoting this tradition, says that there are two ways of narrating such a khabar: one is by way of a continuous chain of narrators; the other is the way of the historians who narrate from the previous generation without maintaining a continuous chain of narrators. In the tradition of Ghadīr both usages are followed, hence it becomes more acceptable. However, those akhbār which the Shī'ah consider mutawātirah are not so considered by Sunnīs. The question, however, arises as to why the Shī'ah accepted the principle of mutawātir. The chief reason, as al-Ṭūsī states, is that the principle serves as a foundation for their arguments in support of the Khilāfat of 'Alī.<sup>29</sup>

The question now arises as to what kind of

'ilm is derived from khavar al-mutawātir? We have set forth al-Murtaḍā's view in the previous chapter.<sup>30</sup> According to al-Ṭūsī such a khavar results in 'ilm al-muktasab and not 'ilm al-ḍarūrī, because of the three conditions laid down above. When someone looks into a khavar to see whether it fulfils the above mentioned three conditions or not, he is justified in acting on the khavar only if he finds that it fulfils the conditions. This kind of scrutiny leads to acquired knowledge. The resulting 'ilm is not like the 'ilm about prophecy or about the imāmah of 'Alī.<sup>31</sup>

Of the two kinds of 'ilm, one is called ḍarūrī, and the other is called muktasab. One can obtain 'ilm al-ḍarūrī if all his senses are sound. But in the case of 'ilm al-muktasab, one needs to exercise the intellect. The definitions of essential and acquired knowledge are the same for both Sunnīs and Shī'ahs. The difference is that there are many traditions like those concerning the imāmah of 'Alī which provide the Shī'ah with essential knowledge, but do not constitute knowledge at all for the Sunnīs. Moreover, there are many akhbār al-mutawātirah which have been accepted by the Sunnīs but have been rejected by the Shī'ah because the akhbār do not meet the three



conditions of a valid khābar al-mutawātir.<sup>32</sup>

Khābar al-wāḥid.

Khābar al-wāḥid is a report transmitted by one, two or more narrators, whose number falls short of that required for a khābar al-mutawātir. Al-Shāfi'ī called this type of khābar khābar al-khāṣṣah. The status of khābar al-wāḥid was a highly controversial subject during the time of al-Ṭūsī. He quotes al-Nazzām for whom it constituted essential knowledge only if one knew the reliability of the narrator and the content of his narration did not entail speculation. But according to some of the Ṣāḥirīyah, khābar al-wāḥid constitutes knowledge which obliges action upon it. Others, however, held that such knowledge did not oblige action, because the principles of religious observances had not come into existence through khābar al-wāḥid, but through khābar al-mutawātir. According to Ibn Shurayḥ actions are made obligatory by khābar al-wāḥid. Indeed, according to most of the jurists and theologians, actions are made obligatory by 'ilm from khābar al-wāḥid, though some made a certain minimum number of narrators a condition, i.e., the khābar had to be narrated by more than one person; while some other neglected this condition.<sup>33</sup> This

controversy made it necessary for al-Ṭūsī to justify his own point of view. Whether khavar al-wāḥid is a proof or not is a matter of controversy among the Shī'ī scholars also. Al-Ṭūsī opposed his teacher al-Murtaḍā, whose point of view we have already expounded. Since al-Ṭūsī is often challenged and condemned because of his standpoint, it is well to quote what he holds:

If khavar al-wāḥid is related by transmitters who believe in imāmah, and is related either from the Prophet or from one of the 'imāms, and none of the transmitters is known to be untrustworthy, and they are scrupulous in transmitting, and there is no circumstantial or external evidence regarding its truth, (because if it has an external and circumstantial evidence, it necessitates knowledge and extricates itself from this category), it is permissible to act upon it.<sup>34</sup>

From this statement it is clear that unlike other Shī'ī jurists,<sup>35</sup> al-Ṭūsī did not reject khavar al-wāḥid entirely. He, however, had reservations, some of which are linked with the khavar and some with the narrators. As regards the khavar itself he, like the other Shī'ī scholars, holds that it must be either a report from the Prophet or from one of the imāms. The other condition is dependent on qarīnah (context). If there is a qarīnah in the khavar, then it is said to lead to 'ilm and, therefore, necessitates

obligation. For accepting a khavar al-wāḥid in which there is a qarīnah, al-Ṭūsī makes the following qualifications:

- 1) It must be consistent with reason and its requirements.
- 2) It must be in accordance with the Qur'ān,
- 3) It must agree with al-Khavar al-maqtū'.
- 4) It must not be against what the truthful community has agreed upon.<sup>36</sup>

Under these conditions, khavar al-wāḥid will constitute knowledge. But if the conditions are not met, then the khavar will be rejected. All these are khavar al-wāḥid in which qarīnah are available. But those without a qarīnah, since they do not lead to knowledge, do not necessitate obligation but may be taken as supporting arguments, and it is permissible to act upon them. Even for this, however, the transmitters are required to have fulfilled certain conditions.

The first is that the transmitter: must be an imāmī and the report must be from the Prophet or from one of the imāms. In the case of a non-imāmī transmitter transmitting a report from one of the imāms, al-Ṭūsī gives no specific directive, but some scholars

have assumed that the khavar is acceptable because the aim of the Shī'ah is to obtain reports from the imāms and not to validate the chain of narrators.<sup>37</sup> The majority of the Shī'ah, however, do not accept this viewpoint. Some scholars have followed a middle course in this respect and have said that if the narrator is reliable, then the khavar will be acceptable. This acceptance is subject to certain conditions; i.e., he must be reliable and must not be at enmity with the descendants of the Prophet. Moreover, in the whole chain of narrators, at least one reliable imāmī narrator must be included.<sup>38</sup>

The second condition is that the transmitter must be 'ādil (righteous), that is to say, that he must be a man who generally in his life and conduct prefers to follow the injunctions of religion and reason, rather than the dictates of desire and passion.<sup>39</sup> This then raises the question of whether the transmitter is 'ādil or not, and whether this fact must be known before he transmits the khavar or not. If this information is not known to the people, then there is a doubt whether his khavar is acceptable or not. To the earlier Shī'ī scholars, khavar from such a man is not acceptable while to the

later scholars (muta'akhkhirīn) it is, because he is a Muslim who believes in imāmah.<sup>40</sup> Al-Ṭūsī accepts the narration of such a man if he avoids falsehood in the transmission, even if the narrator has committed adultery provided his i'tiqād (faith) is intact. Al-Ṭūsī states that a man's being immoral does not count against acceptance of khavar that he may transmit.<sup>41</sup>

Scholars like al-Ḥillī<sup>42</sup> (d. 726/1325) and al-Shahīd al-Thānī (d. 1011/1602) also agreed with al-Ṭūsī, arguing on the following basis:

1) Allāh says, "Oh, you who believe, if an unrighteous man brings you news, look carefully into it, lest you harm a people in ignorance, then be sorry for what you did."<sup>43</sup> This verse advises, concerning the news delivered by a fāsiq (unrighteous man), that one should look into it carefully. The verse does not advise its outright rejection. Since we cannot be certain about the condition of the transmitter, verification is not obligatory, and, hence, his report is not binding but may be accepted.

2) A khavar narrated by a mu'min (believer) is valid because of his reliability. Unless some evidence is obtained that the khavar is false, it should

be considered true.

3) In case there is doubt about something being ḥalāl (lawful) or ḥarām (forbidden) and a man, of whose condition we are ignorant, tells us that it is ḥalāl, then his khavar will be acceptable.

4) Al-Ṭūsī has maintained that khavar from a fāsiq is acceptable. A man about whose character we are ignorant and who transmits a report can be considered acceptable also. Rather, he is even preferable to a fāsiq. Hence, a narration from such a man is acceptable.<sup>44</sup>

However, with regard to ‘adālah, al-Ṭūsī teaches that if a transmitter is not a staunch believer in Shī‘īsm, but transmits reports from one of the imāms in contradiction with which there exist other narrations by reliable narrators, then the reports of such a transmitter will not be accepted. But if information from reliable persons supports the khavar of someone whose character is not known, then the reports of such a man will be accepted. In case there is no narration whatsoever to contradict a report from a person of unknown character, then al-Ṭūsī is inclined to accept it.<sup>45</sup>

The third condition for the acceptance of

khavar al-wāḥid is that the transmitter must be dābiṭ (one who possesses the power of retention), i.e., he should not make too many mistakes in transmitting, nor should he forget what he has heard.<sup>46</sup> Mistakes may be of various kinds: sometimes the transmitter may forget and add a few words of his own, leading to confusion in understanding the khavar; or sometimes he may change some words in it. If any omission is made in the chain of narrators, then it becomes very difficult to know whether the khavar has been reported from the imām or not. Because of this omission, the khavar will be mungaṭi (broken). Under these conditions it will not be accepted.<sup>47</sup>

Dabṭ has a different meaning for Ḥanafī jurists as set forth by Fakhr al-Islām al-Bazdawī, who says:

dabṭ is to hear the saying very carefully and then to understand the meaning intended by the transmitter, then to remember with his utmost strength, then to repeat it by himself and remember it until he transmits it to some other.<sup>48</sup>

Dabṭ is of two kinds: 1) dabṭ al-matn, or mastering the text together with the meaning and 2) consideration of the khavar's application in terms of sharī'ah. If there is a contradiction between these two kinds of dabṭ then the second will be given

preference. The second category of ḍabt is not known to the Shī'ah because fiqh al-rāwī (understanding the shar'ī application by a transmitter) is not considered necessary for them. It does not matter, therefore, whether the transmitter is a faqīh or not.<sup>49</sup> For the Shī'ah the Prophet's sayings or the sayings of their imāms constitute a ḥujjah.

The fourth condition leading to acceptance of khavar al-wāḥid is ta'addud (numerousness); i.e., the narrators must be more than one. Of course, this is also a controversial matter among the Shī'ah. For the majority of Shī'ī jurists, ta'addud is not considered necessary,<sup>50</sup> but in the view of al-Ṭūsī it is necessary because 'Alī had not accepted any khavar without there having been two transmitters.<sup>51</sup> Such was also the case with some of the companions of the Prophet who refused to accept any report unless there were at least two transmitters.

Let us now examine the arguments of al-Ṭūsī in favour of accepting khavar al-wāḥid as a ḥujjah. We shall quote what he says:

What supports this standpoint is the general agreement of the truthful community. I found them agreeing to action upon such traditions as related by them in their books and compiled by them in their original sources. They do not dispute it. They never felt like defending their position. If one of them gave an opinion on the basis



of a certain fact that others did not know, they asked him about its source. If he quoted a source that was not known (ma'rūf) or well known (mashhūr), but the man who was quoting it was reliable, then they did not object to this statement. They kept quiet and submitted accordingly. This was their attitude since the days of the Prophet and after him during the days of imāms. In the days of Ja'far al-Ṣādiq, from whom knowledge spread, he was the single source for a number of akhbār. If these akhbār were not reliable, they would not have agreed upon it. Since their consensus includes the ma'ṣūm (infallible) among them, it is not permissible to accuse them of falsehood. This stand is further supported by their attitude toward qiyās. According to them, qiyās was not permissible in sharī'ah. They never acted upon it. If anybody ever depended upon it or applied it in arguing with the opponents, though he did not believe in it, they forsook him, accused him and disassociated themselves from him. If khābār al-wāḥid was unreliable on such grounds, they would have certainly not depended upon it.<sup>52</sup>

The other probable reason, and a more practical one, for al-Ṭūsī's accepting khābār al-wāḥid as a ḥujjah is that Shī'ī jurisprudence went through two stages. The first stage was the period when the imāms were present. During that period all 'ilm they received from the infallible imāms constituted definitive knowledge. The second stage was the period after the concealment of the twelfth imām. In this period definitive knowledge ceased. Among the narrations which came down, a very few were

mutawātir, most being singly transmitted, and constituting speculation. Speculation, if practised widely, would lead to certain traditions being current, even if the narration had been a single individual tradition. Al-Kāfi, in al-Ṭūsī's opinion was a case in point.<sup>53</sup> It is likely that during the time of the imāms there were no specific attempts to preserve traditions from them or from the Prophet. However, after the ghaybah the need for preservation arose. It is for this reason that most of the traditions are transmissions from single or a very few narrators. This fact necessitated the acceptance of Khabar al-wāḥid as a source for Shī'ī uṣūl al-fiqh.

To understand al-Ṭūsī's viewpoint, we must know the legal methodology he used in systematizing his book. Since al-ʿIjlī al-Ḥillī (d. 597/1200) first criticised al-Ṭūsī, his legal methodology has always been open to serious criticism. Al-ʿIjlī was the first jurist after al-Ṭūsī who revised the whole system of legal reasoning and who tried to dogmatize the theories.<sup>1</sup> Al-ʿIjlī's views were further established when the Ṣafavids, in order to build and strengthen an official orthodoxy, replaced the al-Nihāyah of al-Ṭūsī, as a standard book, by a work of

Ibn Muṭahhar,<sup>54</sup> a true representative of Shī'ī jurisprudence.

Al-Ṭūsī's critics blame him for confusion in his methodology, but paradoxically the critics are themselves confused and hold variant opinions on this point. Al-ʿIjlī al-Ḥillī regards al-Ṭūsī only as an akhbārī not as a mujtahid or a muftī (one considered competent to give legal decision on a question asked). Certain serious faults are found even in his akhbārī method.<sup>55</sup> Some scholars accuse him of adopting the popular non-Shī'ī methodology, perhaps because of taqīyah (dissimulation). The community also looked unfavourably at the practice of ijtihād and legal reasoning.<sup>56</sup> Khānsārī denies that al-Ṭūsī was practising taqīyah, because of the symposia and discussions so frequently held in Baghdad at that time and also because al-Ṭūsī was assigned the chair of kalām by the ʿAbbāsīd Caliph, a great honour at that time. On the contrary Khānsārī is of the opinion that al-Ṭūsī faced the different situations and conflicting circumstances with a very sensitive mind. He also adds that al-Ṭūsī was very ambitious and a prolific writer. As a result, his work sometimes suffers from lack of scrupulousness, far-fetched

arguments and invalid reasoning. Also, he often applied analogy and equity.<sup>57</sup>

The apparent differences found in his works, in accepting or rejecting the consensus, accepting khābar al-wāḥid, application of analogy, adopting methods of akhbār-narration different from his predecessors, are all the result of a partial and unintegrated study of his works. A true perception of his legal methodology depends on an overall and comprehensive study of all of his works against the background of contemporary and preceding legal thought. During his time akhbār was the only basis of law (collected by al-Kulaynī in uṣūl al-Kāfī), and this aṣl was easily accessible and consequently there existed less difference among them.<sup>58</sup> The concept of ijmā', though used as evidence, had a connotation very different from the technical one it developed later.<sup>59</sup> It would appear that the word ijma' was normally used for those types of akhbār that were later classified as mashhūr.<sup>60</sup> On the other hand, the contemporary Shāfi'ī and Ḥanafī schools of Muslim jurisprudence had developed an advanced form of reasoning. Al-Ṭūsī had studied these developments and was fully aware of the need of their application for the

development of Shī'ī legal structure. In the following lines we will give a resumé of his legal methodology.

Al-Ṭūsī did not care very much for the earlier jurists, and has this to say about his own effort:

Only after mentioning all the principles of these problems can I put forth what our standpoint requires and what our jurisprudence intends to say. Whenever a problem or its branch is apparent and needs no further evidence, I only quote the decisions, but if the problem or its branch is ghalaṭ (wrong) or mushkil (difficult)<sup>61</sup> I indicate its causation and reasoning so that the reader may not be a blind follower. . . . I have not seen as yet any book by any jurist which deals with problems and their branches comprehensively. Non-Shī'īs have such books in abundance but no one book covers the entire subject and our people (Shī'ah) do not possess any such book.<sup>62</sup>

This need urged him to write two great works of immense significance: al-Mabsūṭ and al-Khilāf. In his introduction to al-Khilāf, he wrote:

This book deals with problems which are disputed among us and our opponents. This states the standpoint of each opponent precisely and tells which of them is correct. Each conclusion is followed by the argument which we put forth against our opponents and which is obligatorily based on evidence of the Qur'ān or sunnah al-maqtū' or ijmā' or on inference from khiṭāb or inference from the practice of our companions or implications of the aṣl. I mention khābar from the Prophet that makes the opponent

obliged to abide by it, and I support this khavar with a particular chain of transmission up to the Prophet or imāms. If the conclusion is based upon ijmā' of the "Truthful community", I state it explicitly, and if there exists a difference of opinion on the point, I point it out.<sup>63</sup>

The passage quoted above is the organum of al-Ṭūsī's legal methodology. According to al-Ṭūsī, things are good unless they are prohibited.<sup>64</sup> Prohibition is determined only by knowledge or speculation. Essential knowledge is based on two sources: kitāb or sunnah and khavar al-maqtū'. All things or actions not thus forbidden are ḥasan (good). Al-Ṭūsī, on the basis of essential and acquired knowledge, further categorises these actions into four: mubāḥ al-muṭlaq (those which have no further qualification, omits goodness), mandūb (those which are praiseworthy if done, but if not done not blameworthy), wājib al-muḍayyiq (those which are blameworthy if not done precisely according to the time and mode as commanded) and wājib al-mukhayyar (those the foresaker of which is blameworthy if he does not perform the proper substitute action).<sup>65</sup>

As mentioned earlier, khavar has been the main stay of Shī'ī law. Unlike contemporary jurists, the Shī'ī imāms depended exclusively on the traditions

which were indisputedly accepted among them or based their decisions on the knowledge which they had inherited from the Prophet.<sup>66</sup> The Shī'ah believe that the companions of the imāms wrote and collected whatever they heard from the imāms. Such collections were the sources of later compilers of the āthār of ahl al-bayt, like al-Kulaynī and others.<sup>67</sup> The compilers who came later depended much on these collections, though the compilers' methods of transmission varied. Earlier scholars reported from the original sources, with a chain of transmission via their teachers, like the method adopted in al-Kāfī. The second method was to relate from original transmitters who related the tradition directly from the imāms, like the method employed in Man Lā Yaḥduruhū al-Faqīh. The third method was adopted by al-Ṭūsī. He related khābar from the authors of books, who in turn had drawn from original sources. This resembles the method adopted in al-Taḥdhīb.<sup>68</sup> He has been criticized for this method and is often considered as unreliable.<sup>69</sup> Obviously, however, his was the most practical method for avoiding irrelevant repetition of statements which already existed in books.

When we consider al-Ṭūsī's achievement, we must take into account the fact that his development reflected a particular need that al-Murtaḍā's systematization had not dealt with. Al-Ṭūsī seems to have realized that if khavar al-wāḥid were rejected as a principle, Shī'ī law would not only be deprived of a considerable body of material but also of flexibility. Further, he attempted to show that not all khavar al-mutawātir lead to 'ilm. In cases where the Companions were antagonists of 'Alī, he felt that their narrations could not have been based on scrupulousness, whereas certain khavar al-wāḥid, though not having a continuous chain, provided solutions to many legal problems. It is against this background that we must appreciate the divergent line he took from his master.

Al-Ṭūsī has unfortunately been much misunderstood by later Shī'ah. He was an important jurist of his time who attempted to develop Shī'ī jurisprudence and who also attempted to point out certain inaccuracies in the opposing points of view. Later jurists have usually depended upon what earlier jurists like Ibn Muṭahhar and especially al-'Ijlī have said about al-Ṭūsī. Consequently, more often



than not, he has been shown in a very unfavourable light. Recently, however, there has been a resurgence of interest in al-Ṭūsī and a greater appreciation of his work and worth not only as an uṣūlī but also as a great scholar.

## CONCLUSION

This study has attempted an analysis of the origin and systematization of Shī'ī uṣūl al-fiqh in the works of al-Murtaḍā and al-Ṭūsī. What now remains is to sum up by way of a few concluding remarks.

In many ways the pattern of development of Shī'ī uṣūl al-fiqh shows many similarities with that of the Sunnī one. This is evident, for instance, with regard to the question of origins. In the development of Sunnī fiqh, the compilation of legal tradition precedes a systematization of uṣūl al-fiqh. Similarly, among the Shī'ah, there developed first of all a compilation of the tradition with no attempt to systematize a science of uṣūl until the ghaybah of the twelfth imām produced the need for systematization. In the Shī'ī case, particularly (because they were a minority), a favourable political and social milieu was necessary to permit such a creative effort on the part of the Shī'ī scholars. Such a favourable climate

existed in the fifth century under the Buwayhid's patronage of Shī'ī scholars. By the fifth century, the Shī'ah became aware not only of a need to establish their own system of law in the face of the ruling Sunnī majority, but also of their ability to do so. The Buwayhid patronage provided the necessary incentive and a favourable climate.

Al-Murtaḍā emerges as the pioneer of the science of systematized uṣūl al-fiqh among the Shī'ah. The important thing to note is that he shared in the academic atmosphere of Baghdad at the time and had had the opportunity to debate and discuss matters with all schools of thought. This permitted him to view and elaborate his task against a very wide background, which is evident both in his methodology and systematization. He begins always by laying out the opposing points of view and then by counter-arguments, attempting to establish his own. He was the first Shī'ī scholar to lay stress on Khabar al-Mutawātir, besides the Qur'ān, as a basis for Shī'ī uṣūl al-fiqh. This stress forms the basis of the structure of his systematization. In his opinion, khabar al-wāḥid was not acceptable as a basis for uṣūl al-fiqh since it constituted speculation rather than knowledge.

Another attempt on his part was to release Shī'ī scholarship from a limitation of uṣūl al-fiqh only to the sayings of the imāms. He favoured the use of ijtihād in order to be able to understand and interpret khavar against a much wider background. His al-Dharī'ah laid down the first rules on which a system of law could be based. It ranks as both the most important source as well as the most significant achievement for the beginnings of Shī'ī uṣūl al-fiqh.

His successor, al-Ṭūsī, though a disciple, did not depend entirely on his master's work. He worked at giving the Shī'ī system of law an added flexibility. He argued, contrary to al-Murtaḍā's stand, that khavar al-wāḥid was also an acceptable source of knowledge yielding specific rules of law. He realized that if this were not done, a considerable body of legal materials would have to be rejected, leaving a wide gap in the development of Shī'ī law. He, therefore, tried to assert the value of khavar al-wāḥid, very convincingly according to some, and as a result later invited a great deal of criticism.

The books under study did not lay down definitely what the Shī'ī uṣūl al-fiqh are, but from these works we are able to determine that the attempt at systematization sought to base Shī'ī fiqh, firstly

on the Qur'ān, then the akhbār of the Prophet and the imāms and the ijmā' of their own community. Qiyās was rejected as a source, but ijtihād was accepted, though only as a means of understanding the Qur'ān and the akhbār.

Schacht has demonstrated that the sectarian legal systems borrowed largely from the Sunnī schools, but as Coulson points out, Schacht may not be exactly correct when he states that the Shī'īte and Kharijite systems "do not differ from the Sunnite schools of law more widely than these last differ from one another."<sup>1</sup>

We have noted that some of the problems which the Shī'ī scholars faced were very different from those of the Sunnīs and affected their systematization to give it some distinct qualities, as in the case of the rejection of qiyās and the Sunnī ijmā'. The Shī'ah also developed distinct concepts of their own about sunnah and gave emphasis to ijtihād. All in all, the works of the two scholars discussed above represent one aspect of the Shī'ī attempt to formulate an identity separate from the Sunnīs in the field of uṣūl al-fiqh.

## FOOTNOTES

## INTRODUCTION

<sup>1</sup>For the development of Twelver Shī'īsm, see, D. M. Donaldson, The Shī'ite Religion. London, 1933, Introduction p. xxlv; John Norman Hollister, The Shī'ah of India. London, 1953; R. Strothmann, "Shī'ah", E.I., old ed., vol. iv:i, pp. 350-58; D. M. Donaldson, "The Shī'a Imāmate", The Muslim World, Vol. XXI, January, 1931, No. 1, p. 13.

<sup>2</sup>Henri Corbin, Histoire de la Philosophie Islamique, Gallimard, 1964, pp. 41-101.

<sup>3</sup>See the Introduction below, pp. 18-19 for a fuller discussion on the secondary sources.

<sup>4</sup>For the books written on the subject, see Maḥmūd Shihābī, Taqrīrāt al-Uṣūl, Tehran, 1344 A.H., pp. 58-59.

<sup>5</sup>For biographies of these two scholars, see Chapters II and III of the thesis.

<sup>6</sup>The importance of the fifth century and the choice of these two figures and their respective books as a starting point in the systematization of Shī'ī

uṣūl al-fiqh will become clear as our study progresses, especially Chapter I below.

<sup>7</sup>These points are examined in greater detail in Chapter I below, particularly pp. 33, 34-35 and 40. For the concept of ghaybah among the Twelver Shī'ah, see D. B. Macdonald [M. G. S. Hogson], "ghaybah", E.I., new ed., vol. 11, p. 1026.

<sup>8</sup>Ḥasan Ṣadr is regarded as one of the best Shī'ī scholars of the twentieth century. He died in 1935. His book Ta'sīs al-Shī'ah was published in Iran in 1951.

<sup>9</sup>Muḥammad al-Baqir was the fifth imām of the Twelver Shī'ah. He was born at Madinah in the year 57/676. He succeeded to imāmah in the year 92/710. (D. M. Donaldson, The Shī'ite Religion. London, 1933, pp. 112-119).

<sup>10</sup>Ja'far al-Ṣādiq the sixth imām of the Twelver Shī'ah, was born in 83/702, and succeeded to the imāmah in 114/732. (D. M. Donaldson, op. cit., pp. 129-141; M. G. S. Hodgson, "Dja'far al-Ṣādiq", E.I., new ed., vol. II, pp. 374-75).

<sup>11</sup>Hishām ibn al-Ḥakam was one of the most distinguished Shī'ī theologians of the earlier period. He was born in Wasit and died in 199/814. (W. Madelung,

"Hisham Ibn al-Hakam", E.I., new ed., vol. III, pp. 496-98; Najāshī, Rijāl, [n.p., n.d.], p. 338).

<sup>12</sup>Yūnus ibn 'Abd al-Raḥmān was an early Twelver Shī'ī jurist. He was a companion of 'Alī al-Riḍā. He died in the year 208/823. (Najāshī, op. cit., p. 348).

<sup>13</sup>Hasan Ṣadr, op. cit., pp. 312-13.

<sup>14</sup>Muḥammad Abū Zahrah, Muḥāḍarāt fī 'Uṣūl al-fiqh. Cairo, 1955.

<sup>15</sup>Ibid., pp. 7-9.

<sup>16</sup>Ibid., pp. 19-25.

<sup>17</sup>Maḥmūd Shihābī, Taqrirāt al-Uṣūl. Tehran, 1344/1965.

<sup>18</sup>Ibid., p. 40.

<sup>19</sup>For the discussion about these two groups see Chapter I below, p. 36.

<sup>20</sup>Maḥmūd Shihābī, op. cit., p. 50.

<sup>21</sup>Hāshim Ma'rūf al-Ḥusaynī, Ta'rīkh al-Fiqh al-Ja'farī. Bayrūt [n.d.]; al-Mabādī al-āmmah li al-Fiqh al-Ja'farī. Bayrūt [n.d.].

<sup>22</sup>Hāshim Ma'rūf al-Ḥusaynī, op. cit., pp. 126-129.

<sup>23</sup>Muḥammad Khudārī Bek, Ta'rīkh al-Tashrī' al-Islāmī. Miṣr, 1934.



<sup>24</sup>Al-ʿAyyāshī was the greatest imāmī jurist of his time and an inhabitant of Samarqand. He died about 320/932. (B. Lewis, "Al-ʿAyyāshī", E.I., new ed., vol. I, p. 794); (Zirkilī, Aʿlām. Vols. 7-8. Bayrūt, 1956, p. 316).

<sup>25</sup>Najāshī, op. cit., pp. 299; Zirkilī, op. cit., vols. 5-6, p. 203.

<sup>26</sup>Yūsuf Mūsá, al-Fiqh al-Islāmī. Cairo, 1954.

<sup>27</sup>Mūsá al-Kāẓim was the seventh imām of the Twelver Shīʿah and one of the sons of Jaʿfar al-Ṣādiq. According to the Twelvers, he succeeded his father to the imāmah in 148/765 to 183/799. (D. M. Donaldson, op. cit., p. 153).

<sup>28</sup>Dr. Yūsuf Mūsá, op. cit., pp. 156-169.

<sup>29</sup>ʿAlī al-Riḍá the eighth imām of the Twelver, Shīʿah, succeeded to Mūsá al-Kāẓim and died in 203/818. (B. Lewis, "ʿAlī al-Riḍá", E.I., new ed., vol. I, pp. 399-400; D. M. Donaldson, op. cit., pp. 161-169).

<sup>30</sup>This book has been published in Tehran, 1274/1857.

<sup>31</sup>Najāshī, op. cit., p. 274.

<sup>32</sup>Yūsuf Mūsá, op. cit., p. 156.

<sup>33</sup>Ibid., pp. 168-169.

<sup>34</sup>Muḥammad Subkī and others, Ta'rīkh al-Tashrī' al-Islāmī. Cairo, 1937.

<sup>35</sup>Ibid., p. 164.

<sup>36</sup>Ṣubḥī Maḥmaṣānī, Falsafat al-Tashrī' fī al-Islām. Bayrut, 1946.

<sup>37</sup>Ṣubḥī Maḥmaṣānī, op. cit.; tr. Farhat J. Ziadeh. Leiden, 1961, pp. 35-39.

<sup>38</sup>Asaf 'Alī Aṣghar Fayzee, Outline of Muhammadan Law. Oxford 1949; "Shī'i legal Theories", Law in the Middle East, ed. by Majīd Khaddūrī and Herbert J. Liebesny. Washington, 1955, pp. 113-31.

<sup>39</sup>R. Strothmann, "Zaid ibn 'Alī", E.I., old ed., Vol. IV; II, pp. 1193-94; D. M. Donaldson, op. cit., pp. 144-145.

<sup>40</sup>Asaf. A. A. Fayzee, op. cit., pp. 28-36.

<sup>41</sup>J. Schacht, Origin of Muhammadan Jurisprudence. Oxford, 1950.

<sup>42</sup>Ibid., p. 262.

<sup>43</sup>Ibid.

<sup>44</sup>S. G. Vesey Fitzgerald, "Nature and sources of the Sharī'ah", Law in the Middle East, p. 86.

<sup>45</sup>The science of uṣūl deals with the first principles of interpretation while the science of furū' deals with the particular injunctions or the substantive law. (Asaf A. A. Fayzee, op. cit., pp. 20-21).

<sup>46</sup>Abd al-Rahīm, Muhammadian Jurisprudence. Madras, 1911, p. 48.

<sup>47</sup>N. P. Agnides, Mohammadan Theories of Finance. Lahore, 1961, p. 26.

<sup>48</sup>Istithnā' is placing an order with an artisan. (Agnides, op. cit., p. 26).

<sup>49</sup>Khuḍarī Bek, op. cit., p. 15.

<sup>50</sup>Ibid., p. 19.

<sup>51</sup>When the existence of a thing has once been established by evidence, even though later some doubt should arise as to its continuance, it is still considered as existing. This is called istiṣhāb al-ḥal, if the present is judged according to the past; istiṣhāb al-mādī, if the converse is the case. For an elaborate discussion on the problem, see al-Ṭūsī, op. cit., pp. 124-25; Khuḍarī, op. cit., pp. 160-67.

<sup>52</sup>Mullā Muḥammad Kāẓim al-Khurāsānī, Kifāyat al-Uṣūl. Tehran: Khīyābān Kitāb furūshī, n.d., vol. 11, pp. 58-64.

<sup>53</sup>The basic sources of sharī'ah are the kitāb and the sunnah.

<sup>54</sup>Khudārī, op. cit., p. 19.

<sup>55</sup>Kurr is a measure of capacity consisting of six camel loads (Lane, Arabic English Lexicon, 1885).

<sup>56</sup>Mabādī are applied to the affirmation or negation of a problem.

<sup>57</sup>For example usurpation of property is prohibited. If one performs his prayer standing on the usurped land, the question arises as to whether it will be considered valid or not, since there are two contrasting things involved, the command for prayer and prohibition of usurpation.

<sup>58</sup>This book is the collection of six thousand traditions of the Shī'ī imāms which form the basis of the community's knowledge. The book was first published in Shiraz. We are using the Tehrān edition, 1311/1893.

<sup>59</sup>Al-Murtaḍā, al-Dharī'ah ilā 'Uṣūl al-Sharī'ah, Tehrān, 1946. The editor has used different manuscripts in his edition, which in turn were copied by:

- 1) Ḥasan ibn al-Muḥsin ibn al-Ḥasan al-Ḥusaynī al-A'rajī, in 1224/1809.

- 2) 'Alī ibn Aḥmad al-Ḥusaynī al-Madanī al-'Aḥṣā'ī in 1312/1894.
- 3) Ibn Muḥammad Ṣādiq Sharīf in 1238/1822. The most interesting feature of these copies is that they were transcribed from a unique manuscript allegedly dated 430/1030 (see photo copy in the Introduction of the book).

<sup>60</sup>'Abd al-Razzāq, Muḥy al-Dīn, Adab al-Murtadā. Bagdad, p. 150.

<sup>61</sup>This book was first published by Mirzā Shirāzī in 1312/1894. We are using the second edition, Bombay, 1318 A.H.

<sup>62</sup>See Chapter II of this thesis.

<sup>63</sup>Al-Ṭūsī, Talkhīṣ al-Shāfī. Najaf, second ed., 1383/1963.

<sup>64</sup>Ibid., pp. 239-250.

<sup>65</sup>Al-Shahīd al-Thānī al-'Āmilī, Ma'ālim al-Uṣūl. Tehran, 1297/1879.

<sup>66</sup>Muḥammad Ḥasan Mirzā, Qawānīn al-'Uṣūl. Tehrān, 1378/1958.

<sup>67</sup>Muḥammad Amīn Shūshtarī, Farā'id al-'uṣūl. Tehrān, 1374/1954.

<sup>68</sup>Sahl al-Sarakhsī, Uṣūl al-Sarakhsī, written in 479/1086 and published in Cairo, 1372/1954.

<sup>69</sup>Al-Ghazzālī, al-Mustaṣfā. Miṣr, 1937.

<sup>70</sup>Kashf al-Asrār was published in Constantinople in 1307/1889. This book is a commentary on the Kanz al-Uṣūl ilā Ma'rifat al-Uṣūl al-Pazdawī, written by Fakhr al-Islām al-Pazdawī (d. 482/1089).

<sup>71</sup>Amidī, Iḥkām fī 'Uṣūl al-Aḥkām, Miṣr, 1914.

<sup>72</sup>Ibn Khaldūn, al-Muqaddimah, Miṣr, 1320/1920.

<sup>73</sup>Aghnides, op. cit.

<sup>74</sup>Majīd Khaddūrī, op. cit.

<sup>75</sup>Asaf A. A. Fayzee, op. cit.

<sup>76</sup>Ṣubḥī Maḥmaṣānī, op. cit.

<sup>77</sup>Kemāl Fārūkī, Islamic Jurisprudence, Karachi, 1382/1962.

<sup>78</sup>D. M. Donaldson, op. cit.

<sup>79</sup>W. M. Watt, "Shī'īsm under the Umayyads", Journal of the Royal Asiatic Society, 1960, pp. 158-172.

<sup>80</sup>H. A. R. Gibb, "Government and Islam under the early Abbasids", L'elaboration de l'islam, Paris, 1961, pp. 115-127.

## CHAPTER I

<sup>1</sup>Ibn Khaldūn, al-Muqaddimah, tr. Franz Rosenthal, vol. III, London, 1958, vol. III, pp. 23-24.

<sup>2</sup>Generally speaking, only two hundred verses of the Qur'ān deal with legal materials. While according to S. G. V. Fitzgerald, only eight of them are legal in the strict sense, because, he argues, others were actually non-legal texts which either deal with rituals or ethics. (Khudārī, Ta'rikh al-Tashrī' al-Islāmī, p. 45; S. G. Vesey Fitzgerald, "Nature and Sources of Sharī'ah", Law in the Middle East, vol. I, Washington, 1955, pp. 87-88).

<sup>3</sup>J. Schacht, Introduction to Islamic Law, Oxford, 1964, pp. 13-14.

<sup>4</sup>H. A. R. Gibb, "Law and Theology", Studies in the Civilization of Islam, Boston, 1962, p. 198. For the development of the concept of ḥadīth and its position in Islāmīc law, see, J. Robson, "Ḥadīth", E.I., new ed., Vol. 11, pp. 23-28.

<sup>5</sup>The ritual of ramal during hajj is commonly taken as sunnah of the Prophet but Ibn 'Abbās argued that the Prophet did it because of certain personal reasons, so it is not normative but only a coincidence. (Shāh Wālī Allāh, al-Inṣāf, pp. 12-13 and 20).

<sup>6</sup>I. Goldziher, "The Principles of Law in Islam", Historians History of the World. London, 1908-09, Vol. VIII, p. 295.

<sup>7</sup>D. B. Macdonald, Development of Muslim Theology, Jurisprudence and Constitutional Theory. New York, 1903, pp. 71-73.

<sup>8</sup>J. Schacht, Introduction to Islamic Law, p. 19.

<sup>9</sup>Fitzgerald suggests that the term ahl al-ra'y was originally applied to the judges and lawyers and later used to describe Abū Ḥanīfah and to his school when they allied themselves with the 'Abbāsīd regime. (Vesey, Fitzgerald, op. cit., p. 92).

<sup>10</sup>Mālik ibn Anās was the founder of Mālikī School of Law. He was known as the imām of Madinah. (J. Schacht, art. "Mālik B. Anās", E.I., old ed., Vol. 111:1, pp. 205-09).

<sup>11</sup>J. Schacht, "Al-Awzā'ī", E.I., new ed.,



Vol. 1, pp. 772-73.

<sup>12</sup>M. Plessner, "Sufyān al-Thawrī", E.I., old ed., Vol. IV:1, pp. 500-02.

<sup>13</sup>J. Schacht, "Dāwūd B. 'Alī b. Khallāf", E.I., new ed., Vol. II, pp. 182-83.

<sup>14</sup>Abū Ḥanīfah was the founder of the Ḥanafite School of Law which was named after him. He was born in the year 80/699 and died in the year 150/767. (W. Juynboll, "Abū Ḥanīfah", E.I., old ed., Vol. I:1, pp. 90-91.

<sup>15</sup>I. Goldziher, op. cit., p. 301.

<sup>16</sup>Khuḍarī, Uṣūl al-Fiqh, Qahirah, 1938, p. 5.

<sup>17</sup>Al-Shāfi'ī, op. cit., p. 17.

<sup>18</sup>Muḥammad ibn al-Ḥasan al-Shaybānī, a Ḥanafī jurist, was born at Wāsiṭ, in 132/749. He was the disciple of Abū Ḥanīfah. (Heffening, "Al-Shaibānī", E.I., old ed., Vol. IV:1, p. 271).

<sup>19</sup>Shihābī, op. cit., pp. 24-25.

<sup>20</sup>J. Schacht, "Abū yūsuf," E.I., new ed., Vol. I, pp. 164-65.

<sup>21</sup>Ibn Khalliqān, Wafāyat al-A'yān wa Abnā' al-Zamān, Miṣr, 1949, Vol. V, p. 424.

<sup>22</sup>Subkī, op. cit., p. 224.

<sup>23</sup>The main points of conflict were: (a)

Some of the jurists denied the Prophetic tradition and the others the tradition of the Companions. Some of them accepted only those Prophetic traditions as valid, which explained the Qur'ānic verses. Some of them denied Khabar al-wāḥid. Some of them made declaration a condition for accepting the tradition. On the other hand some people accepted not only the sunnah of the Prophet but of the people of Madina. Some of them permitted the abrogation of the Qur'ānic verses by Khabar al-wāḥid. (b) In the matter of qiyās some of the jurists gave preference to it over khabar al-wāḥid. On the other hand the Shī'ah accepted only the Qur'ān and the sunnah on the imāmī isnād). (Subkī, op. cit., pp. 225-226).

<sup>24</sup>Ishāq ibn Rahwayh and Aḥmad ibn Ḥanbal collected a hundred thousand traditions from the various centres. On the other hand Mālik and 'Uyaynah collected traditions narrated by the people of Madina and the total collection was ten thousand. Contradictions were therefore bound to occur. (Ibid.).

<sup>25</sup>Ibn Khaldūn, op. cit., pp. 27-28.

<sup>26</sup>At first al-Shāfi'ī was in favour of tradition but later on, after settling in Egypt, al-

Shāfi'ī seemed to have felt more strongly the need to strike a balance between the two schools of thought, and sought to find a common ground of agreement.

(al-Shāfi'ī, Risālah, tr. Majīd Khaddūrī, pp. 7 and 25).

<sup>27</sup>Ibid., p. 34.

<sup>28</sup>Al-Shāfi'ī, Risālah, pp. 16-17.

<sup>29</sup>Ibid., pp. 279-368.

<sup>30</sup>J. Schacht, "Uṣūl", E.I., old ed., Vol. IV:2, pp. 1054-1055.

<sup>31</sup>Ijtihād in the old sense in which it is a synonym of ra'y means the jurist's use of his intelligence. (Al-Shāfi'ī, op. cit., p. 477).

<sup>32</sup>Ibid.

<sup>33</sup>Ibid., p. 479.

<sup>34</sup>J. Schacht, op. cit., pp. 122-24.

<sup>35</sup>Ibid.

<sup>36</sup>Al-Shāfi'ī, op. cit., p. 598;  
trans. Majīd Khaddūrī, p. 39.

<sup>37</sup>Hāshim Ma'rūf, Ta'rīkh al-Fiqh al-Ja'farī, p. 124.

<sup>38</sup>Bukhārī, al-Ṣaḥīḥ al-Bukhārī. Leyden, Brill, 1908, Vol. IV, p. 288.

<sup>39</sup>Traditions on the authority of the

ahl bayt are quoted to the effect that 'Alī had written such a booklet. (Muḥsin al-Amīn, A'yān al-Shī'ah. Bayrūt: Matba'ah al-Inṣāf, 1380, Vol. 1:2). Further al-Kulaynī has a few traditions where Ja'far al-Ṣādiq is said to have mentioned this book. (Al-Kulaynī, op. cit., Vol. I, pp. 239-42). And lastly we are told that al-Ṭūsī is said to have quoted from the Jāmi'ah of 'Alī. (Hāshim Ma'rūf, op. cit., p. 128).

<sup>40</sup>Hāshim Ma'rūf quoted from Baṣā'ir al-Darajāt, a tradition from Abū Naṣr who said "Abū Ja'far showed us a ṣaḥīfah in which there were many traditions regarding ḥalāl and ḥarām. I asked what is it? He said this is from the dictation of the Prophet and hand writing of 'Alī. Then he said, it is Jāmi'ah."

<sup>41</sup>Hāshim Ma'rūf, op. cit., pp. 132-133; al-Najāshī, Rijāl, pp. 3-5.

<sup>42</sup>Hāshim Ma'rūf, op. cit., p. 253.

<sup>43</sup>Ḥasan Ṣadr, op. cit., p. 279.

<sup>44</sup>J. Schacht, op. cit., p. 262.

<sup>45</sup>These books were written by Ibn Bābuwayh (Shihābī, op. cit., p. 39).

<sup>46</sup>Ibid.

<sup>47</sup>Muḥammad Ibn Ya'qūb ibn Ishāq al-Kulaynī al-Rāzī was the contemporary of the wakīls of the twelfth imām. He was a renowned faqīh during the

reign of al-Muqtadir. The Shī'ah consider him as the third mujaddid of the Shī'ah community. He died in 328/939 or 329/940. (Donaldson, op. cit., p. 285).

<sup>48</sup>Books like I'tiqādāt al-Ṣadūq and al-Ifṣāḥ had been written by that time. See list of books written by al-Murtaḍā, Appendix 11, below. Here, though we are dealing with primarily the Twelvers, it would be worthwhile to point out that legal trends were also developing among other major Shī'ah groups, namely the Zaydī and Ismā'īlī. For a brief discussion of legal development among the former, see: A. K. Kazi, "Notes on the Development of Zaidi Law," ABR-NAHRAIN, Vol. 11, 1960-61, pp. 36-40; J. Schacht, op. cit., p. 263; A. A. A. Fyzee, "Shī'ī legal theories", Law in the Middle East, Washington, 1955, p. 117. For the Ismā'īlī, see A. A. A. Fyzee in the above article, p. 117, and for a more detailed look at Fāṭimid theories of law related to the state, P. J. Vatikiotis, The Fatimid theory of State. Lahore: Orientalia Publishers, 1957, pp. 69-90.

<sup>49</sup>Khāṭansārī, Rawḍāt al-Jannāt. Tehran, 1382 A.H., pp. 320-23.

<sup>50</sup>Al-Murtaḍā, op. cit., Introduction.

<sup>51</sup>Hāshim Ma'rūf, op. cit., p. 191.

<sup>52</sup>Ḥasan Ṣadr, op. cit., p. 310.

<sup>53</sup>For his life and works, see 'Abbās Iqbāl, Khānḍān-i-Nawbakhtī, Tehran: Kutubkhānah-i-Ṭahūrī, 1345 A.H.

<sup>54</sup>Ḥasan Ṣadr, op. cit., p. 311.

<sup>55</sup>Ibid.

<sup>56</sup>Hāshim Ma'rūf, op. cit., p. 187.

<sup>57</sup>Infra, p.46-50; C. Cahen, "Buwayhids", E.I., new ed., Vol. I, p. 1352.

<sup>58</sup>Abū Zahrah, op. cit., p. 21.

<sup>59</sup>When the twelfth imām Muḥammad al-Muntaẓar al-Qā'im went into concealment, he was represented on earth by four wakīls (agents) for about seventy years. The first of these was 'Uthmān ibn Sa'īd. After his death his son Muḥammad ibn Sa'īd (d. 304/916) became the wakīl and after his death, Ibn Rūḥ (d. 326/937) became the wakīl and the last of them was Abū'al-Ḥasan al-Samarrī (d. 329/940).

<sup>60</sup>Abū Zahrah, Muḥāḍrāt fī Uṣūl al-Ja'farī, Cairo, 1956, pp. 21-23.

<sup>61</sup>C. Collin Davies, "Buwayhids", E.I., new ed., Vol. I, p. 1350-1357.

<sup>62</sup>Hanafī, Mālikī, Shāfi'ī and Hanbālī schools of Law.

<sup>63</sup>C. Collin Davies, "Buwayhids", E.I., new ed., pp. 1350-1357.

<sup>64</sup>For list of those treatises, see Chapter I of the thesis, pp. 36-40.

<sup>65</sup>Gibb has discussed this development in some detail in L'elaboration de l'Islām, pp. 115-27.

<sup>66</sup>Donaldson, op. cit., p. 284.

<sup>67</sup>Al-Ṭūsī, Fihrist, Najaf, 1961, p. 19.

<sup>68</sup>Al-Murtaḍā, op. cit., p. 6.

<sup>69</sup>Al-Murtaḍā, al-shāfi'ī fī al-Imāmah, Iran, 1301.

<sup>70</sup>Al-Baṣrī, op. cit., p. 886.

<sup>71</sup>Al-Ghazzālī, op. cit., p. 4.

<sup>72</sup>G. Santillana, "Law and Society", The Legacy of Islām. Oxford, 1949, p. 288.

<sup>73</sup>Al-Ghazzālī, op. cit., pp. 5-7.

## CHAPTER II

### SYSTEMATIZATION OF AL-MURTAḌĀ

<sup>1</sup>See Chapter I, pp. 41-42.

<sup>2</sup>There is a story told of how he came to have this cognomen. See Nūr Allah Shūshtarī, Majālis al-Mu'minīn, Tehran, 1375/1955, p. 501.

<sup>3</sup>Abd al-Raḥmīm ibn Muḥammad ibn Ismā'īl al-Hudaqī al-Fakīrī, born in 355/984. He lived at the court of Sharīf al-Dawla in Ḥalab as a preacher. (Carl Brockelmann, "Ibn Nubata", E.I., old ed., Vol. II; 1, p. 407). For al-Murtaḍā's studies with him, see Khānsārī, Rawḍāt al-Jannāt, p. 375).

<sup>4</sup>Shūshtarī, op. cit., p. 501.

<sup>5</sup>For his life and works, see R. Nicholson, "Abu'l 'Alā", E.I., old ed., Vol. I:1, p. 75.

<sup>6</sup>Al-Ṣābī' Abū Ishāq, Ibrāhīm ibn Hilāl ibn Ibrāhīm ibn Zahrūn al-Ḥarrānī was born in the year 313/925. He was an adherent of the Ṣābians. His father Hilāl was a skilful doctor. Ibrāhīm was also



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<sup>1</sup>See Chapter I, pp. 41-42.

<sup>2</sup>There is a story told of how he came to have this cognomen. See Nūr Allah Shūshtarī, Majālis al-Mu'minīn, Tehran, 1375/1955, p. 501.

<sup>3</sup>'Abd al-Raḥmīm ibn Muḥammad ibn Ismā'īl al-Hudaqī al-Fakīrī, born in 355/984. He lived at the court of Sharīf al-Dawla in Ḥalab as a preacher. (Carl Brockelmann, "Ibn Nubata", E.I., old ed., Vol. II; 1, p. 407). For al-Murtaḍā's studies with him, see Khānsārī, Rawḍāt al-Jannāt, p. 375).

<sup>4</sup>Shūshtarī, op. cit., p. 501.

<sup>5</sup>For his life and works, see R. Nicholson, "Abu'l 'Alā", E.I., old ed., Vol. I:1, p. 75.

<sup>6</sup>Al-Ṣābī' Abū Ishāq, Ibrāhīm ibn Hilāl ibn Ibrāhīm ibn Zahrūn al-Ḥarrānī was born in the year 313/925. He was an adherent of the Ṣābians. His father Hilāl was a skilful doctor. Ibrāhīm was also

skilled in medicine. He was highly honoured by the Buwayhid Amīr Mu'izz al-Dawla (d. 356/966). (F. Krenkow, "Al-Ṣabī", E.I., old ed., Vol. IV:1, pp. 19-21).

<sup>7</sup>Abū al-Faṭḥ- 'Uthmān ibn al-Jinnī was born in Mūṣil around 327/938. He was a scholar of Arabic literature and philosophy. He died in Baghdad, in 392/1001. (Zirkilī, al-A'lām, Bayrut, 1954, Vol. III, p. 364).

<sup>8</sup>Muḥy al-Dīn 'Abd al-Razzāq, op. cit., p. 122.

<sup>9</sup>Sayyid ibn Hibat Allāh Ibn al-Ḥasan (d. 573/1177) counted ninety-five such disagreements. (Aghā Buzrg Tehrānī, al-Dharī'ah ilā Taṣānīf al-Shī'ah, Najaf, 1355, Bāb al-Hamzah).

<sup>10</sup>'Alī al-Raḍī was the brother of al-Murtaḍā. He was born in the year 359/970. His father, Abū Ṭāhir al-Ḥusayn was Naqīb (deputy) of the Tālibīs under Buwayhid rule in Baghdad. After his father had retired from the office, al-Raḍī was honoured with that post in the year 388/998. He died in the year 406/1016. (F. Krenkow, "Al-Sharīf Al-Raḍī", E.I. old ed., Vol. IV:1, pp. 329-330; Nūr Allāh Shūshtārī, op. cit., p. 503).

<sup>11</sup>A. A. A. Fyzee, A Shī'īte Creed, London, 1942, Introduction, pp. 4-6.

<sup>12</sup>Out of his 41 works, 33 exist today. For a list of the works, see Appendix II.

<sup>13</sup>Tehran, 1346/1927. Al-Murtaḍā has divided his book into thirteen chapters, each chapter being divided into sections. For the preview of the contents of the book, see Appendix III.

<sup>14</sup>Al-Murtaḍā, al-Dharī'ah, pp. 7-10.

<sup>15</sup>Abū 'Alī Jubbā'ī was a native of Jubbā' in Khuzistan. He was one of the leaders of the Mu'tazilites. (L. Gardet, "Al-Djubbā'ī", E.I., new ed., Vol. I, pp. 569-70).

<sup>16</sup>Abū Hāshim was son of Abū 'Alī al-Jubbā'ī, who was more renowned than his father. His followers are known as Bahshamiyyah. The Mu'tazilites honoured Abū Hāshim as their Shaykh. (Ibid.).

<sup>17</sup>Abū al-Ḥusayn Muḥammad ibn 'Alī ibn al-Ṭayyib al-Baṣrī, a Mu'tazilī scholar of the fifth century. For his life and works, see Kitāb al-Mu'tamad, ed. Muḥammad Ḥamīdullah, 1965, Introduction, pp. 20-29.

<sup>18</sup>Al-Nazzām ibn Ishāq was a Mu'tazilī theologian of the Baṣrah school. He died in 230/845.

(H. S. Nyberg, "Al-Nazzām," E.I., old ed., Vol. III: 2, p. 892).

<sup>19</sup>Al-Fārisī, Abū 'Alī al-Ḥasan ibn 'Alī was one of the grammarians of the fourth/tenth century. Born in 288/900 at Fasā, and died at Baghdād in 377/987. (C. Rabin, "Al-Fārisī", E.I., new ed., Vol. II, pp. 802-03).

<sup>20</sup>The summarization of his methodology is evident in al-Dharī'ah and will become clear as our discussion proceeds.

<sup>21</sup>Al-Murtaḍā, op. cit., p. 7.

<sup>22</sup>Ibid., p. 15.

<sup>23</sup>Ibid., p. 329.

<sup>24</sup>Ibid., pp. 197, 275.

<sup>25</sup>Ibid., p. 562.

<sup>26</sup>Ibid., pp. 507-508.

<sup>27</sup>Ibid., p. 7.

<sup>28</sup>A discussion of this is in fact found throughout al-Dharī'ah.

<sup>29</sup>Al-Murtaḍā, op. cit., pp. 7-10.

<sup>30</sup>Ibid., pp. 17-18.

<sup>31</sup>As in the Qur'ānic commandment, "Establish Prayer".

<sup>32</sup>Ibid., pp. 28, 101.

<sup>33</sup>Ibid., p. 75.

<sup>34</sup>Ibid., pp. 75-78.

<sup>35</sup>The Qur'ān, tr. Muḥammad 'Alī, 74:42-43.

<sup>36</sup>For example, prayer is wājib (obligatory) and one cannot perform prayer without ablution. Hence the problem of whether ablution is also wājib like prayer or not.

<sup>37</sup>There is a difference between shart and sabab. If sabab, is present, musabbab will be present too. For example a contract is a sabab for buying or selling. On the other hand the presence of shart does not necessitate the presence of mashrūṭ but in case of the negation of the shart, mushrūṭ necessarily will be negated. E.g., zakāt (poor tax). (Bihārī, Musallam al-Thubūt, Egypt, 1326, pp. 59-65; Al-Shahīd al-Thānī, Ma'ālim al-Uṣūl, p. 53).

<sup>38</sup>Al-Murtaḍā, op. cit., p. 116.

<sup>39</sup>Ibid., p. 330.

<sup>40</sup>Al-Shāfi'ī, Risālah, p. 21.

<sup>41</sup>Al-Murtaḍā, op. cit., pp. 331-32.

<sup>42</sup>Here bayān does mean the principles of law.

<sup>43</sup>If the meaning of a word cannot be discovered except with the help of another text, it is called mujmal (vague). With regard to mujmal the ambiguity

or absurdity lies in the meaning and the intention of the speaker and not in the expression itself. E.g. the Qur'ānic verse, "And from the remote part of the city there came a man running." (xx11:xxxv1). Here it is not known who the man is and henceforth there may be confusion as to the exact understanding of the text.

<sup>44</sup>Ibid., pp. 361-70.

<sup>45</sup>Ibid., p. 264.

<sup>46</sup>Ibid., p. 374.

<sup>47</sup>Ibid., pp. 416-17.

<sup>48</sup>They based their rejection on the following grounds:

1) The Qur'ān is the essence and is miraculous whereas the akhbār are only supplementary to the Qur'ān and are not as miraculous.

2) The Qur'ān says: "it is not for me to change it of my own accord. I only follow that which is inspired in me. Lo! If I disobey my lord I fear the retribution of the great day." (10:15). This is an order directed to the Prophet not to change the rules of the Qur'ān of his own accord.

3) The Qur'ān says: "Such of our revelations as we abrogated or cause to be forgotten

We replace by one better or the like thereof." (2:106). This is taken to prove that a verse in the Qur'ān may only be superseded by another verse.

4) The following saying of the Prophet is cited: "Whatever is quoted in my name, compare with the book of God. That which conforms to it is my own, that which does not, was never uttered by me." He adds a further tradition too, "my words do not supersede the words of God. The words of God supersede my words, and the word of God supersede one another."

<sup>49</sup>The Qur'ān says: "it is prescribed for you whether one of you approach death, if he has wealth, that he bequeath unto parents and near relatives in kindness. This is a duty for all those devout." (2:180). Despite this clear verse the jurists considered this verse superseded by the saying of the Prophet, "No bequest (is to be made) to an heir." (Ibn Ḥāzm, Iḥkām fī Uṣūl al-Aḥkām, Vol. IV, pp, 111-114).

<sup>50</sup>Since the condition of qiyās is that nothing in the aṣl should be against it. If there is, there is no necessity of qiyās.

<sup>51</sup>Al-Murtaḍā, op. cit., p. 458.

<sup>52</sup>As is evident in the Six Authentic Sunnī

collections of ḥadīth.

<sup>53</sup>Al-Murtaḍā, op. cit., pp. 477-478.

<sup>54</sup>Ibid., pp. 482-483, 485.

<sup>55</sup>Ibid., pp. 483, 515.

<sup>56</sup>Abū al-Qāsim al-Balkhī was a Mu'tazilī scholar of the fourth century. He was born at Balkh and lived for a long time at Baghdād. He died in the year 319/931. (Albert N. Nader, "Al-Balkhi", E.I., new ed., Vol. I, pp. 1002-1003).

<sup>57</sup>Al-Murtaḍā, op. cit., p. 486.

<sup>58</sup>For the definition of khavar al-wāḥid see Chapter III below.

<sup>59</sup>Al-Shahīd al-Thānī, op. cit., pp. 519-528.

<sup>60</sup>Because in a mutawātir tradition there cannot be any contradiction.

<sup>61</sup>Al-Murtaḍā, op. cit., pp. 512-519.

<sup>62</sup>Muḥy al-Dīn, op. cit., p. 145.

<sup>63</sup>As quoted by al-Murtaḍā, See al-Dharī'ah pp. 519-528.

<sup>64</sup>Ibid.

<sup>65</sup>See Chapter III below.

<sup>66</sup>Al-Shahīd al-Thānī, op. cit., p. 181.

<sup>67</sup>Abū Zahrah, op. cit., p. 134.

<sup>68</sup>Kemāl Fāruqī, op. cit., p. 68.



<sup>69</sup>Al-Murtaḍā, op. cit., pp. 604-605.

<sup>70</sup>Ibid., p. 607.

<sup>71</sup>The Qur'ān, 3:109.

<sup>72</sup>Al-Murtaḍā, op. cit., pp. 608-616.

<sup>73</sup>Ibid., p. 620.

<sup>74</sup>Ibid., p. 623.

<sup>75</sup>Ibid., pp. 621-622.

<sup>76</sup>Ibid., p. 22.

<sup>77</sup>Ibid., pp. 625-27.

<sup>78</sup>Ibid., pp. 605-607.

<sup>79</sup>M. Y. Hā'irī, art. "Ijtihād"[unpublished].

<sup>80</sup>Al-Murtaḍā, op. cit., pp. 792-793.

<sup>81</sup>The Qur'ān, 2:114.

<sup>82</sup>Ibid., 2:149.

<sup>83</sup>Al-Murtaḍā, op. cit., p. 793.

<sup>84</sup>He was one of the earliest scholars who emphasized ijtihād.

<sup>85</sup>Al-Ṭūsī, al-Shahīd al-Thānī and the other scholars followed what al-Murtaḍā said.

### CHAPTER III

#### SYSTEMATIZATION OF AL-ṬUSĪ

<sup>1</sup>Al-Ṭūsī, Rijāl al-Ṭūsī; ed. by Sayyid Muḥammad Ṣādiq, Najaf, 1961, p. 19; Al-Tibyān; ed. by Aghā-Buzurg, Tehrānī, Najaf, 1957, Introduction.

<sup>2</sup>Ibid.

<sup>3</sup>According to Sayyid Muḥammad Ṣādiq, al-Ṭūsī studied with Aḥmad ibn Muḥammad ibn Mūsā ibn Ṣalt al-Ahwāzī in the mosque of Shāri' Dār al-Raqā', Baghdad in Rabī' al-Awwal, 409/1018. But Aqā Ḥusayn al-Ṭabāṭabā'ī in his introduction to al-Ṭūsī's Kitāb al-Khilāf records the death of Shaykh al-Ahwāzī as 405/1014 which means, as he too explicitly says, that al-Ṭūsī studied with him obviously before coming to Baghdad. (Aqā Ḥusayn al-Ṭabāṭabā'ī, al-Ṭūsī's Kitāb al-Khilāf, Tehrān, 1377, A.H. Introduction, p. 6; Rijāl al-Ṭūsī, p. 35).

<sup>4</sup>Rijāl al-Ṭūsī, Introduction.

<sup>5</sup>They are as follows:

- 1) Aḥmad ibn Muḥammad ibn Mūsā ibn Ṣalt  
Al-Ahwāzī (d. 409/1018).
  - 2) Abū al-Ḥusayn ibn Sawār al-Maghribī.
  - 3) Abū 'Alī ibn Shādhān.
  - 4) Abū Manṣūr al-Sukarī.
  - 5) Abū Muḥammad ibn Muḥammad ibn Yaḥyā  
ibn Dāwūd al-Faḥām (d. 408/1017).
  - 6) Abū 'Amr 'Abd al-Wāḥid ibn Muḥammad ibn  
'Abd Allāh ibn Muḥammad ibn Mahdī ibn Khashnām (d.  
410/1019).
  - 7) Qāḍī Abū al-Qasīm 'Alī al-Tanūkhī (d.  
448/1056).
  - 8) Abū al-Ḥusayn 'Alī ibn Muḥammad ibn 'Abd  
Allāh ibn Bishrān (d. 411/1020).
  - 9) Abū al-Fataḥ Muḥammad ibn Aḥmad ibn  
Abū al-Fawāris (d. 411/1020).
  - 10) Muḥammad ibn Sinān.
  - 11) Muḥammad ibn 'Alī ibn Khashīsh ibn Naḍr  
ibn Ja'far ibn Ibrāhīm al-Tamīmī (d. 408/1017).
  - 12) Abū al-Ḥasan Muḥammad ibn Muḥammad ibn  
Ibrāhīm ibn Mikhlad al-Bazzār (d. 419/1028).
  - 13) Sayyid Abū al-Faṭḥ Hilāl ibn Muḥammad  
ibn Ja'far al-Ḥafār (d. 414/1023).
- (Ibn Muṭahhar al-Ḥillī, al-Ijāza al-Kabīrah

as quoted by Sayyid Muḥammad Ṣādiq in the Introduction to Rijāl al-Ṭūsī, pp. 35-42).

<sup>6</sup>From a survey of the names of his teachers one can easily conclude that his early education was in Sunnī disciplines of knowledge. For instance, Abū Zakarīyā Muḥammad ibn Sulaymān, his early teacher, was a Sunni scholar. His other teacher Shaykh Aḥmad ibn Muḥammad ibn Mūsā ibn Salt al-Ahwāzī was also not a Shī'ah scholar. (Al-Tibyān, Introduction; Rijāl al-Ṭūsī, Introduction).

Regarding the mutual respect between Shī'ahs and Shāfi'īs it is said that Shāfi'ī was an 'Alīd. The regions like Khurāsān and Ardabil where non-Arab elements held sway and where afterwards Shī'ism got established, under the impetus provided by Shāfi'īs in al-Ṭūsī's time. Shī'ī scholars like Shustārī (d. 1019/1610) professed themselves to be Shāfi'ī -- when they had to lean upon taqīyah. (Iḥqāq al-Ḥaqq, p. 31).

The reasons for preferring Shāfi'ī over other non-Shī'ī scholars were said to be as follows:

- 1) Shāfi'ī acquired knowledge from ahl bayat.
- 2) Geneologically the Shī'ah is the only

group descended from Quraysh. (Ṭabaqāt al-Shāfi'īyah, p. 104).

3) Shāfi'īs believed in the nobility of the Qurayshī (ibid., pp. 99-100).

4) Shāfi'ī was full of love and devotion for ahl bayt. (Sayyid Muḥammad, Rahnumā-e-Madhhabe-e-Shafī'ī, Tehrān, 1337 A.H. 4).

<sup>7</sup>Rijāl al-Ṭūsī, Introduction.

<sup>8</sup>Karkh was the central district of Baghdad, now in ruins, surrounded by palaces. Next to it are the Bāb al-Baṣrāh quarters which were mostly populated by fanatic Ḥanbalites. Conflicts between these two sections of Baghdad populations were very frequent. The fiercest conflict occurred in 351/962 and 441/1049 (Shūstārī, Majālis al-Mu'minīn, Vol. I, Tehrān, 1375 A.H., p. 66).

<sup>9</sup>Ibn al-Athīr, Tārīkh al-Kāmil, vol. 10, p. 3; Yaqūt, Mu'jam al-Buldān, vol. II, p. 342; Kurd 'Alī, Khitāt al-Shām, vol. 6, p. 185.

<sup>10</sup>It was thought that the burning of his house and library was the work of his opponents who had complained against al-Ṭūsī to the Caliph. Their complaint against him was that in one of his books he had criticized companions of the Prophet, in something

he had written about "the early oppressors being cursed". He was called before the Caliph to explain, but denied that he had ever had any such intention, saying, "O Commander of the faithful, the first oppressor was Kain, the murderer of Abel. It was he who thus started murder among mankind." The second reference he said was to Kaider ibn Salaf, the third to the murderer of Yaḥyā ibn Zakharīya, and the fourth to Ibn Muljim, the murderer of 'Alī. (Donaldson, The Shī'ites Religion, London, pp. 287-288).

<sup>11</sup>Al-Tībyān, Introduction; Rijāl al-Ṭūsī, Introduction; Talkhīṣ al-Shāfi', Najaf, 1963, Introduction; al-A'lām, Vol. III, p. 484.

<sup>12</sup>For the list of the books, see Appendix IV.

<sup>13</sup>Bombay, Dutt Press, 1312 A.H.

<sup>14</sup>A brief preview of the book is contained in Appendix V.

<sup>15</sup>Hāshim Ma'rūf al-Ḥusaynī, Mabādī al-'Ammah, p. 73.

<sup>16</sup>Al-Ḥillī divided aḥādīth in four categories:

(a) ṣaḥīḥ which is connectedly related by a just imāmī from a ma'sūm, (b) ḥasan which is related

from an imāmī who is praised though not explicitly described as just, (c) al-muwaththaq, which is related by a reliable non-imāmī and (d) al-da'īf, which is not in accordance with the above three categories. (Mabādī al-‘Ammah, p. 245).

<sup>17</sup>‘Uddat al-Uṣūl, p. 90.

<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

<sup>20</sup>Ibid., p. 27.

<sup>21</sup>Ibid., p. 35.

<sup>22</sup>Ibid., p. 55.

<sup>23</sup>Ibid., p. 36.

<sup>24</sup>Supra, Chapter II, "ijmā‘."

<sup>25</sup>A high bench stood in the hallway where the ummah, after the death of the Prophet, gathered and elected their Caliph. (Donaldson, op. cit., p. 10).

<sup>26</sup>Abū Bakr, the first Caliph of Islam, was born in around 573 A.D. He became the first Caliph of Islam after the Prophet died, on the 8th June 632 A.D. He died in 13/634. (W. Montgomery Watt, "Abu Bakr", E.I., new ed., Vol. I, pp. 109-11).

<sup>27</sup>Al-Ṭūsī, Talkhīṣ al-Shāfī, p. 334; Abū Zahrah, op. cit., p. 125.

<sup>28</sup>Ghadīr refers to a place where water is

accumulated and Ghadīr Khumm is a place close to water at a place called al-Kharrār in the district of al-juhḥfah. (Donaldson, op. cit., p. 2; L. Veccia Vaglieri, "Ghadir Khum", E.I., new ed., Vol. I, pp. 93-94).

<sup>29</sup>Abū Zahrah, op. cit., p. 125.

<sup>30</sup>Supra, Chapter II.

<sup>31</sup>Abū Zahrah, op. cit., p. 126.

<sup>32</sup>Ibid., p. 127.

<sup>33</sup>Ibid., p. 150.

<sup>34</sup>Uddat al-Uṣūl, p. 47.

<sup>35</sup>Al-Mufīd, al-Ifṣāh, op. cit., p. 19;

Khānsārī, Rawḍāt al-Jannāt, pp. 599-600.

<sup>36</sup>Uddat al-Uṣūl, p. 58.

<sup>37</sup>Abū Zahrah, op. cit., p. 137.

<sup>38</sup>Ibid.

<sup>39</sup>Uddat al-Uṣūl, p. 60.

<sup>40</sup>Al-Shahīd al-Thānī, op. cit., p. 209.

<sup>41</sup>Uddat al-Uṣūl, p. 61.

<sup>42</sup>Ibn Muṭahhar al-Ḥillī was born in 648/1250, and died 726/1326. He was the greatest Shī'ī scholar of his time.

<sup>43</sup>The Qur'ān, 49:6.

<sup>44</sup>Al-Shahīd al-Thānī, op. cit., p. 209.



<sup>45</sup>Uddat al-Uṣūl, p. 60.

<sup>46</sup>This means that if he makes a mistake very rarely, then his narration will be accepted. (Abū Zahrah, op. cit., p. 145).

<sup>47</sup>Al-Shahīd al-Thānī, op. cit., p. 202.

<sup>48</sup>Abd al-ʿAzīz Bukhārī, Uṣūl al-Pazdawī, Vol. II, p. 717.

<sup>49</sup>Abū Zahrah, op. cit., p. 146.

<sup>50</sup>Ḥillī says that in the case of giving witness, taʿaddud is necessary but in the case of narration it is not necessary. (Ibid., p. 147).

<sup>51</sup>Uddat al-Uṣūl, p. 31; Abū Zahrah, op. cit., p. 150.

<sup>52</sup>Uddat al-Uṣūl, p. 51.

<sup>53</sup>Al-Shahīd al-Thānī, op. cit., p. 190; Abū Zahrah, op. cit., pp. 132, 126.

<sup>54</sup>Browne quotes from Aḥsan al-Tawārīkh, the whole story of a search for a proper book to serve as a basis of religious instruction during the Safavid regime and finally how Qāḍī Zaytūnī produced from his library the book Qawāʿid al-Islam (most probably Qawāʿid al-Aḥkām, Kanatūry, 2292/417) by Ibn Muṭahhar al-Ḥillī, which replaced al-Nihāyat of al-Ṭūsī. (Browne, Literary History of Persia, Cambridge, 1959,

p. 54; Khānsārī, op. cit., p. 581; M. Nallino, "Abū Ga'far Muḥammad ibn al-Ḥasan al-Ṭūsī", Rivista Degli Studio Orientali, Vols. 22-25, 1947-50, p. 14.

<sup>55</sup>Al-Sarā'ir as quoted by Khānsārī, op. cit., pp. 598-99.

<sup>56</sup>Khānsārī, op. cit., p. 581.

<sup>57</sup>Ibid.

<sup>58</sup>Ibid., p. 582.

<sup>59</sup>Al-Mufīd, al-Ifṣāḥ, Najaf, 1950, p. 10.

<sup>60</sup>Al-ʿĀmilī, Ma'ālim al-Uṣūl, Tehran, 1379 A.H., p. 316.

<sup>61</sup>If a word be obscure of meaning in itself, but is capable of being understood by the application of our own judgement, it is called mushkil.

<sup>62</sup>Khānsārī, op. cit., p. 581.

<sup>63</sup>Al-Ṭūsī, al-Khilāf fī al-Fiqh, Tehran, 1377 A.H., Vol. I, p. 2.

<sup>64</sup>Ibid., p. 8; ʿUddat al-Uṣūl, Vol. 11, pp. 117-22.

<sup>65</sup>ʿUddat al-Uṣūl, pp. 10-11.

<sup>66</sup>Al-Ḥusaynī, al-Mabādī al-ʿĀmmah, p. 73.

<sup>67</sup>Ibid., p. 101.

<sup>68</sup>Khānsārī, op. cit., p. 585.

<sup>69</sup>Ibid.

## CONCLUSION

<sup>1</sup>N. J. Coulson, A History of Islamic Law,  
Edinburgh, 1964, p. 105.

# APPENDIX I

## TRANSLITERATION TABLE

Consonants:      initial: unexpressed      medial and final:

Arabic	Persian	Turkish	Urdu	Arabic	Persian	Turkish	Urdu
b	b	b	b	ş	ş	ş	ş
	p	p	p	đ	ž.	ž.	ž.
t	t	tt	t	ţ	ţ	ţ	ţ
			<u>t</u>	ž	ž	ž	ž
th	<u>s</u>	<u>s</u>	<u>s</u>	'	'	'	'
j	j	c	j	gh	gh	g	<u>gh</u>
	ch	ç	ch	f	f	f	f
h	h	h	h	q	q	k	q
kh	kh	<u>h</u>	<u>kh</u>	k	k	k	k
d	d	d	d		g	g	g
			<u>d</u>			<u>n</u>	
dh	<u>z</u>	<u>z</u>	<u>z</u>	l	l	l	l
r	r	r	r	m	m	m	m
			<u>r</u>	n	n	n	n
z	z	z	z				ŋ
	zh	zh	zh	h	h	h	h
s	s	s	s	w	v	v	v
sh	sh	ş	sh	y	y	y	y

Vowels, diphthongs, etc. (For Ottoman Turkish vowels etc. see separate memorandum).

short: a; i; u.

long: ā; ū, and in Persian and Urdu also rendered ō; ī, and in Urdu also rendered by ē; (in Urdu) ē.

alif maqṣūrah: ā. diphthongs: ay; aw.

long with tashdīd: īya; ʾuwa. tāʾ marbūṭah:

ah; in idāfah: at.

## APPENDIX II

### A. Adab (Arabic literature)

<sup>1</sup>Dīwān al-Murtaḍā; ed. Shaykh Ḥasan ibn Shaykh Muḥsin al-Jawāhirī: Miṣr, 1958.

<sup>2</sup>Sharḥ Qaṣīdah al-Ḥumarī, Qahirah, 1313/1895 [published with some other treatises].

<sup>3</sup>Al-Shihāb fī al-Shayb wa al-Shabāb. Baghdad, 1302/1884.

<sup>4</sup>Taif al-Khiyāl, Baghdad, 1958.

### B. Tafsīr (exegesis of the Qur'ān)

<sup>1</sup>Amālī al-Murtaḍā; ed. Abū al-faḍl Ibrāhīm. Miṣr: Dār Akhyār al-Kutub al-‘Arabīyah, 1954.

### C. ‘Aqā’id and al-kalām (theology)

<sup>1</sup>Al-Shāfī fī al-Im‘āmah, Iran, 1301/1883.

<sup>2</sup>Inqādh al-Bashar min al-Jabar. Najaf, 1935.

<sup>3</sup>Tanzīh al-Anbiyā’. Najaf: Maṭba‘ah al-Haydarīyah, 1380/1961.

<sup>4</sup>Uṣūl al-I'tiqādiyyah. Baghdad, 1954.

<sup>5</sup>Fuṣūl al-Mukhtārah. Najaf. [n.d.]

<sup>6</sup>Al-Walāyat min Qibal al-Ẓālimīn. (M.S., Muḥy al-Dīn 'Abd al-Razzāq, Adab al-Murtaḍā, p. 142).

<sup>7</sup>Al-Muqni' fī al-Ghaybah [published with the footnotes of Durar al-Farā'id], Tehran, 1319/1901.

<sup>8</sup>Aḥkām ahl al-Ākhirah [published with the footnotes of Durar al-Farā'id].

<sup>9</sup>Muqaddimah fī al-Uṣūl (M.S., Adab al-Murtaḍā, p. 150).

<sup>10</sup>Fī Man Yatawallā Ghusl al-Imām. (M.S., Adab al-Murtaḍā, p. 150).

<sup>11</sup>Mas'alah al-Wajīzah fī al-Ghaybah. (M.S., Adab al-Murtaḍā, p. 152).

<sup>12</sup>Man' Tafdīl al-Malā'ikah 'alā al-Anbiyā' (M.S., Adab al-Murtaḍā, p. 151).

<sup>13</sup>Mas'alah fī al-'iṣmah (M.S., Adab al-Murtaḍā, p. 138).

#### D. Falsafah (philosophy)

<sup>1</sup>Mas'alah fī al-I'tirād'alā man Yathbutu Qidam al-Ajsām (M.S., Adab al-Murtaḍā, p. 148).

<sup>2</sup>Munāẓarah al-Sharīf al-Murtaḍā li Abī al-'Alā al-Ma'arrī (M.S., Adab al-Murtaḍā, p. 151).

E. Fiqh

<sup>1</sup>Al-Intiṣār. Iran, 1315/1897.

<sup>2</sup>Al-Nāṣirāt. Iran, 1315/1897.

<sup>3</sup>Al-Masā'il al-Rassīyah al-Thānīyah (M.S., Adab al-Murtaḍā, pp. 145-46).

<sup>4</sup>Al-Masā'il al-Mūṣilīyah al-Thānīyah (M.S., Ibid., p. 146).

<sup>5</sup>Al-Masā'il al-Mūṣilīyah al-Thālithah (M.S., Ibid.,)

<sup>6</sup>Masā'il Ahl Miyāfāriqīn (M.S., Ibid., p. 147).

<sup>7</sup>Masā'il al-Rasīyah al-'Ulā (M.S., Ibid., p. 145).

<sup>8</sup>Al-Radd 'alā Aṣḥāb al-'adl (M.S., Ibid., p. 151).

F. Uṣūl al-fiqh

<sup>1</sup>Ibtā'āl al-'Amal bi khabar al-Wāḥid (M.S., Ibid., pp. 148-49).

<sup>2</sup>Al-Muḥkam wa al-Mutashābih [Published with some other treatises].

<sup>3</sup>Al-Dhakhīrah (M.S., al-Murtaḍā, al-Dharī'ah, p. 4).



<sup>4</sup>Masā'il al-Tabā'ināt (M.S., Adab al-Murtadā,  
p. 152).

<sup>5</sup>Al-Dharī'ah; ed. Dr. Abū al-Qāsim Gurgī,  
Tehran, 1346 A.H.

### APPENDIX III

<sup>1</sup>Discussions about khiṭāb, its rules and categories, ḥaqīqah and majāz.

<sup>2</sup>Amr and nahy (positive and negative commands and its categories).

<sup>3</sup>ʿUmūm and khuṣūṣ (general and particular concepts) and its forms.

<sup>4</sup>Muṭlaq and muqayyad (absolute and particular concepts).

<sup>5</sup>Mujmal and mubayyan (concise) and explicit concepts).

<sup>6</sup>Naskh (abrogation), its rules and regulations and its categories.

<sup>7</sup>Discourse on akhbār.

<sup>8</sup>Discourse on afʿāl (actions).

<sup>9</sup>Discourse on ijmāʿ (consensus).

<sup>10</sup>Discourse on qiyās (analogy).

<sup>11</sup>Discourse on ijtihād (personal reasoning).

<sup>12</sup>Discourse on ḥaẓar and ibāḥah (the nature of things originally prohibited or permitted).

<sup>13</sup>Discourse on nāfī (one who denies the fact).

## APPENDIX IV

### A. Rijāl (biographical)

<sup>1</sup>Rijāl al-Ṭūsī, ed. Sayyid Muḥammad Ṣādiq. Najaf, 1961.

<sup>2</sup>Ikhtiyār al-Rijāl. (M.S., Aghā Buzrg, Tehrārī, al-Dharī'ah ilā Taṣānīf al-Shī'ah. Najaf, 1355 A.H., Vol. I, pp. 365-366).

### B. Fihrist (bibliographical)

<sup>1</sup>Fihrist kutub al-Shī'ah, ed. Sayyid Muḥammad Ṣādiq. Najaf, 1961.

### C. Adā'id and al-Kalām (theological)

<sup>1</sup>Talkhīṣ al-Shāfī. Najaf, 1301 A.H.

<sup>2</sup>Al-Fuṣūl fī al-Uṣūl.

<sup>3</sup>Kitāb al-Ghaybah. Najaf: Maktabat al-Ṣādiq, 1385 A.H.

<sup>4</sup>Al-Mufaṣṣṣah fī al-Imāmah (M.S., Maktabah Rājah, Faiz Abad, India; al-Tibyān, Introduction).

- <sup>5</sup>Muqaddimah fī Madkhal ilā ‘ilm al-Kalām  
(M.S., Fihrist, p. 189).
- <sup>6</sup>Tamhīd al-Uṣūl. (M.S., al-Dharī‘ah, Vol. IV, p. 423).
- <sup>7</sup>Misbāh al-Mutahajjad. Tebriz, 1338 A.H.
- <sup>8</sup>Misbāh al-Mutahajjad al-Ṣagīr. Tebriz, 1296 A.H.; Tehran, 1300 A.H.
- <sup>9</sup>Al-Iqtisād al-Hādī ilā Tarīq al-Rashād.  
(M.S., al-Dharī‘ah, Vol. II, pp. 269-70).
- <sup>10</sup>Mālā yasa‘u al-Mukallaf al-Ikhlāl bihī.  
(M.S., al-Tibyān, Introduction).
- <sup>11</sup>Mā yu‘alla lu wa Mālā yu‘allalu. (M.S., Fihrist, p. 189; Rijāl al-Najāshī, p. 316).
- <sup>12</sup>Uṣūl al-‘aqā‘id. (M.S., al-Jumal wa al-‘Uqūd, Introduction, p. 31).
- <sup>13</sup>Riyādat al-‘Uqūl. (M.S., Rijāl al-Najāshī, p. 316).
- <sup>14</sup>Masā‘il fī al-Uṣūl. (M.S., al-Jumal wa al-Uqūd, Introduction, p. 33).
- <sup>15</sup>Al-Farq bayn al-Nabi’ wa al-Imām. (M.S., Fihrist, p. 189).
- <sup>16</sup>Al-Masā‘il al-Rāziyah fī al-Wa‘īd. (M.S., Fihrist, p. 189).

<sup>17</sup>Al-Naqqd 'alā Ibn Shādhān fī Mas'alat al-Gār. (M.S., Fihrist, p. 189).

#### D. Tafsīr (Exegesis of the Qur'ān)

<sup>1</sup>Al-Tibyān fī Tafsīr al-Qur'ān; ed. Aḥmad Shawqī al-Amīn. Najaf, 1957.

<sup>2</sup>Al-Masā'il al-Dimashqiyyah fī Tafsīr al-Qur'ān. (M.S., Muḥammad Wā'iz Zādah, Introduction to al-Jumal wa al-'uqūd, p. 30).

<sup>3</sup>Al-Masā'il al-Rajabiyyah fī Āy min al-Qur'ān. (M.S., al-Ībid, Introduction, p. 30).

#### E. Akhbār (tradition)

<sup>1</sup>Tahdhīb al-aḥkām; ed. Sayyid Ḥasan al-Mūsawī. Najaf, 1377 A.H.

<sup>2</sup>Istibṣār, Tehran, 1315-17 A.H.

<sup>3</sup>Al-Amālī fī al-Ḥadīth, Tehran, 1313 A.H.

#### F. Fiqh

<sup>1</sup>Al-Nihāyah; ed. Sayyid Bāqir Sabzawārī. Tehran, 1333 A.H.

<sup>2</sup>Al-Khilāf fī al-Fiqh; ed. Aqā Ḥusayn al-Ṭabāṭabā'ī. Tehran, 1377 A.H.

<sup>3</sup>Al-Mabsūṭ, Tehran, 1271 A.H.

<sup>4</sup>Al-Jumal wa al-'uqūd, ed. Muḥammad Wā'iz Zādah. Mashhad: Dānishgāh-i-Mashhad, 1347 A.H.

<sup>5</sup>Al-ījāz fī al-Farā'id. (M.S., al-Dharī'ah, Vol. II, p. 486).

<sup>6</sup>Manāsik al-Ḥajj fī Mujaṣṣad al-'Amal. (M.S., Fihrist, p. 189).

<sup>7</sup>Al-Masā'il al-Ḥalbiyyah fī al-Fiqh. (M.S., al-Dharī'ah, Vol. V, p. 219).

<sup>8</sup>Al-Masā'il al-Jumalā'iyyah fī al-Fiqh. (M.S., al-Dharī'ah, Vol. V, p. 219).

<sup>9</sup>Al-Masā'il al-Ḥā'riyyah fī al-Fiqh. (M.S., al-Dharī'ah, Vol. V, p. 218).

<sup>10</sup>Mas'alah fī Ujūb al-Jizyah 'alā al-Yahūd wa al-Muntamīn ilā al-Jabābirah (M.S., al-Tibyān, Introduction).

<sup>11</sup>Mas'alah fī Taḥrīm al-Faqā' (M.S., al-Tibyān, Introduction).

#### G. Ta'rīkh (history)

<sup>1</sup>Mukhtaṣar akhbār al-Mukhtār (M.S., al-Dharī'ah, Vol. I, p. 438).

<sup>2</sup>Maqal al-Ḥusayn (M.S., Fihrist, p. 190).

H. ‘Ibādāt (Religious duties)

<sup>1</sup>Uns al-Wahīd (M.S., Fihrist, p. 189).

<sup>2</sup>Hidāyat al-Mustarshad wa Baṣīrat al-muta‘abbad (M.S., Fihrist, p. 190).

<sup>3</sup>Mukhtaṣar fī ‘Amal yaum wa laylah (M.S., al-Tibyān, Introduction).

I. Miscellaneous

<sup>1</sup>Al-Masā’il al-Qummiyyah (M.S., al-Dharī‘ah, Vol. V, p. 330).

<sup>2</sup>Masā’il ibn al-Barā’i (M.S., al-Jumal wa al-Uqūd, Introduction, p. 32).

<sup>3</sup>Al-Masā’il al-Ilyāsiyyah (M.S., al-Dharī‘ah, Vol. V, p. 214).

J. Uṣūl al-Fiqh

<sup>1</sup>Al-‘amal bi Khabar al-Wāḥid (M.S., al-Dharī‘ah, Vol. VI, p. 270).

<sup>2</sup>Sharḥ al-Sharḥ (M.S., al-Tibyān, introduction).

<sup>3</sup>‘Uddat al-Uṣūl, Bombay: Datt prasad Press,

1318 A.H.

## APPENDIX V

### Volume I

<sup>1</sup>Introductory discussion on the nature of jurisprudence.

<sup>2</sup>Discussion about khiṭāb (the Qur'ān and the sunnah). The nature and categories of knowledge; the categories of the actions of mukallaf, linguistic and semantic discussions, the knowledge of Allah, the Prophet and the imāms.

<sup>3</sup>Discourse on akhbār. The nature and position of khavar, ways of transmission and individual khavar.

<sup>4</sup>Discourse on amr (positive commands).

<sup>5</sup>Discourse on nahy (negative commands).

<sup>6</sup>Discourse on 'umūm wa al-khuṣūṣ (general and particular concepts).

<sup>7</sup>Discourse on muṭlaq wa al-muqayyad (absolute and the confined concepts).

<sup>8</sup>Discourse on bayān wa al-mujmal (interpretation and exposition and unexplained concepts).



## Volume II

- <sup>9</sup>Naskh and its nature and conditions.
- <sup>10</sup>Discourse on af'āl al-mukallaf (human actions).
- <sup>11</sup>Discourse on ijmā'.
- <sup>12</sup>Discourse on qiyās.
- <sup>13</sup>Discourse on ijtihād.
- <sup>14</sup>Discourse on ḥaẓar wa al-ibāḥaḥ (nature of things originally permitted or prohibited).

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