

first two grades have laid down no rule. If the *Mujtahid* of a higher grade has laid down a rule, the *Mujtahid* of this grade is bound to follow it and cannot overrule or even ignore it. Among this category are such eminent and world renowned jurists as Imam Hazaf, Imam Abi Jaffar Tahhawi, Abi al-Hassan Kerkhy, As-Sarakhsi, Fakhr ul-Islam, Bazdawi, Fakhar-ud-Din, Qadi Khan and others of the same rank.

#### (iv) Fourth Grade

*Ashab al-Takhrij* or Masters who can draw out the real law. They are thoroughly well versed in all branches of the law and have profound knowledge of jurisprudence, so if there is any ambiguity in the law they can remove it, and can say with authority what the real meaning of the rules laid down by the jurists of the higher grades is. Among them is placed such a famous *Mujtahid* as Imam Abu Bakar Razi.

#### (v) Fifth Grade

*Ashab al-Tarjih* or Masters who have the authority to show preference. These *Mujtahids* are bound by the rulings of the higher grade jurists, but in case of difference of opinion between the higher grade *Mujtahids* of their own school, they can decide as to which opinion is better or which is correct or which is more suitable for the people. Usually after quoting opinion of the different Imams they declare that *Fatwa* is with so and so. This is accepted as final and binding on the courts. Among these *Mujtahids* are counted such great jurists as Abi Hassan Quduri and Sheikh Burhan-ud-Din (A. H. 1152-1213) the author of the world famous "Hedaya".

#### (vi) Sixth Grade

*Ashab al-Tashih* or those Jurists who have the authority to say whether a particular version of the Law is strong or weak. Among this grade are placed the jurists like the authors of *Al-Mukhtar*, and *Sharha Waqaya*. These jurists only quote the correct law and ignore the law for which there is no reliable authority.

#### (vii) Seventh Grade

*Muqaladoon*.—These jurists are learned men who know the law and do not claim to deduce new rules. These are jurists of the latter ages who became famous for their learning, such as Abu al-Ilyas, Abu al-Qasim and others including the author of the "Durr al-Mukhtar."

## Chapter Four

### Schools of Islamic Jurisprudence

During the lifetime of the prophet Muhammad (peace be on him), there was no division among the Muslims. They would follow the instructions of the prophet without any question. All the problems were solved according to Quran and Sunnah of the prophet and hence there was no sect or sub-sect or any grouping, political or religious, among the Muslims. The origin of division among the Muslims was started after the demise of the prophet and during the last part of the reign of the *Khilafate-e Rashidin*.

According to the legal point of view, Muslims became divided into two main schools— the Sunni and the *Shiya*. Those who acknowledge Abu Bakar (R), Umar (R), Osman (R) and Ali (R) as the Caliphs are known as *Ahl-e Sunnah wal Jamat*. But those who recognise Hazrat Ali as the only Caliph after the demise of the prophet are known as *Shiyas*. They differ from each other in many respects. Both the Schools are again divided into different sub-sects.

#### 1. Sunni Schools

There are four sunni schools—Hanafi, Maliki, Shafei and Hanbali. The sunni schools of Muslim law originated during Abbasid period. Though there are no fundamental difference among them, but still they differ from each other in minor and unimportant matters. Discussions on them are made in chronological order.

##### (i) The Hanafi School

The founder of this first distinctive juridical school among the sunnis is Abu Hanifa. His full name is Abu Hanifa An Numan Ibn Thabit. He is popularly known as *Imami-Azam*. He was born at kufa in Bagdad in 80 A.H. (699A.D.) The vast majority of the Muslims in all parts of the world are Hanafi. It is the dominant school in India, Pakistan, Bangladesh Asia Minor, Palestine and Cyprus. Abu Hanifa spent some years of his early life under the care of Imam Jafor Sadiq and received

education from him. He mainly learnt *Fiqa* from Hammad bin Abi Sulaiman, one of the scholars of Islamic law at that time. Hammad used to teach a number of scholars including Abu Hanifa, who recognised the validity of *Rai* or personal opinion as source of law, which is equivalent to *Qiyas*.

Abu Hanifa used to impart knowledge to his pupils by way of discussions which were so much exhaustive and in detail that some times it would continue for several days and even for a month. The decisions, on the basis of discussion, were recorded in writing. Imam Abu Yusuf, Imam Muhammad, Imam Zafor and Imam Hasan were the most famous pupils of Imam Abu Hanifa. These pupils of Imam Abu Hanifa would differ from their masters on many legal matters. '*Hedaya*', the most popular text-book of Hanafi law, bears the testimony that the unanimous opinion of Abu Yusuf and Muhammad carries greater weight than the opinion of Imam Abu Hanifa. On analysis the following special features of the legal system founded by Abu Hanifa are seen<sup>1</sup>:

- (a) Abu Hanifa relied less on Hadith as a basis for legal propositions unless their authenticity is proved beyond any doubt, because no compiled book on Hadith was available at that time. But later on, Hanafi jurists used Hadith at the time of writing books on law.
- (b) Abu Hanifa and his followers, unlike other three schools, base most of their legal preoperation on *Qiyas*. They deduce laws by analogy or *Qiyas* from the Quran, Hadith and *Ijma*.
- (c) Abu Hanifa was the greatest advocate of free and independent personal opinion and on that account, he was called the upholder judgement opinion of private judgement (*Ahl-i-Rai*). The other schools did not disclaim the use of *Rai* but they would use it in limited field.
- (d) Abu Hanifa introduced a doctrine known as *Istihsan* or juristic equity as a source of law. A large number of instances of legal propositions based on *Istihsan* is found in the *Hedaya*, a famous book on law based on Hanafi school. Hanafi also recognises

<sup>1</sup> Mir Waliullah, Muslim Jurisprudence and Quranic law of Crimes, P. 48.

custom or *urf* as a basis of legal proposition and recognises the general practice of the people of a place unless it is against the Quran and the Hadith.

- (c) Hanafi law is more liberal. Abu Hanifa was a free thinker and used to apply common sense to all the legal deductions which he would draw. Hanafi law is more sensible, moderate and judicious to follow. It is believed that on that account an overwhelming majority of the sunni Muslims of the world belong to Hanafi school. In this respect the prophet said, "The best religion is the easiest religion<sup>2</sup> Abu Hanifa formed a committee consisting of forty experts to prepare a treatise on law. It worked thirty years and prepared a valuable document on law, but unfortunately it was lost. Abu Hanifa was offered the post of Justice (*Qadi*) at Kufa but he refused this offer on this ground that it was not possible for him to exercise independent judgment under kingship. On his refusal to accept that post he was sent to jail where he was tortured physically.

It is said that he was poisoned to death. He was so much popular that his funeral prayer was held for ten days and about fifty thousand people used to participate in it each day.

Abu Yusuf, one of his pupil, stated above, was appointed to the post of chief Justice of Bagdad and he held this post till his death under three Abbaside caliphs – Mahdi, Hadid and Harnn-ur-Rahid. Abu Yusuf wrote several books on law. *Kitabul Kharaj*, a book on land tax, is one of them. The Hanafi school is followed in Bangladesh, Pakistan, India, Afghanistan, Turkey, Egypt, Arabiya, China and other parts of other Arabiyan countries.

#### (ii) **Maliki School**

Maliki School is the second school of Islamic Law. *Maliki* School derives its name from its founder, Malik Ibn Anas. He was born at Medina in 95 A. H. He lived and taught in Medina, where he held the position of Mufti. Malik was a jurist of high calibre, who laid stress on

<sup>2</sup> Cited by waliullah, Muslim Jurisprudence, P.51.

Hadith but did not rule out Qiyas. The greatest work of his life is the *Muatta*, a first collection on Hadith, which consists of a large number of Hadith arranged subject-wise. This book is now available in Bengali. He introduced a doctrine known as *Istislah*, which means public interest. The main features of this school are as follows<sup>3</sup>:

- (a) Acceptance and greater reliance on Hadith even if the Hadith was narrated by a single narrator.
- (b) Acceptance of the practices of the people of Medina and the sayings of the companions of the prophet.
- (c) In the absence of an express text, analogy is accepted.
- (d) Introduction of a new doctrine known as *Al-Masalihal Mursahah* which means public good or public interest.

The followers of Maliki School are found in North Africa, Spain, Morocco, Algeria, Tunisia, Sudan, Bahrain and Kuwait. Imam Muhammad and Imam Shafei were his famous students. Imam Malik died in 179 A.H.

### (iii) Shafei School

Muhammad Ibn Idris As-Shafei, the founder of Shafei School, was born at Palestine in 145 A.H. He was the pupil of Imam Malik. This school follows the middle course of Hanafi and Maliki schools in respect of accepting Hadith as a source of law, i.e. a compromise between the two schools. He also laid stress on *Ijma* and he rejected *Istislan* of Hanafi school and *Istislah* of Maliki school.

Imam Shafei devoted his life on reading and teaching. He has in his credit two books *Sunan* and *Musnad*. He had stupendous memory and he could select and borrow freely from various sources to take decision. Ahmad Ibn Hanbal was his pupil. Most of the *Mufassirin* and *Muhaddisin* were Shafeis. Eminent Scholars and writers like Abu Ishaque, Shirazi, Imam Ghazzali, Imam Rafi, Imam Nawari, Mohiuddin Jilani, Mohiuddin Chisti and Shihabuddin Suhrawardi were the followers of Shafei School. The followers of this School are found in Egypt, Syria,

<sup>3</sup> Syed Khalid Rashid, Muslim Law. P. 18.

Lebanon, Iraq, Pakistan, India, Indo-China, Java and Yemen. It is prominent in Palestine and Jordan. This is the second largest school of Islamic Jurisprudence. Imam Shafei died in the year 193 A.H.

### (iv) Hanbali School

Imam Abu Abdullah Ahmad Ibn Muhammad Ibn Hanbal is the founder of Hanbali School. He was born at Bagdad in 164 A.H., where he received his early education, Later he traveled to kufa, Basrah, Mecca, Medina, Yemen, Syria and Jazirah to study Hadith and law. He learnt *Fiqh* from Shafei till Shafei left for Egypt. He imposed more importance on Hadith and Sunnah than *Ijma* and *Qiyas*. He collected large number of Hadith. The treatise on Hadith collected by him is *Musnad* which consists of more than one thousand Hadith.

The most important characteristics of this school is that its followers would accept any Hadith, however weak it maybe, without any hesitation. Imam Hanbal would never conduct any inquiry worth the name about the authenticity of a Hadith.<sup>4</sup> He did not yield to the wrong decisions of Khalifa Al-Mamun and on that reason he was severely persecuted. The followers of this school are few and confined to Najd only. He died in the year 241 A.H. After his death no new school was originated.

The doctrines propounded by the four Schools, as stated above, are essentially the same as regards the fundamental dogmas (*usul*), but they differ with each other in the application of private judgment and in the interpretation and exposition of the Quran.<sup>5</sup>

## 2. Shia School

It is the belief of *Shiya* school that Hajrat Ali (R) was the direct descendant and heir of the prophet (peace be on him). According to them, he was the first *Imam* and the first caliph. The shiyas are divided into several sub-sects-

- (i) *Ithna Asharia*
- (ii) *Ismailia*
- (iii) *Zaidiya*

<sup>4</sup> Mir waliullah, Muslim Jurisprudence and the Quranic law of Crimes, P. 67.

<sup>5</sup> Syed Ameer Ali, Muhammadan Law, Vol. I, P. 24.

(i) **Ithna Asharia:** *Ithna Asharia* are those who believe in the twelve Imams. Their last Imam was Al-Mehedi Muhammad Al-Muntazir who disappeared between 873-477 A.D. That is why he is called *Imam Gaib* and they believe that he will re-appear and reform the world. *Ithna Asharia* is divided into two schools, namely –(a) *Akhbari* (b) *Asuli*. The *Akhbarias* are traditionalists and follow rigidly the principles of the *Mujtahids*. They believe in *taqlid*. The *asulis* depend on reasoning and they interpret the Quran in the light of everyday knowledge. They reject those Hadith which, according to them, are not in conformity with the spirit of the Quran.

(ii) **Ismailia:** *Ismailia* are the followers of seventh Imam Ismail, Imam Ismail died during the lifetime of his father, Imam Jafor. Those who refused to accept Imam Musa al Kazim and brought allegiance to Imam Ismail are *Ismailia*. The *Ismailias* are divided into two groups – (a) *Nisari* and (b) *Mustali*

(iii) **Zaidiyya:** They were the followers of Imam Zaid, Son of Imam Ali Asgar. He was the fifth Imam. *Zaidijyas* are very few in numbers scattered in different parts.

## Chapter Five

### Evolution of Islamic Law

Islamic law has been developed through evolution under different stages. Justice Abdur Rahim divides the stages into four but Asaf Fyzee divides it into five adding one more.<sup>1</sup> We discuss the five periods of development of Islamic law.

#### First period

The first period extends from 1 A.H. (622 A.D) to 10 A.H. (632 A.D.) i.e. the last ten years of the prophet's life. This is the most important period so far Quran and Hadith are concerned. At this period most of the legal verses of the Quran were revealed and this period is also related to most important judicial decisions and traditions of the prophet. The prophet used to receive revelation for the guidance of human beings. As a matter of fact, many rules and regulations of law were revealed in answer to the questions made by people. The following verses of the Quran are cited in support of this view.

- (a) "They ask thee about the new moons."-(2:189).
- (b) "They ask thee what they should spend."- (2: 215).
- (c) "They ask thee regarding the sacred month."-(2:17).
- (d) "They ask about intoxicants and games of chance."- (2: 219).
- (e) "They ask thee what is made lawful for them"-(5:4).
- (f) "They ask thee of the spoils of war"-(8:1).
- (g) "They ask thee concerning the orphans"-. (2:220).

The answers in reply to these questions have become part of legislation. The number of legislative verses concerning law is about five hundred. Besides, the practice and precepts of the prophet are also part of legislation. Thus all the problems are solved by the Quran and the Sunnah of the prophet, which arose during this period. The first period of evolution of Islamic law came to an end with the demise of the prophet in the eleventh year of the Hijri era.

<sup>1</sup> Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P. 32.