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Jurisprudence (fiqh)

Introduction

The study of jurisprudence is one of the most extensive studies in Islam. Its history is older than all the other Islamic studies. It has been studied on a very wide scale throughout the whole of that time. So many jurists have appeared in Islam that their numbers cannot be counted.

The Word Jurisprudence (fiqh) in the Qur'an and the Traditions

The words *fiqh* and *tafaqquh*, both meaning "profound understanding", have been often used in the Qur'an and in the Traditions. In the Holy Qur'an we have been told:

"Why should not a company from every group of them go forth to gain profound understanding (tafaqquh) in religion and to warn their people when they return to them, so that they may beware. " (9:122)

In the Traditions, the Holy Prophet has told us: "Whoever from my nation learns forty Traditions; God will raise him as a *faqih* (jurisprudent) an *alim* (a man of 'ilm or knowledge)."

We do not know for sure if the 'ulema and fuzala, the learned and distinguished, of the Prophet's companions were called *fuqaha* (jurisprudents), but it is certain that this name was applied to a group since the time of those who had not witnessed the Prophet but had witnessed those who had (*tabi'in*).

Seven of the *tabi'in* were called 'the seven jurists'. The year 94 A.H. which was the year of the departure from this world of Imam Ali ibn Husayn (d,) and the year in which Sa'id ibn Masib and Orwat ibn Zubayr of the "seven jurists" and Sa'id ibn Jabir and others of the jurists of Medina also passed away, was called the 'year of the jurists'. Thereafter the word *fuqaha* was gradually given to those with knowledge of Islam, especially of the laws of Islam.

The holy Imams have repeatedly made use of these words. They have commanded some of their

companions to profound understanding (*taffaqquh*) or have termed them as a master of jurisprudence or fuqaha (the plural of *faqih*, a jurisprudent). The prominent pupils of the Imams during that same period were known as Shi'ite fuqaha.

The word jurisprudence (fiqh) in the terminology of the 'ulema

In the terminology of the Qur'an and the Sunnah, *fiqh* is the extensive, profound knowledge of Islamic instructions and realities and has no special relevance to any particular division. In the terminology of the 'ulema, however, it gradually came to be especially applied to the profound understanding of the Islamic laws. The 'ulema of Islam have divided the Islamic teachings into three parts:

First, the realities and beliefs: the aim of which is awareness, faith and certitude, and which are related to the heart and the mind, containing issues like the issues related to the unseen past and the unseen future, to Prophethood, revelation, angels and Imamate.

Second, morality and self-perfection: the goals of which are the spiritual qualities of how to be and how not to be, containing issues like cautiousness of God (*taqwa*), justice (*'idalat*), generosity, courage, fortitude and patience (*sabr*) being satisfied and content with God (*riza*) firmness on the true path (*istiqamat*) and so on.

Third, the laws and issues of actions: which is related to the special external actions that human beings must perform and how the actions they perform are to be and how they are not to be.

The jurisprudents of Islam have termed this last division, *fiqh* (jurisprudence), perhaps from the viewpoint that since the early days of Islam the laws were the most subject to attention and queries. Therefore, those whose specialty was in this subject came to be known as the fuqaha (jurisprudents).

Two Types of Law

It is necessary that we mention some of the special terms of the jurisprudents. Amongst these is the names of the two divisions the jurisprudents have made of the Divine Laws: the laws of (human) duty (*hukm taklifi*) and the laws of (human) situations (*hukm waz'i*).

The laws of duty include those duties which contain obligation, prohibition, desirability, undesirability, and, simple permissibility.

These five laws are termed as "the five laws" (*ahkam khamsah*).

The jurisprudents say that in the view of Islam no single action is empty of one of these five laws. Either it is obligatory (*wajib*), meaning that it must be done and must not be left undone, like the five daily ritual prayers, or it is forbidden (*haram*), meaning that it must not be performed and must be refrained from like lies, injustice, drinking alcohol and such like; or it is desirable (*mustahab*) meaning that it is good to do but leaving it undone is not a crime or sin, including such things as praying in a mosque; or it is

undesirable (*makruh*), meaning that it is bad to do but if done no sin is committed, like talking about worldly affairs in a mosque which is a place of worship; or it is permissible (*mubah*), meaning that the doing of it and the not doing of it are exactly equal, and this includes most actions.

The laws regarding situation are not like the laws regarding duty. The laws regarding duty consist of "do's" and "don'ts", commands and prohibitions, or the giving of permissions, while the laws of situation regard situations like marriage and ownership and the rights thereof.

Types of Obligation

Another issue is that the obligations, the things that are obligatory, are divided into many different classifications. Firstly, they are divided into *ta'abbudi* and *tawassuli*.

Ta'abbodi means those things, the correct and valid performance of which depends upon the intention (*niyyat*) of nearness of God. That is, if the obligatory action is performed solely with the intention of approaching the Divine without any worldly, material motive, it is correct and valid, and if not, it is not valid. Prayer and fasting are both "*wajib ta'abbudi*"

Wajib tawassuli, however, is that in which, even if performed, imagine, without the intention of nearness to God, still the obligation has been met and one's duty fulfilled. Obeying one's parents, for example. Or the performance of responsibilities towards society, like if a person undertakes to do a certain work in return for a certain payment, the doing of that work. And, in fact, absolute loyalty to all one's promises is the same way.

Another way in which the obligations are divided is into *'aini* and *kafa'i*. An *'aini* obligation means that which is obligatory on each and every individual, like prayer and fasting, and *kafa'i* obligation is that which is obligatory on the general Muslim population, and which, when performed by one or a group of them, is no longer obligatory on any of them. Such types of obligation include the needs of the community like the need for doctors, soldiers, judges, farmers, traders and so on. In the same class is the burial procedures of deceased Muslims that the general Muslim population is commanded to perform, which, when performed by some, are no longer obligatory on any.

Another way the obligations are divided is into *t'ayini* and *takhiyiri*. A *t'ayini* obligation is that a special specified thing must be performed, like the daily prayers, fasting, *Hajj*, *khums*, *zakat*, commanding to what is recognized as good (*amr bi m 'aruf*), struggle (*jihad*), etc.

A *takhiyiri* obligation on the other hand, means that the duty-bound is to perform one thing out of two or several things. For example, if a person has intentionally not fasted one day during the holy month of *Ramazan*, it is a *takhiyiri* obligation for him either to free a slave, or to feed sixty poor people or to fast consecutively for two months.

Yet another way the obligations are divided is into *nafsi* and *muqaddami*. A *nafsi* obligation means that

the duty itself is the concern of the Shari'ah, and it is for its own sake that it is demanded, while a *muqaddami* obligation is obligatory for the sake of something else.

For example, to save a respected person's life is obligatory but this obligation is not a preparation for some other obligation. However, the actions needed in preparation for saving him, such as acquiring a rope or boat or other means of saving a person who, let us say, has fallen in a river and cannot swim, are also obligatory, not for their own sakes but as a preparation for a different obligation, the obligation of saving the man's life.

Or, for example, the actions of the *Hajj* are themselves obligatory, but the acquiring of a passport and ticket and the other preparations are obligatory in preparation. Prayer is a *nafsi* obligation, while to take *Wuzu* or *ghusl* or *tayammum* as their substitute in order to enter the state of cleanliness necessary for the prayer are not obligatory until the time of prayer has begun, and then not for themselves, but as an obligatory preparation for the obligatory prayer. Thus the *Hajj* and the ritual prayers are both *nafsi* obligations, while acquiring a passport or taking ablution are *muqaddami* obligations.

Brief History of Jurisprudence and Jurisprudents

As we mentioned in the previous lessons, one of the preparations for learning about any field of knowledge is to pay attention to the famous personalities of that field, the views and ideas of whom were important, and to its important books.

Jurisprudence, the jurisprudence in which books have been classified and compiled that are still studied today, has a history of eleven hundred years, meaning that for eleven centuries, without a break, centers for the studying of jurisprudence and the related studies have existed. Masters have trained students and those students in their turn have trained other students, and this has continued down the ages until today. Furthermore, this relationship between master and pupil has never been broken.

Other fields, of course, like philosophy, logic, arithmetic and medicine have been studied for far longer, and books exist on these subjects that are older than the books that exist on jurisprudence. Perhaps in none of these subjects, however, can the guarding of the same kind of ever-present relationship between master and pupil be shown that has existed in jurisprudence. Even if such constant relationships existed in other subjects, still they are particular to the fields of Islamic studies. Only in the Islamic world does the system of teaching and studying have a continuous uninterrupted history going back over a thousand years.

The Shi'ite Jurisprudents

We will begin the history of the Shi'ite jurisprudents from the period of the Imam's "minor occultation" (260–320 A.H.), and this we will do for two reasons:

First, the period previous to the "minor occultation" was the period of the presence of the holy Imams,

and in the period of their presence, although there were jurists and *mujtahids* who were able to make their own verdicts, who had been encouraged by the Imams to do so, yet due to the presence of the Imams they were nevertheless outshone by the brilliance of the Imams. That is, the referral of problems to the verdicts of the jurists is because of there being no access to the Imams. In the period of the Imams' presence, however, people tried as far as possible to refer to the original sources of the Imams. Similarly, even the jurists, bearing in mind distances and other difficulties, used to place their own problems before the Imams whenever they could.

Second, in the formal, classified jurisprudence, we are limited to the period of the minor occultation, for none of the actual books in jurisprudence from that period has reached us, or, if any have, I have no information about it.

All the same, amongst the Shi'ites there were great jurists during the days of the holy Imams, whose value can become apparent and determined by comparing them with the jurists of their period from other sects. The Sunni, ibn Nadin writes in his book *Fihrist* about Husayn ibn Sa'id Ahwazi and his brother, both notable Shi'ite jurists, "They were the best of those of their time in knowledge of jurisprudence, effects (i.e. writings and compilations) and talents," and, about 'Ali ibn Ibrahim Qumi he writes, "Amongst the 'ulema and jurists," and, about Muhammad ibn Hasan ibn Ahmad ibn Walid, "And he has amongst books the book *Jam'e fil-fiqh*".

Apparently these books were compiled of traditions on the varying subjects of jurisprudence that the compilers considered to be reliable, and to which they acted in accordance, together with the comments of the compilers.

The scholar Hilli, in the introduction to his book *M'utabar* wrote, "Bearing in mind that our jurists (God be pleased with them) are many and their compilations numerous and to narrate the names of them all is not possible, I will content myself with those who are the most famous in merit, research and good selection, and with the books of those paragons whose *ijtihad* is mentioned in other undoubtable books as reliable.

"Those I will mention include, from the 'earlier' period (i.e. the period of access to the Imams), Hassan ibn Mahboub, Ahmad ibn Ali Nasr Bazanti, Husayn ibn Sa'id, Fadl ibn Shathan, Yunis ibn 'Abd ur-Rahman and, from the later period, Muhammad ibn Babawayh Qumi (Shaykh Saduq), and Muhammad ibn Y'aqub Kulayni and from the authors of verdicts (fatwas) Ali ibn Babawayh Qumi, ibn Jamid Iskafi, ibn Ali 'Agil, Shaykh Mufid, Syed Murtadha. 'Alam ul Huda and Shaykh Tusi . . . "

Notice that although the first group are quoted as having their own views and good selection and *ijtihad*, yet they are not mentioned as being masters of verdicts.

This was because their books, even though they were the summaries of their *ijtihad*, were in the form of collections of traditions and not in the form of verdicts.

Now we will look at the history of Shi'ite jurists, as I have said, from the period of the Imam's occultation .

Ali ibn Babawayh Qumi, died in 329 A.H. buried in Qum. The father of Shaykh Muhammad ibn Ali ibn Babawayh known as Shaykh Saduq, who is buried near Tehran. The son was learned in Traditions, the father in jurisprudence and compiled a book of his verdicts. Normally this father and son are called Saduqayn.

'Ayashi Samarqandi, lived at the same time as Ali ibn Babawayh or a little before. The author of a famous commentary of the Qur'an, though his specialty was commentary, he is still numbered amongst the jurists. He wrote many books in different fields including jurisprudence. Ibn Nadim writes that the books of this man were largely available in Khorasan, but I have not yet seen his views related anywhere, and his books on jurisprudence no longer exist.

'Ayashi was originally a Sunni Muslim but later became a Shi'ite. He inherited vast wealth from his father, and this he spent on collecting and copying books and on teaching and training his students.

Ibn Jamid-Iskafi, one of the teachers of Shaykh Mufid. It seems he passed away in 381 A.H. and it is said that his books and writings numbered fifty. His views have ever been subject to consideration in jurisprudence and still are to this day.

Shaykh Mufid. His name was Muhammad ibn Muhammad ibn Naman. He was both a mutakalam (theologian) and a jurist. Ibn Nadim, in the section of his book *Fihrist* in which he discusses Shi'ite mutakalamin, calls him "ibn Mu'alim" and praises him. Born in 336 A.H. he passed away in 413. His famous book in jurisprudence, *Muqna'ah*, is still used today.

The son-in law of Shaykh Mufid, Abu Y'ala J'afari, tells us that Shaykh Mufid slept little at night, and spent the rest in worship, study and teaching or reciting the Qur'an.

Sayyid Murtadha, known as 'Alam ul Huda, born 355 A.H. and passed away in 436 A.H. Allamah Hilli has called him the teacher of the Shi'ites of the Imams. He was a master of ethics, theology and jurisprudence. His views on jurisprudence are still studied by the jurists of today. He and his brother, Sayyid Razi the compiler of the *Nahj ul-balagha*, both studied under Shaykh Mufid.

Brief History of Jurisprudence and Jurists (2)

Shaykh Abu Ja'far Tusi, one of the shining stars of the Islamic world, wrote many books on jurisprudence and the principles of jurisprudence, Traditions, commentaries, theology and the transmitters. Originally from Khorasan (in east Iran), he was born in 385 A.H. and after twenty-two years emigrated to Baghdad which in those days was the great centre of Islamic studies and culture. He stayed in Iraq the rest of his life and after the demise of his teacher, Sayyid Murtadha, the directorship of learning and the station of highest reference for verdicts (fatwas) was transferred to him.

Shaykh Tusi remained for twelve more years in Baghdad but then, due to a series of disturbances in which his house and library were ravaged, he left for Najaf where he formed the famous scholastic centre which still exists today. There, in the year 460 A.H., he passed away.

One of the books which were compiled about jurisprudence by Shaykh Tusi was called *An-Nahayeh*, and was used as a textbook for religious students. Another, *Masbut*, brought jurisprudence into a new stage and was the most famous Shi'ite book of jurisprudence of its time. In *Khelaf*, another of his books, he wrote about both the views of the jurisprudents of the Sunni schools and also those of the Shi'ite jurisprudents. He also wrote other books about jurisprudence, and, until about a century ago, whenever the name Shaykh was mentioned the man meant was Shaykh Tusi, and by Shaykhayn was meant Shaykh Tusi and Shaykh Mufid. According to what has been related in some books, it seems the daughters of Shaykh Tusi were also distinguished *faqihat*.^{[1](#)}

Ibn Idris Hilli, one of the distinguished Shi'ite 'ulema. He himself was an Arab though Shaykh Tusi is counted as having been his maternal grandfather. He is known for the freedom of his thought; he broke the awe and reverence of his grandfather Shaykh Tusi and his criticisms of the jurisprudents bordered on impertinence. He died in 598 A.H. at the age of fifty-five.

Shaykh Abul-Qasim Ja'far ibn Hasan ibn Yahya ibn Sa'id Hilli, known as Muhaqqeq Hilli. Author of many books about jurisprudence, amongst them: *Sharay'e*, *Ma'arej*, *Al-Mukhtasar an-na'fi* and many others. He was the student of Ibn Idris Hilli, and the teacher of Allamah Hilli who we are to speak about. In jurisprudence he has no superior. Whenever in the terms of jurisprudence the word *muhaqqiq* is used it refers to him. Great philosophers and mathematicians used to meet with him and used to sit in his lessons of jurisprudence. The books of Muhaqqiq, especially the book *Sharay'i*, has been a textbook for students and still is, while his books have been subject to the commentaries of many other jurisprudents.

Ibn Hasan ibn Yusef ibn Ali ibn Mutahhar Hilli, famous as Allamah Hilli, one of the prodigies of the age. Books have been written by him about jurisprudence, principles, theology, logic, philosophy, transmitters and still other things. Around a hundred of his books have been recognized, some of which, I like *Tathkurat ul-fuqaha* are alone enough to indicate his genius. Allamah wrote many books on jurisprudence which have mostly, like the books of Muhaqqiq, been commented on by the jurisprudents who succeeded him. His famous books on jurisprudence include *Irshad*, *Tabsaratol Muta'alemin*, *Qawa'id*, *Tahrir*, *Tathhorat-ul-fuqaha*, *Mukhtalif ash-shia'* and *Mutaha*. He studied under various teachers: jurisprudence under his paternal uncle, Muhaqqiq Hilli, philosophy under Khawajeh Nasir ud-Din Tusi, and Sunni jurisprudence under the 'ulema of the Sunnis. He was born in the year 648 A.H. and passed away in 726 A.H.

Muhammad ibn Makki, known as Shahid Awal ("the First Martyr"), one of the great Shi'ite jurisprudents. He is of the rank of Muhaqqiq Hilli and Allamah Hilli. He was from Jabal 'Amel, an area in today's south Lebanon which is one of the oldest centers of Shi'ites and still is today a Shi'ite area. Shahid Awal was born in 734 A.H., and, in 786 A.H., according to the fatwa of a jurisprudent from the Maliki sect which

was endorsed by a jurisprudent of the Shaf'i sect, he was martyred. He was a pupil of the pupils of Allamah Hilli, amongst them Allamah's son, Fakhr ul-Muhaqqeqin. The famous books of Shahid Awal on jurisprudence include *Al-lum'ah* which he composed during the brief period he remained in prison awaiting his martyrdom. Amazingly, this noble book was subject to a commentary two centuries later by another great jurisprudent who suffered the same fate as the author. He too was martyred and thus became called Shahid ath-Thani ("The Second Martyr"). The famous book *Sharh ul-lum'ah* which has been the primal textbook of the students of jurisprudence ever since is the commentary of Shahid th-Thani. Other books of Shahid Awal include *Durou*, *Thikra*, *Bayan*, *Alfiyeh* and *Qawa'id*. All of the books of the First Martyr are amongst the priceless writings of jurisprudence.

Shahid Awal came from a very distinguished family, and the generations that succeeded him preserved this honor. He had three sons who were all 'ulema and jurisprudents, and his wife and daughter were likewise jurisprudents.

Shaykh Ali ibn Abul ul-Ala Karaki, known as Muhaqqiq Karaki or Muhaqqiq Thani. One of the Jabal 'Amal jurisprudents and one of the greatest of the Shi'ite jurisprudents. He perfected his studies in Syria and Iraq and then went to Iran and for the first time the position of Shaykh ul-Islam went to Iran when it was entrusted to him. The order which the ruling king of Iran (Shah Tahmaseb) wrote in Mutaqqiq Karaki's name in which the king gave him complete control, declaring himself to be only his agent, is famous. A well-known book that is often spoken of in jurisprudence is Muhaqqiq Karaki's *Jam'i ul-Muqasid*, which is a commentary on the *Qawa'id* of Allamah Hilli.

The arrival of Mutaqqiq Thani in Iran and his establishing a religious university in Qazvin and then in Isfahan, together with his training of outstanding pupils in jurisprudence, caused Iran for the first time since the time of the Saduqayn to become a centre of Shi'ite jurisprudence. He died between the years 937 A.H. a–nsl 941 A.H. He had been the pupil of the pupil of Ibn Fahd Hilli, who had been the pupil of the pupils of Shahid Awal, such as Fazlel Miqdad.

Shaykh Zayn ud-Din known as Shahid Thani, the "Second Martyr", was another of the great Shi'ite jurisprudents. A master of several sciences, he was from Jabal 'Amal and a descendant of a man called Saleh who was a student of Allamah Hilli. Apparently Shahid Thani's family was from Tus, and sometimes he would sign his name "At-Tusi Ash-Shami".

He was born in 911 A.H. and martyred in 966 A.H. He travelled widely and experienced many teachers. He had been to Egypt, Syria, Hejaz, Jerusalem, Iraq and Istanbul, and wherever he went he learnt. It has been recorded that his Sunni teachers alone numbered twelve. Besides jurisprudence and principles he was accomplished in philosophy, gnosis, medicine and astronomy. Very pious and pure, his students wrote that he used to carry wood at nights to support his household and, in the mornings, sit and teach.

He compiled and wrote many books, the most famous of them in jurisprudence being *Sharh lum'a*, his commentary on the *Lum'a* of Shahid Awal. He was a pupil of Muhaqqiq Karaki (before Muhaqqiq

migrated to Iran), but Iran was one place that he himself never went to. The author of *M'alim* which is about the Shi'ite 'ulema was Shahid Thani's son.

Muhammad ibn Baqer ibn Muhammad Akmal Bahbahani, known as Wahid Bahbahani, who came in the period after the fall of the Safavi dynasty of Iran. After that overthrow, Isfahan was no longer the centre of religion, and some of the 'ulema and jurists, amongst them Sayyid Sadr ud-Din Razawi Qumi, the teacher of Wahid Bahbahani, left Iran as the result of the Afghan turmoil and went to the *atabat*, the holy centers of Iraq.

Wahid Bahbahani made Karbala the new centre and there he tutored numbers of outstanding pupils, many of them famous in their own right. Besides this it was he who led the intellectual combat against the ideas of the *akhbariyyin*, which in those days were extremely popular. His defeat of the *akhbariyyin* and his raising of so many distinguished *mujtahids* has led to him being termed as "*Ustad ul-kul*" ("The General Teacher"). His virtue and piety was perfect and his students maintained profound respect for him.

Shaykh Murtadha Ansari, a descendant of Jaber ibn Abdullah Ansari, one of the great companions of the Holy Prophet himself. On a visit with his father to the *atabat* of Iraq at the age of twenty, the 'ulema, appreciating his genius, asked his father to let him stay. He remained four years in Iraq and studied there under the leading teachers. Then, due to a series of unpleasant events, he returned to his home. After two years he went once more to Iraq, stayed for two years, and again returned to Iran, this time deciding to benefit from the 'ulema in Iran.

He set off to visit Mashhad and on the way visited *Hajj* Mulla Ahmad Nuraqi the author of the famous *Jam'i S'adat* in Kashan. This visit became a long stay as he benefitted from the teachings of Mulla Ahmad in Kashan for three years. He then went to Mashhad and stayed there for five months. He also journeyed to Isfahan and to Burujerd in Iran and the aim of all these trips was to learn from men of knowledge. Around 1202/3 A.H. he went for the last time to the *atabat* and began giving lessons. After the decease of Shaykh Muhammad Hasan, he became recognized as the sole authority for referral for verdicts.

Shaykh Ansari is called the *Khatim ul fuqiha walmuitahidin* (the seal of the jurists and the mujtahids). He was one of those who in the precision and depth of his views have very few equals. Two of his books, *Risa'il* and *Mukassib* are today's textbooks for (higher) religious students, and many commentaries have been written on his books by later 'ulema. After Muhaqqiq Hilli and Allamah Hilli and Shahid Awal, Shaykh Ansari is the first person whose books have been so regularly subject to commentaries. He passed away in 1281 A.H., in Najaf where he is buried.

Hajj Mirza Muhammad Hasan Shirazi, known as Mirza Shirazi. His preliminary studies took place in Isfahan and he then went to Najaf and took part in the lessons of Shaykh Ansari and became one of the Shaykh's leading and outstanding students. After Shaykh Ansari's demise, he became the leading

authority of the Shi'ite world, and he remained thus until his demise about 23 years later. It was by means of this great man's prohibition of tobacco that colonialism's famous monopoly agreement in Iran was broken.

Hajj Mirza Husayn Naini, one of the great jurists and master of principles of the fourteenth century Hijrat, a pupil of Mirza Shirazi, who became a highly valuable teacher. His fame is mostly in Principles, into which he introduced new views. Many of today's jurists were his pupils. He died in 1355 A.H. in Najaf. One of the books he wrote was in Persian and was called *Tanaziyeh al-ameh* or *Hukumat dar Islam*, which he wrote in defense of constitutional government and its roots in Islam.

Summary and Review

In total we have introduced sixteen of the faces of the recognized jurists from the time of the minor occultation until the end of the 13th century Hijrat. We have only mentioned the jurists that in the world of jurisprudence and principles are very famous, whose names and fame have been continually mentioned in lessons and books from their own times until today. Of course, there are many other such names we could have mentioned, but from those we have reviewed, certain points became clear:

First, ever since the third century A.H., jurisprudence has had a continuous existence. Throughout the whole of these eleven centuries, schools have operated with no period of stand-still and the relationship between teacher-student in all that time has never been severed. If we start with my own teacher, the late great Ayatollah Burujerdi, we can trace the line of his teachers back over a thousand years to the period of the Imams. Such a constant chain seems to have existed in no culture and civilization other than the Islamic one.

Of course, as we stated before, we did not appoint the third century to begin with for the reason that Shi'ite jurists began then, but because the period previous to that period was the period of access to the holy Imams, and during that time the brilliance of the Shi'ite jurists was always dimmed by the brilliance of the Imams, and the jurists had no independence of their own. Otherwise the beginnings of *ijtihad* and jurisprudence amongst the Shi'ites and the composing of books about jurisprudence occurred amongst the companions. The first treatise on jurisprudence was written by Ali ibn Ali Raf'i who was the brother of Abdullah ibn Abi Raf'i, the scribe and accountant of Amir ul Muminin, Ali (a) during the period of the Imam's caliphate.

Second, contrary to the perception of some, the Shi'ite sciences, amongst them jurisprudence, have not been developed and systemized solely by the 'ulema and jurists of Iran. The 'ulema of Iran and the 'ulema of other lands have both shared in this great work, and, until the commencement of the tenth century and the emergence of the Safavi dynasty, non-Iranians were predominant. It is only since the middle of the Safavi period that predominance has been gained by Iranians.

Third, likewise, the centre of jurisprudence and of the jurists has not always been Iran. At first Baghdad was the centre of Shi'ite jurisprudence, and then, by the action of Shaykh Tusi, the centre was transferred to Najaf. It was not long before Jabal 'Amal in today's south Lebanon became the centre. Then Hilleh, a small town in Iraq, and then for a while Halab, one of the districts of Syria. During the time of the Safavids it was transferred to Isfahan, while at the same time Najaf was revived by Muqaddas Ardebili and other greats and still functions today.

Of the towns of Iran, it is only Qum that in the first centuries of Islam, due to men like Ali ibn Babawayh, was a minor centre of jurisprudence and the related studies while Baghdad was the main centre. During the time of the Qajar dynasty, Qum was revived due to the efforts of Abul Qasim Qumi and it was revived a second time in 1340 A.H. (i.e. 61 years before this translation) by the late Shaykh Abdul Karim Ha'iri Yazdi, and today it is one of the two great centers of Shi'ite jurisprudence.[2](#)

Fourth, the jurists of Jabal 'Amal played an important role in the development of Safavi Iran. The Safavi dynasty, as we know, were inclined to Sufism. Their path was originally based on the methods and customs peculiar to Sufism. If they had not been corrected by the profound and unchallengeable understanding of the jurists of Jabal 'Amal, and if a profound centre of Islamic studies not been established by those jurists, things would have led in Iran to the same kind of condition that now exists in Turkey and Syria.

This action of theirs had many effects. Firstly, the population and government of Iran remained immune from that deviation, and, secondly, Shi'ite Sufism likewise followed a more reasonable path. Thus, for founding the religious university in Isfahan, the jurists of Jabal 'Amal—Muhaddiq Karaki and others – have a lot to be thanked for.

Fifth, as has been pointed out by others, Shi'ism in Jabal 'Amal existed an age before it did in Iran, and this is one of the definite proofs and reasons for rejecting the views of those who consider Shi'ism to have been formed in Iran. Some believe that the Shi'ite penetration into Lebanon was due to the great companion of the Prophet, the mujahid Abuzar Ghaffari. During his stay in ancient Syria which included all or part of present Lebanon, at the same time as stiffly opposing the misappropriation of public wealth by Mu'awiyah and the rest of Bani Umayyid, Abuzar also used to propagate the holy platform of Shi'ism.

The Sections and Chapters of the Issues of Jurisprudence

For us to form an acquaintance with jurisprudence it is necessary for us to recognize its different sections. Previously we said that the range of jurisprudence is extremely wide, for it contains all the subjects related to all the actions about which Islam contains instructions.

The famous classification of today is the same classification first introduced by Muhaddiq Hilli in his *Sharay'i* and which Shahid Awal has briefly commented on and explained in his *Qawa'id*. Amazingly the most proficient of those who have composed commentaries of the book *Sharay'i* amongst them Shahid

Thani in his *Masalik*, made not the slightest comment or explanation about the classification of Muhaqqiq, and the First Shahid in *Lum'a* has not even followed Muhaqqiq's system

In any case, Muhaqqiq's classification is that all the issues of jurisprudence are divided into four parts: worship, two-party contracts, one-party contracts and (other) commands.

This division is based on the fact that the actions that must be performed in accordance to the Shari'ah are either such that a condition of their validity is the intention of nearness to God meaning that they must be done solely for God and if there is any other motivation for their performance the obligation is not fulfilled and they must be done again, or they are not subject to this condition .

If they are of the first type, like prayer, fasting, *khums*, *zakat*, *Hajj* and so on, they are termed in jurisprudence as worship (*ibadat*).

If, however, they are of the second type and the intention of nearness is not a condition of their validity, and, supposing that they are performed with a different intention, are still correct and valid, then they are of two types: either their actualization does not depend upon the execution of a special contract or it does.

Acts that do not depend upon the execution of a special contract, like inheritance, punishments, retribution and so on, are grouped together in jurisprudence under the heading commands, (*ahkam*). If they do depend upon the execution of a contract, then again they are of two types: either the contract must be recited by two parties, or there is no need for two parties and the contract is unilateral.

If they are of the first type, like selling, hire, and marriage, they are called contract (*aqd*), in which one party states the contract and the other agrees. If, however, one person can carry it out alone with no need of another party like the changing of one's mind regarding one's due, divorce and so on, it is called unilateral instigation.

In this classification all the sections of jurisprudence have been divided into fifty two chapters. Ten chapters of worship, nineteen of contracts, eleven of unilateral instigations and twelve chapters of commands.

One point is not to remain unmentioned. In the first and second centuries of Islam, the books of jurisprudence that were written were related to one or a few of the subjects of jurisprudence, not about all the subjects. For example, it is recorded that such and such a person wrote a book about prayer and such and such a person a book about marriage. For this reason, in later eras, when books about all the issues of jurisprudence were written, the different chapters of jurisprudence were all under the heading The Book. The custom is that instead of writing The Chapter of the Ritual Prayer, or The Chapter of the *Hajj*, we write, The Book of Ritual Prayer or the Book of *Hajj*.

Now, in the order first used by Muhaqqiq Hilli, we will look at the different sections and chapters of the

issues of jurisprudence.

Worship

There are ten books of worship:

The Book of Cleanliness (*kitab ut-taharat*): Cleanliness is of two kinds: being clean of external, non-inherent, material filth and pollution; and being spiritually clean of inherent pollution. The first type of cleanliness means the body, clothes and other things being clean from the ten types of filth which include urine, feces, blood, sperm, corpses and carcasses and so on and which are termed as *najasa*t. The second type of cleanliness means entering the state of purity by performing the partial ablution, or total ablution or earth ablution, that is a condition of certain forms of worship like prayer and circumambulation of the Ka'ba and certain other things, and which is annulled by a series of natural things like sleep, urination, sexual intercourse and simple sperm discharge, and which must thereafter be re-entered.

The Book of Prayer (*kitab us-salat*): In this book the obligatory prayers, i.e. the five daily ritual prayers, the prayers of *'id ul fitr* and *'id ul ahza*, the prayer for the deceased, the prayer of special signs such as earthquakes and eclipses, etc. and the prayer of the circumambulation of the Ka'ba; the *naflah* prayers, i.e. the desirable prayers such as the daily desirable prayers; the conditions, preparations, essentials, preventions, delayers and annulers of prayer; and the qualities of prayer, such as the prayer of a person at home and the prayer of a person ruled as travelling, individual prayer and congregational prayer, the prayer offered at the right time (*ida*) and the prayer missed and made up for after its time (*qaza*), are all discussed in detail.

The Book of Zakat: *Zakat* is a way of paying wealth that is similar to a tax and which is due from nine things :gold, silver, wheat, barley, dates, grapes, and animals of the cow family, animals of the sheep family, and animals of the camel family. In jurisprudence the conditions for *zakat* being due from these nine things; the amount of *zakat* due; and the ways it is to be spent are all discussed and, from the authentic sources and in the recognized ways, determined. In the Qur'an, *zakat* is mostly mentioned along with prayer, but only that it is to be given and the ways it is to be spent has been explained; the rest is known from the Sunnah .

The Book of Khums: *Khums*, like *zakat*, is a way of paying wealth that resembles a tax. *Khums* means a fifth. In the view of the 'ulema of our Sunni brothers it is only a fifth of the spoils of war that is to be transferred to the Bait ul-mal, or public treasury of Islam, and it is to be spent for the public benefit. In the Shi'ite view, however, spoils of war is just one of the things from which *khums* must be paid. In addition, profits of mining, the finding of buried treasure and of diving in the sea, wealth that is mixed with illegitimate wealth when unable to discern the amount and/or the owner, land that a *thimmi kafir*³ buys from a Muslim, and that which exceeds one's yearly expenses from one's yearly earnings, must all be divided into five and one of those fifths be given as *khums*. *Khums* in the Shi'ite path of religion is the

great budget that can secure the important part of the budget of the state.

The Book of Fasting (*kitab us-sawm*): As we know, in a state of fasting, one must refrain from eating and drinking, from sexual intercourse, from immersing one's head in water, from breathing in dust (even as far as the throat) and from certain other things. For one month each lunar year, the blessed month of *Ramazan*, is obligatory for every mature, sane person who is not ruled as an exception (like a ruled traveler or a woman having her monthly period) to fast each day from daybreak until sundown. Other than in the month of *Ramazan* fasting is generally desirable. On the two festivals, fasting is forbidden, and on certain other days, like the day of 'Ashura, it is undesirable (*makruh*).

The Book of Taking Seclusion (*i'tikaf*): This literally means "to reside in a specified place" In the terminology of jurisprudence, however, it means a type of worship whereby a person resides in a mosque for three days or more, not setting foot out of the mosque, and fasting each day. This has laws and conditions that are determined in jurisprudence. In its essence *i'tikaf* is desirable, not obligatory, but if it is begun and kept up for two days, the third day becomes obligatory. *I'tikaf* is to be performed in the Masjid ul-*Haram* in Mecca or the Masjid un-Nabi in Medina, or in the masjid of Kufa in Iraq or the masjid of Basreh in Iraq, or at least in the major masjid of a city. *I'tikaf* in minor masjids is not permissible. The Holy Prophet used to perform *i'tikaf* during the final days of the month of *Ramazan*.

The Book of Hajj: *Hajj* is that famous act of worship performed in Mecca and the outskirts of Mecca that is normally linked to *'umrah*. The performance of the *Hajj* consists of binding *ihram*⁴ upon oneself in Mecca, a stay in 'Arafat, a stay for a night in Mash'ar, the symbolic ceremony of throwing stones at the furthest (of three) boulders, the sacrifice, the shaving of the head for men and the cutting of a few curls for women, circumambulation (walking seven times around the Holy Ka'ba), the prayer of the circumambulation, the walking of seven times between the two hills of Safa and Marwah, the final circumambulation, the prayer of the final circumambulation, throwing stones at (all three of) the boulders, and the night stays at Mina.

The Book of Umrah: *Umrah* is a kind of lesser Pilgrimage. Normally it is obligatory for those about to perform the *Hajj* to perform the *Hajj 'Umrah* first. The actions of *'umrah* are as follows:

Binding "*ihram*" on oneself at one of the special places (*mi'qat*); circumambulation; the prayer of circumambulation; walking seven times between Safa and Marwa; and, finally, the cutting of a few hairs or a fingernail or toe nail.

The Book of Jihad: This book deals with the issues concerning Islamic warfare. Islam is a religion of society and community and of the responsibilities of society, and for this reason it includes a law of jihad. There are two types of jihad: *ibtida'i* (to be begun by Muslims) and *defa'i* (defensive). In the view of Shi'ite jurisprudence, *ibtida'i* jihad can only take shape under the direction of the Holy Prophet or one of the twelve immaculate and perfect Imams, otherwise it is forbidden. This type of jihad is obligatory only on men, but the other jihad, the jihad of defense, is obligatory on both men and women whenever the

conditions demand it.

In the same way, jihad can be either internal or external. If some of the people for whom obedience to the Imam is obligatory rise up against him, just as the Khawarij at Nahrawan and other places, Talha and Zubayr at the battle of Jamal and Mu'awiyah and his companies at Siffin all rose up against Amir ul-Muminin, Ali, internal jihad is also obligatory against them.

In jurisprudence, the laws of jihad and of *thimmeh*, the conditions for allowing non-Muslims to live in the Islamic state as citizens of the state, and of peace between the Islamic state and non-Islamic states are all discussed in detail.

The Book Commending to what is Recognized: -as good-and Prohibiting from what is Rejected-as bad (*amr bi m 'aruf wa nahyan al-munkar*): Because Islam is a religion of society and of the responsibilities of society, and sees its orderly environment as the essential condition for the enactment of its heavenly programs and the bestowing of prosperity and fulfillment, it has brought into existence a shared general responsibility. We are all duty-bound to be guardians of virtue and goodness, and to combat evils and wrongs. The guarding of virtue and goodness is named *amr bi m'aruf* and the combating of evil and wrongs, *nahyan al-munkar*. The conditions attached to these duties and their stipulations and regulations are all stated in jurisprudence.

Here, our concise glimpse at the ten parts of the section of worship comes to an end, and it is now the turn of the contracts.

Contracts ('oqud)

The second section, according to our classification, consists of the contracts and includes nineteen books:

The Book of Buying and Selling (kitab ul-bay'i)

This book deals with buying and selling, the conditions which the two parties (the buyer and seller) must meet, the conditions of the two commodities exchanged, the conditions of the contract and the type of transaction: cash transactions; *nisiyah* transactions which are transactions wherein a commodity is given cash and the payment after a period and *salaf* transactions which are the opposite of *nisiyah* transactions, i.e. a sale wherein payment is immediate and the commodity is not put at the buyers disposal until after a period.

Transactions wherein both the payment and the product are to be exchanged after a period are null and void. Similarly, in the chapter of selling, advantageous transfers, disadvantageous transfers and advantage less transfers are also discussed.

What is meant by advantageous transfer (*marabihah*) here is that a person makes a transaction and

then, after having made some profit, transfers it to someone else. A disadvantageous transfer (*muwadah*) is the opposite, meaning a transaction which, after having suffered some loss and damage, is transferred to someone else. And what is meant by an advantage less transfer (*tuwliyah*) is that a transaction is transferred to someone else having made no profit nor having suffered any loss.

The Book "Rahn"

Rahn means mortgage. In this book of jurisprudence the laws of mortgaging are studied.

The Book of the Bankrupt (muflis)

Muflis means "the bankrupt", i.e. a person whose holdings do not meet his liabilities. In order to investigate the liabilities of such a person, the Hakim–Shari'ah i.e. a *mujtahid*, can prohibit him from the right to his possessions until an exact investigation is made and as far as possible the liabilities be paid.

The Book of Prohibition (hajr)

Hajr means prohibition. What is meant is the prohibition of making use of property. In many cases, the use of property by the original owner is prohibited. As we have seen, the bankrupt is one instance. Another is an immature child (i.e. a girl under nine or a boy under fifteen). The insane, the person sane in other ways but who always spends his money foolishly like spending all his money on clothes when he is desperately in need of food, are other instances.

The Book of Liability (diman)

Liability is that a person accepts the liability of another person's debts. There exists a difference between Shi'ite jurists and the jurists of our Sunni brothers about the reality of liability. In the view of Shi'ite jurists *diman* is the transference of the obligation of a debt from the debtor to a party that accepts liability, and is only valid with the consent of the creditor, and in Shi'ite jurisprudence, once the liability has been transferred, the creditor has no longer the right to seek it from the person who has made himself liable.

Of course, if the liability was urged on the liable by the debtor, then, once he has cleared the debt, the liable can take that amount from the first debtor. In the view of Sunni jurisprudence, however, it is the annexing of the obligation of the debt onto someone else, who also becomes obliged to repay the debt. Which means that after the contract of liability, the creditor has both the right to seek the debt from the original debtor and also from the person who has made himself liable.

Sometimes two other chapters, *hawalih* (another kind of liability) and *kafalah* (a kind of bail system) are also included in this book.

The Book of Peace (sulh)

The *sulh* (peace) that is studied in this book is different from the *sulh* that is studied in the book of jihad. Sulh in the book of jihad means "political agreements", whereas the Book of Peace concerns property affairs and common rights. For example, if a debt is owed without the amount of the debt being precisely known, the two parties make a *sulh* agreement and settle on a specified sum. *Sulh* agreements generally occur as a settlement for arguments and disagreements.

The Book of Partnerships (sharikat)

Sharikat is that a property or a right belongs to more than one person. For example, if some brothers inherit their father's property, then, for as long as they do not divide it, they are partners in that property.

Or, for example, two people together buy an automobile or a house or a piece of land. Or it may happen that a group of people together take possession of a piece of land that belongs to no one by reclaiming, say, and restoring a part of a desert or marshland. Furthermore, a partnership is sometimes accidentally forced on someone, like, for example, when the wheat of two farmers accidentally becomes mixed and to separate the wheat of one from the wheat of the other is not possible.

There are two types of partnership existing in Islam, contractual partnership and non-contractual. The examples previously cited were non-contracted partnerships. A contractual partnership is that two people or a group of people by an agreement, compact and contract, form what in English is called a company, such as a trading company, a farming company or an industrial company. Contractual partnerships or companies are subject to many laws which are still studied in jurisprudence. In the Book of Partnerships the laws of profit sharing are also discussed.

The Book of the Partnership of Capital and Labor (mudarabah)

A *mudarabah* is a kind of contractual partnership, but not a partnership of two or more investors. Rather it is a partnership of capital and labor, meaning that one or more partners provide the capital for a trading business and one or more partners provide the labor of the actual trading. Firstly the partners must be in concord as to the division of profits, and then the contract of *mudarabah* is to be executed, or must at least be formed in practice.

The Book of Agricultural Partnerships (mazara'at and musaqat)

Mazara'at and *musaqat* are two more types of partnership. They are like *mudarabah*, which we have just mentioned, in that they are both types of partnerships between capital and labor. The difference is that *mudarabah* is relevant to trading whereas *muzara'at* is for farming. The meaning of this is that the owner of land and water makes an agreement with someone else who does the actual farming and they are in concord as to the specified proportion of each party in the division of the profits.

Likewise, *musaqat* is for the affairs of orchards. This means that the owner of fruit trees concludes an agreement with someone else who becomes responsible for all the work involved in looking after those trees, such as watering them and all the other things effective in fruit production, and, according to the specified proportion they agree upon in the actual agreement, both investor and worker take their share of the profits.

Here there is a point that wish to mention, which is that in partnerships between capital and labor, whether *mardarabah* agreements or *mazara'at* or *musaqat*, any kind of harm or loss the capital is subject to is born by the owner of the capital, the investor. And, likewise, there is also no certainty of making a profit on the capital, meaning that it is possible a profit will be returned, and it is possible that a profit will not be returned.

The only profit that is returned to the owner of the capital is in accordance to the profit made by the partnerships and to his specified proportion of those profits. Here it is that the financier, just like the worker, might make no profit, and it is even possible that he may lose his capital and even become bankrupt.

In the world of today, however, even in most parts of the Muslim world, bankers put their aims into practice by means of usury and as a result they receive a specified profit in all circumstances, whatever the types of concern they finance. Should one of the concerns that they have financed return a loss instead of a profit, the manager of that concern is absolutely obliged to return the banker's profit, even if he has to sell his house.

Likewise, in the system of most of today's world, the financier never goes bankrupt; on the basis of the system of usury the financier has entrusted his capital to the hands of the manager, which the manager has to repay many times over, and whatever happens the banker demands that profit, even if the capital has suffered a misfortune or even been lost.

In Islam, profiting from capital in the form of usury, i.e. the action of lending money and demanding the repayment of the loan whatever the circumstances with an addition of an amount of profit is strictly and severely prohibited .

The Book of Trusts (wadiy'ah)

Wadiy'ah, or trust, means the entrusting of property with someone and making that person one's agent in keeping and safe-guarding it. This in turn creates duties for the trustee and, if the property suffers or is lost, and the trustee has performed and observed those duties, he is not liable.

The Book of Lending (ariyah)

Ariyah is that a person receives the property of a second person in order to benefit from its benefits. *Ariyah* and *wadiy'ah* are two types of trusts, but in *wadiy'ah* the owner entrusts his property to be kept

and safe-guarded and without his permission the trustee has no right to make use of it in any way. *Ariyah*, however, is that the owner from the very beginning gives it to the other for him to use and then return.

The Book of Hire (ijareh)

In Islam there are two types of hire, either it is that a person cedes the benefit of his property to another in return for an amount of money which is called "the money of hire" (*mal-ijareh*), such as the normal practices of hiring out one's house or car; or it is that a person hires himself and, in the terms of jurisprudence, becomes *ajir*; which means that he makes an understanding that in return for carrying out a special work, like repairing a pair of shoes, cutting a person's hair, or building his house and so on, he will receive a wage. or payment.

Hire is similar to buying and selling in as far as both involve an exchange. The difference is that in buying and selling the exchange is of a thing and money, while in hire the exchange is of the benefit of a thing and money. Hire also has an aspect in common with *'ariyah* in that both the hirer and the *'ariyah* trustee make use of a benefit, the difference being that the hirer, having paid the price of the hire, is the owner of the benefit, while the *'ariyah* trustee is not the owner of the benefit, he only has the right to make use of it.

The Book of Representatives (wakalah)

Sometimes it occurs that one needs to have a representative for those works which demand a contract. Marriage and divorce are good examples, for the contracts of marriage and divorce must be verbally recited in correct and valid Arabic the person who is represented is called the *muwakkil* and the representative is called the *wakil*, while the act of representation itself is called *takwil*.

The Book of Endowments and Charity (waqf and sadaqat)

An endowment is that which a person sets aside from his property for a special use. In defining *waqf* it has been said that it means safe-guarding the original article of *waqf*, making it un-transferrable, while freeing its benefits. About whether an intention of *qorbat*, of nearness to God, is a condition of *waqf* or not there is a difference of opinion. The fact that it is included in this section is because Muhaqqiq Hilli did not consider the intention of *qorbat* to be an essential condition. In any case, there are two types of *waqf*, general *waqf*, and special *waqf*. Both these and the commands of charity are discussed in detail.

The Book of Temporary Endowments (sukna and habs)

Sukna and *habs* are similar to *waqf* with the difference that in *waqf* the original property or wealth is guarded forever and there is no longer any possibility of it being someone's property, whereas *habs* is that a person designates the benefits of his property for a specified period to be spent in a charitable way, and after that period it again becomes his personal property. *Sukna* however, is that a person

designates a dwelling for the use of a poor, deserving person for a period and at the end of that period it becomes exactly the same as the owner's other property .

The Book of Giving (hebat)

One of the effects of ownership is that one has the right to give one's property to others. Giving is of two types: "in exchange" and "not in exchange". Not in Exchange means that in return for one's gift one receives nothing in return. Giving in Exchange, however, means that one receives something in return for one's gift. Something given in exchange is not retrievable, i.e. it cannot be taken back. When something is given not in exchange, however, if it is given between the mahram members of a family, or if the gift itself is lost or broken, it cannot be taken back, otherwise it can, and the giver can nullify the transaction.

The Book of Wagers (sabq and rimayah)

Sabq and *rimayah* are two forms of betting agreement between the competitors of horse races, camel races or shooting competitions. *Sabq* and *rimayah* are forms of gambling, yet, because they are for practicing the martial arts necessary for jihad, they have been counted by Islam as permissible encouragement for the actual participants. Of course, this permission does not extend to other than the participants.

The Book of Wills (wasiyat)

This book is related to the enjoinders that a person wills to be performed after his death regarding his wealth or his children, whose guardian he is. Each person has the right to appoint a person as his executor (*wasi*) to be the guardian of minors amongst his children after his death; to supervise their education and other affairs. In the same way, each person also has the right to have spent after his death up to a third of his wealth in accordance with the stipulations he makes in his will.

The Book of Marriage (nikah)

First the conditions of the actual contract are discussed, such as the *muhamam*, the people for whom to marry each other is forbidden, such as father and daughter, mother and son, brother and sister, and so on. The two types of marriage are included: permanent and temporary. Disobedience to the husband by the wife and the ill-treating of the wife by the husband and the obligation of the man of the house to economically provide for his wife and children are part of this book. There are a few other issues that are also discussed.

Unilateral Instigations (iyqa'at)

This part, according to the classification we are following, consists of *iyqa'at*, which, as has been

explained, are the actions in need of a contract, but not of a two sided contract; a unilateral contract is enough. There are fifteen of these:

The Book of Divorce (talaq)

Divorce here means the cancelling of the marriage compact by the husband. Divorce is either *ba'in* or *raj'i*. *Ba'in* is the kind of divorce wherein the man has no right to return to the woman. A *raj'i* divorce is that in which the man can return. What this means is that for as long as the woman's special period of restraint (*'iddah*) has not come to an end, the man can return to the woman and thus nullify the divorce.

A divorce is a *ba'in* divorce either because the wife has no *'iddah*, like a divorced woman with whom the husband has not had sexual intercourse, or a woman who has reached the age of menopause, or because, even though the woman must keep *'iddah*, the nature of the divorce disqualifies the man's right to return, like the third consecutive divorce of that couple, in which case, until she marries someone else who has sexual intercourse with her and then himself dies or divorces her and she keeps another *'iddah*, the first husband cannot re-marry her.

It is a condition of divorce firstly that, at the time of the divorce, the woman is clean of her monthly period. Secondly, there must be two just witnesses present when the contract of divorce is recited. Divorce is divinely detested. The Prophet of God tells us : "The most-detested permissible (thing) before God is divorce".

The Book of Divorce Wholly or Partly Instigated by the Wife (khul'a and mabarar)

Khul'a and *mabarar* are two types of *ba'in* divorce. A *khul'a* divorce is a divorce motivated due to the wife being dissatisfied with the marriage and giving the husband something or by releasing him from all or part of the *mahr*⁵ so as to persuade him to divorce her. In this case, just by the man divorcing his wife, he is disqualified from returning to her, unless she wants to take back what she ceded, in which case the man has the right to return to her.

Mabarar is also a type of *ba'in* divorce, like *khul'a* with the difference that both parties are dissatisfied with the marriage, while the wife still gives the husband a sum to divorce her. The other difference is that the given sum in *khul'a* divorce has no specified limit, but in *mabarar* it is a condition that the sum be not more than the amount of the *mahr*.

The Book of Illegal Divorce (zihar)

In the "ignorance" of pre-Islamic Arabia, *zihar* was a kind of divorce consisting of the husband saying to the wife *anti 'aliya kazohriammi*, i.e., "You are like the rear of my mother to me." And this was quite enough for the wife to be recognized as divorced. Islam changed this. In the view of Islam, *zihar* is not divorce. For a man to recite this contract to his wife is forbidden, and he must pay a fine (*kafarah*). Until he pays the fine it is forbidden for him to have sexual intercourse with the wife. The fine of *zihar* is the

freeing of a slave, or, if not possible, fasting each day for two consecutive months, or, if this is not possible, the feeding of sixty poor people.

The Book of Vows of Abstinence (Iyl'a)

Iyl'a is a general word meaning oath, but in jurisprudence it has a special meaning, which is that in order to annoy his wife, a man recites a contract swearing that he will not have sexual intercourse with her ever again or for a fixed period (four months or more). If the wife protests to the Hakim Shari'ah, he will oblige the man to one of two things: break the vow or divorce his wife. If the man breaks his vow, he must, of course, pay the fine. To break a vow is always forbidden but in these circumstances it is obligatory.

The Book of Cursing (l'aan)

L'aan is again related to the marital affairs of man and wife. It means their cursing of each other, and it applies to a situation wherein the husband accuses his wife of immorality, meaning here adultery or lesbianism.

If someone accuses a woman of the said immorality and cannot produce four just witnesses, the punishment of falsely accusing is to be carried out upon that person himself, and the same applies if a man accuses his wife. Now, if the man accuses his wife and cannot produce four witnesses, then rather than punish him, something else can be done. What can be done is called *l'aan*. If this takes place, however, although he is no longer subject to the other punishment, his wife becomes forbidden to him forever.

L'aan takes place in front of the Hakim Shari'ah. As we said before, *l'aan* is a way in which the two parties curse each other. It takes place like this: first the man stands up in front of the Hakim and says four times, "God is my witness, I am truthful in my claim." The fifth time he says, "God curse me if I lie in my claim." The woman then stands up in the presence of the Hakim and says four times, "I call God as a Witness that in his claim he is a liar." The fifth time she says, "The Anger of God be upon me if in his claim he is truthful."

The Book of Freeing (itq)

Freeing means the freeing of slaves. In Islam a series of legislatures has been introduced about slaves. Other than the making of slaves of captives taken in war, Islam considers no other form of slavery as legitimate. Furthermore, the aim of taking slaves in Islam is not to profit from them, rather it is for them to stay for a period in the homes of genuine Muslims and come to understand the Islamic teachings.

This, all by itself, would draw them to the appreciation and acceptance of Islam and its sublime teachings. In reality, this form of slavery is the passage between the slavery of disbelief (*kufr*) and the freedom of Islam. So the aim is not that slaves remain slaves forever, the aim is for them to fully

discover the Islamic teachings and their liberating effect, and earn the real, spiritual freedom in the freedom of society. Therefore, freedom after slavery is the aim of Islam.

Islam has provided many systems of *itq*. Because the goal of Islam is freeing and not enslaving, the jurisprudents have titled the book dealing with slavery the Book of Freeing and not the Book of Enslaving.

The Book of Acquiring Freedom through Will, by Purchase and Through Relationship (Tadbir, mukatibeh and istilad)

Tadbir, *mukatibeh* and *istilad* are three of the ways in which slaves are freed. *Tadbir* is that the owner stipulates in his will that after his death his slave is free. *Mukatibeh* is that a slave settles an agreement with his owner that by paying a sum (or agreeing to pay a sum in the future) he will become free. In the Qur'an it has been stipulated that if such an application is made by a slave in whom good is discerned, meaning that belief is discerned in them, (or that it is discerned that they can manage themselves and not become helpless), not only is the application to be accepted but they are also to be given capital from their owners' wealth.

Istilad concerns a slave woman who is made pregnant by her owner. Such a woman, when the owner dies, definitely becomes part of the inheritance, a part of which is inherited by her child, and since no one can be the slave of one's parents, grandparents and so on up, or children and grandchildren and so on down, she automatically becomes free.

Similarly, there are many other ways slaves become free, such as a slave being afflicted by blindness and so on; as the *kafarah* (fine) of various sins, one of the forms of which, as we have seen, is freeing a slave; being freed by someone simply to please God; and others, and these are generally discussed in the Book of Freeing.

The Book of Confessing (iqrar)

Iqrar is related to the Islamic laws of arbitration. One of the means by which a case is proved against a person is the person's own confession. If, for example, a person claims that he is owed something by a second person, he must produce evidence or testimony, and, if he does not, his claim is rejected. Should, however, the second person himself confess to the debt, this confession renders evidence and testimony unnecessary. Confession is accepted only from sane adults.

The Book of Reward (ja'alah)

Reward in its essence is similar to the hiring of people. In hire, however, a specific person is hired to do a specific work in return for a specific sum, whereas in reward no certain person is hired. Instead, the hirer simply announces that whoever does a certain work for him (like finding his missing child, for example) will be paid a certain sum as a reward.

The Book of Vows (ayman)

If a person swears to do a certain thing, the doing of that which he has sworn to do becomes obligatory for him. One condition is that the vow is in the Name of God. Therefore, a vow made in the name of the Prophet or of an Imam or the Qur'an, is not binding on him according to the Divine Law.

Another condition is that what he vows to do is ruled as permissible in the Shari'ah, so a vow to do something that is ruled as forbidden (*haram*) or repulsive (*makruh*), is meaningless and not at all binding. A legitimate vow would be like one swearing to study a certain beneficial book from beginning to end, or swearing to brush one's teeth at least once a day. The breaking of such a vow necessitates a fine (*kafarah*).

The Book of Taking an Oath (nathr)

Nathr is a type of undertaking to do something that involves an oath but no special contract. If, for example, one makes an oath to pray all the daily *naflah* prayers, i.e. the encouraged prayers that accompany the obligatory prayers of the day, all one has to do is declare that one will pray the *naflah* prayers.

As we saw, one of the condition of the *ayman* vows was that the object of the vow be not forbidden (*haram*) or repulsive (*makruh*), so that there is no obstacle to the vow being simply permissible. The condition of *nathr*, however is that the object of the vow be useful in some way. So any *nathr* to do something or to refrain from something which is not beneficial, meaning that the doing and the refraining from the action in question, are both equal, is void. As in the *ayman* vows, the breaking of a *nathr* warrants a fine.

The inner meaning of *ayman* and *nathr*, and of the necessity of acting in accordance to them, lies in the fact that both are types of compact with God, and, in the same way that one must respect one's compacts with the creatures of God ("O you who believe, be loyal to your compacts". 15:1]), so is one to respect one's compacts with God Himself. An *ayman* or a *nathr* is normally made when one has little confidence in one's willpower. By means of the *ayman* or *nathr* one makes a thing obligatory for oneself until one is able to form the desired habit.⁶

Laws

The ninth section of the four sections of jurisprudence consists of the issues grouped under the heading of 'laws' (*ahkam*). This word used here has no special definition. The fact is that those issues of jurisprudence that do not fall into one of the other three groupings have been grouped together to form this one. This section contains twelve books:

The Book of Hunting and Slaughtering (sayd and thibh)

First it is necessary to state that the meat of permitted meat animals becomes permitted either when the animal is slaughtered in a special way (*thibh* or *nahr*), or, if the animal is a wild animal the meat of which is permitted, when it is properly hunted by specially trained dogs or by means of an iron missile (like a sharp arrowhead or a sharp bullet).

The meat of tame permitted-meat animals is not permissible to eat if they are hunted, and they must be slaughtered in exact accordance to the Shari'ah. The way of slaughtering most tame animals, like hens, sheep and cows, etc., is called *thibh* and the way of slaughtering camels is called *nahr*. There is a slight difference between the actual acts of *nahr* and *thibh*, but the conditions, such as the slaughterer being a Muslim, and killing the animal in the Name of God, are the same.

Hunting is related to permitted meat animals that are wild, like deer and mountain goats, etc. If the means by which the animal is hunted is a dog, the dog must be so trained that it will do whatever it is commanded, and thus reflect its master's will, and the meat of permitted meat animals that are hunted and killed by dogs that are not trained in this way must not be eaten. In the same way, hunting with animals other than dogs, like hawks, is also not permissible.

In hunting by non-animals means, it is a condition that the weapon be iron, or at least metal, and it must be so sharp that it kills the animal by its sharpness. So hunting with stones and blunt metal missiles is not permissible. In both forms of hunting, just like in both forms of slaughtering, the conditions that the man responsible for the animal's death, he the hunter, be a Muslim, and that he begins in the Name of God, must be met for the meat of that animal to be permissible. There are other conditions but they are detailed and here is not their place.

The Book of Eating and Drinking

Islam has a series of instructions concerning the gifts of nature as regarding eating and drinking. The laws of slaughtering and hunting are amongst these, and so are the laws of eating and drinking. In the view of Islam, all good things, i.e. things that are beneficent and useful, are permitted, while all foul things, things that are not beneficial and which are abominable for man, are forbidden. Furthermore, Islam has not contented itself with explaining these generalities but has made it clear that a whole group of things are foul and must be shunned, and that other things are good and there is no obstacle to the making use of them.

Eating means either the eating of meat or the eating of other things. Meat is either from the creatures of the sea or of the land or of the air. Of the creatures of the sea only fish are permissible, and then again only the fish that have scales.⁷ The creatures of the land are of two types: tame and wild.

The tame animals, the meat of which is permissible to eat are cows, sheep, camels, hens, horses, donkeys and mules which are all permissible, though the eating of the meat of horses, donkeys and

mules is undesirable (*makruh*). The meat of dogs and cats and pigs is forbidden. Of the wild animals, the meat of carnivorous animals and insects is forbidden. The meat of deer, however, and of wild cows and goats and other wild animals that are permissible when tame, is permissible. The meat of hares and rabbits, though they are not carnivorous, in accordance to the famous verdict of the 'ulema is forbidden.

Of birds, the meat of the different types of pigeon, partridge, ducks, domestic hens and so on are permissible. The meat of hunting birds is forbidden.

In the cases where the Shari'ah has not made clear the status of the meat of birds, there are two signs of its being forbidden. One is that when the bird flies it does not need to flap its wings all the time and mostly glides. The other is that it has no crop, or no gizzard or no sign of a bump on the back of its leg.

Other than animals: to eat or drink any kind of intrinsic filth (*najasad*) like urine, feces, blood, sperm, alcohol, etc., is forbidden, and the same applies to any intrinsically clean thing that intrinsic filth has dirtied and which is called *mutunajas*. Similarly, to eat or drink anything that is harmful to the body, the harm of which is considered significant like poison, for example, is also forbidden. If medicine discerns that a certain thing, tobacco for example, is definitely harmful to the body, to the heart, let's say, or to the nerves, and shortens one's life expectation or produces cancer, then its use will be forbidden. If it is not consequential, however, and is simply like breathing the air of most cities, it is not forbidden.

For a pregnant woman to consume something which leads to the abortion of her child, or for a person to consume something that leads to disorder of the senses, or for a man to consume something that leads to his sterilization, or for a woman to consume something that leads to her permanent sterility, is forbidden.

To eat earth is absolutely forbidden, whether it is harmful or not. The drinking of intoxicating liquors is also absolutely forbidden. Furthermore, to consume that which belongs to another without the consent of the owner is strictly forbidden, but this is an incidental prohibition, not intrinsic.

Some parts of permitted-meat animals is forbidden, including the spleen, the testicles and generative parts. Likewise, the milk of forbidden-meat animals is also forbidden.

The Book of Mis-Appropriation (*ghasb*)

Mis-appropriation (*ghasb*) means the taking or using of the property of another by force, i.e. without the other's permission. Firstly, this is forbidden. Secondly, it renders the mis-appropriator (*ghasib*) liable, so that if the property is damaged or destroyed while in the control of that mis-appropriator he is liable for it whether the loss or damage was his fault or not. Whatever use one makes of mis-appropriated property is forbidden. *Wuzu* taken with mis-appropriated water and prayer in mis-appropriated clothes or in a mis-appropriated place is void.

At this point, it must be known that in the same way mis-appropriation results in liability, so destruction

causes liability. Meaning, for example, that if a person smashes someone else's window, he is liable for it. Causing likewise, produces liability. Causing here means that if someone does not do any direct damage, like smashing a window, but does something that causes damage, he is liable. If a man, for example, leaves a thing like the skin of some fruits on a public walk-way and a person slips on it and as a consequence suffers damage, that man is responsible for the damage suffered by the person who slipped.

The Book of Right of Preference (shaf'ih)

Shaf'ih means the right of precedence of one partner to buy the share of the other. If two people are legitimate partners according to the Shari'ah and one of them wants to sell his share, the other partner, if he wants to buy that share for the same terms and price for which others wish to purchase it, has the right of precedence.

The Book of Enlivening the Dead (ihiya al'muwt)

This book concerns wasteland, i.e. land that is dead or barren, that by the absence of buildings or farming and suchlike is lifeless. The Holy Prophet told us: "Whoever enlivenes a dead land owns it." This issue has many facets and these, in jurisprudence, are discussed at length.

The Book of Finds

In this book are discussed the laws of finding things the owners of which are not known. The find is either an animal or other than an animal. If it is an animal and such as will not be harmed if left alone, the finder has no right to take it into his control. If the animal might be harmed if left alone, however, like a sheep in the middle of the desert, the finder can take it into his control, but he must search for its owner. If the owner is found, the animal must be returned to him, and if the owner is not found, with the permission of the Hakim Shari'ah, the animal must be given to the poor.

If the find is not an animal, and its value is less than that of 2.32 grams⁸ of minted silver, the finder can keep it for himself, but if it is more he must search for the owner for one year (unless, like fruit, it cannot be kept for a year). If the owner is not found, and if the find was not made in the sacred area of Mecca, the finder has the option of doing any of three things. Either he can use it for himself with the intention that if the owner is discovered, he will repay the find itself or its value to the owner, or give it as charity with the same intention, or he can keep it in the hope that the owner will be found.

If the find has no special signs the search for the owner is not necessary and the finder has the same three options from the time of the find.

The Book of Inheritance

We know that in Islam there are laws of inheritance. Inheritance in Islam is not a matter of choice. In

Islam, a person has no right to specify a certain sum for a certain heir, or, for example, to leave all his wealth to a certain heir. After a person's death, his wealth (apart from "his" third which he can stipulate in a will to be disposed of however he likes) is divided and shared amongst the heirs in accordance to the relevant laws.

The heirs in the view of Islam form different ranks. By the existence of one of the members of the first rank, the inheritance does not reach to the second, and the third rank only inherits if there is no one from the first and second ranks to inherit.

The first rank consists of the deceased's parents and sons and daughters and, if the sons and daughters have died, the grandchildren.

The second rank is the deceased's four grandparents and brothers and sisters and, if the brothers and sisters have themselves passed away, their children.

The third rank is the deceased's uncles and aunts and their children.

Until here, of course, we have spoken only about inheritance of kin. There is other inheritance as well, the inheritance of husband and wife, and they inherit their share one from the other before the inheritance of any of the three ranks. About what is the share of each of the members of the ranks and of the husband and wife, however, is too detailed a subject to go into here.

The Book of Arbitration (qaza)

The issues of arbitration, i.e. the settling in court of differences and disputes, are so many that we cannot even summarize them. Briefly, we can say that the system of arbitration in Islam is a special system. The justice of the arbitrator (*qazi*) is subject to extraordinary attention in Islam. So much precision has been given to the knowledgeable personality of the arbitrator that he has to be a *mujtahid* and an expert on Islamic rights. About his moral and ethical competence, endless diligence has been introduced. He must be free from all types of sin, even those that do not directly affect his work. In no way does he have any right to accept payment from either of the two parties, even after the arbitration. His expenses are to be liberally reimbursed from the public treasury. The position of the judge is to be so respected that the parties of the case to be arbitrated, whoever they may be (even a caliph, as the history of Amir ul-Muminin, Ali, so clearly shows), must both present themselves before the judge with perfect respect for his position and in no way expect or demand partiality. Confession, testimonial and, in some cases, oaths play an important role in the Islamic arbitration system.

The Book of Testimony

This book is connected to the Book of Arbitration in the same way that the Book of Confession is. If a person claims something, the other party either admits it or denies it. If he admits it, this is sufficient for the claim of the claimant to be proved and for the arbitrator to reach his verdict. If he denies it, the

claimant is bound to produce testimony, and if he produces the testimony and it meets the conditions stipulated in the Shari'ah, his claim is proved. The denier is not bound to produce testimony .

In certain circumstances, the denier is bound to swear an oath, and if he swears an oath his prosecution is to go no further. In jurisprudence, it is said, "Testimony upon the claimant, and an oath upon whoever denies it." The issues of arbitration are so many that books have been written solely on this subject that are as voluminous as some of the great books written on all the subjects of jurisprudence.

The Book of Punishments (hudud and t'azirat)

This book is about Islamic punishments in the same way that the previous two books were about Islamic arbitration. Some of the systems of punishment have been precisely defined and determined in Islam, and these are to be performed in the same way regardless of the conditions and any other factors. These types of punishments are called *hudud*. There are a few punishments, however, that the Shari'ah considers to depend on the view of the Hakim⁹, who, by taking into consideration the causes and conditions of the crime and any motivating factors or factors that make the crime more serious, enforces a punishment in accordance. These punishments are called *ta'zirat*.

The crimes for which *hudud* have been stipulated are adultery, homosexuality (including lesbianism), falsely accusing a person of committing one of these crimes– drinking alcohol, stealing and armed civil disturbance, which are all considered crimes against God. Although these have all been greatly misunderstood both inside and outside the Islamic world, they are detailed and here is not the place to discuss them more. It must be mentioned, however, that if a certain punishment has not been introduced in the Shari'ah amongst the *hudud*, the Islamic government must introduce punishments according to what it considers to be in the best interests. These punishments are amongst the *t'azirat*.

The Book of Retaliation (qisas)

Qisas is also a type of punishment, but for offences wherein one person criminally ends the life or harms the body of another person. In reality, *qisas* is the right Islam gives to the offended person or to his heirs if the offense leads to the offended person's death.

Such offenses are either murder or loss or impediment of a part of the body, and are either intentional (*amd*), similar to intentional (*shabih amd*) or purely a mistake (*khata mehd*).

An intentional offense is that the offense was committed with the intention to commit it, such as a person who intends to kill another person and attacks him and kills him, whether or not the attack was made with a special weapon of attack, like a sword or a gun, or whether made with something else, such as a stone. If the serious intention of the murderer was to kill the other, and this in fact he does, this is enough for it to be ruled as "intentional ".

An offense that is "similar to intentional" is that the intention is to do the act but not to do the harm which

the act causes. An example of this is that a person with the intention of hurting another person hits him with a club, which results in the victim's death. Another example is that someone hits a child in their way of teaching a lesson and the child dies. Also in this status is the case of the doctor who treats his patient for a certain disease and the treatment causes the patient to die.

Purely a mistake, however, is that there was no intention at all, such as the killing of someone by a person who was only cleaning his rifle and it accidentally fired a shot, or by a person who was only driving his car quite normally in the street.

In the cases of intentional killing or similar to intentional killing the heirs of the deceased have the right of *qisas*, meaning that under the supervision of the Islamic government, and at the discretion of the nearest of kin, the killer can either be executed or forced to pay recompense but in the case of merely a mistake the killer is not to be executed and is only obliged to pay the heirs the *diyah*, the financial recompense.

The Book of Financial Recompense (diyah)

Diyah is like *qisas* in that it is a right of the offended person or the heirs of the offended person upon the offender, with the difference that *qisas* is a way of taking payment in kind while *diyah* is a financial penalty. The laws of *diyah* like the laws of *qisas*, are very detailed.

Under the books of *qisas* and *diyah*, the jurists have gone into the question of the liability of doctors and of teachers.

About doctors they say that if the doctor is not proficient and makes a mistake in his treatment of the patient that leads to the patient's death, he is liable. And, if he is proficient and he treats the patient without the patient's permission or the permission of the patient's nearest of kin, and the treatment leads to the patient's death, he is again liable.

If the doctor is proficient, however, and he treats the patient with the permission of that patient, or of the patient's nearest of kin, he must first make the condition to the patient or to the heirs that he will do his utmost, but that, should his efforts happen to lead to the patient's death, he is not responsible. In this case, supposing that the patient dies or suffers some physical loss, the doctor is not liable and not subject to *qisas*. If, however, he does not make this condition before beginning the treatment, some of the jurists say that he is liable.

Likewise, if a teacher unnecessarily hitting a child leads to the child's death or damage to the child's body, the teacher is liable. If, however, it is really in the child's best interest to be punished, and this should happen to lead to the child's death or damage to the child's body, the teacher must have taken permission to punish him from the child's guardians, otherwise he is liable.

[1.](#) faqihat is the feminine plural of faqih, meaning, therefore, female jurists.

[2.](#) The other being Najaf, despite the way it has been weakened and reduced by the Ba'ath regime of Iraq.

[3.](#) A thimmi kafir is a kafir (non-Muslim) who lives in peace in the Islamic state in accordance to the laws and subject to the

benefits it accords him, and no other kafir is allowed to live in an Islamic state.

4. ihram is a state which one binds upon oneself wherein many things become forbidden for one. During the Hajj and umrah it accompanies the wearing of two plain white, un-sewn pieces of cloth.

5. Mehr is like a dowry in reverse, i.e. it is the agreed sum to be paid by the man to the woman as a condition of their marriage.

6. A point about nathr which the author has not mentioned is that it is often made as a promise to do some good deed or deeds in return for a requested favor. In this case, the nathr only becomes obligatory when God has granted that favor.

7. Shrimps, however, are ruled as sea-locusts, and are permissible to eat, provided, like fish, they are taken from the water live.

8. i.e. half a mithqal—an eastern measurement.

9. The Hakim Shari'ah is, as we have seen, either a mujtahid meeting the conditions of being just, etc. or his representative, who, in cases needing what in English is called a magistrate, assumes this responsibility.

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