I

DEVELOPMENT OF IKHTILĀF LITERATURE*

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The original literal meaning of the work *Ikhtilāf* is 'difference'.[1] It was to be used in a specific sense in Islamic jurisprudence to refer to differences of opinion among jurisprudents or between legal schools on the detailed cases, not on the question of principles.[2] Thus it is contrasted with the *Ijma*[3] (consensus). The authority of this disagreement was derived from the tradition in which is claimed that the Prophet[4] had said, "Difference of opinion among my people *(ummatī)* is a sign of the bounty of God".[5]

The discussion here will deal with the subject as defined above, and as the period involved is limited, from the second half of the second century to the first few decades of the six century of *Hijra,* it will exclude differences of opinion among the Prophet's companions.

It is classified into two parts; 1) *Ikhtilāf* in general, and 2) Birth of the science of *al-Khilāfiyyāt.*

1. KHTILĀF IN GENERAL

The term *Ikhtilāf* as used in Islamic literature, particularly in Islamic jurisprudence, is comparatively old. Goldziher believes that the oldest known treatise on *Ikhtilāf* is a work composed by Shāfiʿī entitled *Ikhtilāf*

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[1] Cf. Zubaidī, *Tāj al-ʿArus,* Benghazī, 1966, vol. 6, p. 102, Fairuzabadhī, *al-Qamūs al-Muḥīṭ,* Cairo (n.d.), vol. 3, p. 138, H. Wehr, *A Dictionary of Modern Written Arabic,* London 1971, p. 258.

[2] Cf. Abū Zahra, *Tārīkh al-Madhāhib al-Islamiyya,* Cairo (n.d.), vol. 2, p. 78 Schacht, Pre-Islamic Background, in *Law in the Middle East,* Washington D.C. 1955, vol. 1, p. 41.

[3] Goldziher, Ikhtilāf, in *Encyclopaedia of Islam,* vol. 2, p. 458.

[4] Cf. Tabari, *Ikhtilāf al-Fuqahā',* Beirut (n.d.), p. 4 (Introduction), N.J. Coulson, *A History of Islamic Law,* Edinburgh 1964, p. 102.

[5] Cf. Suyuṭī, *al-Jamiʿ al-Ṣaghīr,* Cairo (n.d.), vol. 1, p. 13.

al 'Irāqiyyīn[6], ed. Kern, Cairo 1902.[7] But Abū Yūsuf, the famous Ḥanafite jurist, had composed a similar work under the little, *Ikhtilāf Abī Ḥanīfa wa Ibn Abi Lailā,* edited by Abū al-Wafā al-Afghanī, Cairo 1357. Both works seem to me to resemble each other in contents, but they are dissmilar in title and in a particular expression such as ' ' (i.e. we agree), which is used by Abū Yūsuf referring it to himself after quoting the view of Abū Ḥanīfa, whereas Shāfi'ī uses ' ' (i.e. he agrees) in referring to Abū Yūsuf after quoting Abū Ḥanīfa's view.

The work of Abū Yūsuf was transmitted by Muḥammad b. al-Ḥasan and it was counted among the latter's works as well.[8] Muḥammad was a leading Ḥanafite jurist and a contemporary of Shāfi'ī. A biographical account indicates that Shāfi'ī had for a time been in close contact with Muḥammad during his stay in 'Iraq, and during this time he had studied and copied the former's works.[9] Therefore, it is to be presumed that the present work of Shāfi'ī certainly originated from Muḥammad, and is later than that of Abū Yūsuf. Moreover it was reported that Shāfi'ī's legal activities mostly took place in Egypt,[10] in particular his remarkable work *al-Umm* which partly contains the subject of *Ikhtilāf,* was completed in Egypt, so evidently the work of Abū Yūsuf is the oldest work on *Ikhtilāf* known in Islamic literature.

The works mentioned enable us to learn about the beginning of *Ikhtilāf literature in Islam which appeared about the second half of the second* century. From this period onwards the works on *Ikhtilāf* increasingly multiplied taking various forms.

During the second and third centuries (of Hijra) a great number of individual scholars who were interested in legal studies and devoted to them appeared in many Islamic territories such as 'Iraq, Syria and Hijaz. These legal studies which were carried out by various scholars produced a vast amount of legal decisions relating to all aspects of human activities, and of course, on many points their decisions were in contrast to each other, depending on the place and environment in which they lived. These views, in fact, became materials for the development of this literature.

[6] The same work published in Cairo 1968 with *al'-Umm* bearing the title *Kitāb Ma Ikhtalafa fīnī Abū Hanīfa Wa Ibn Abī Laila 'An Abī Yūsuf.*

[7] Cf. Goldziher, *The Zabiris,* Leidin 1971, note p. 36.

[8] Cf. Sarakhsī, *al-Mabsūt,* Cairo 1906–1913, vol. 30, p. 129.

[9] Cf. Khaddūrī, *Islamic Jurisprudence,* Baltimore 1961, p. 12, Abū Zahra, *op. cit.*, vol. 2, p. 245.

[10] Cf. Khaddūrī, *op. cit,* p. 15.

The several *Madhāhib* had not yet been established in this period, and the rulings which were produced by jurists were the achievement of individuals. On this point it differs from a later period when the *Madhāhib* were established.

Works of Ikhtilāf in the second century and the first half of the third century

The following are the works composed during the second century and the first half of the third;

1) *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laila,* by Abū Yūsuf (d. 182 H.), edited by Abū al-Wafā' al-Afghānī, published in Cairo 1357.
2) *Al-Hujaj al-Mubīna or al-Hujaj fi Ikhtilāf Aḥl al-Kufa wa Ahl al-Madina,* by Muḥammad b. al-Ḥasan al-Shaibanī (d. 189 H.) Only the first part of this book has so far been published in Haiderabad. Earlier it was published by Fath Muḥammad Tayyib from the Anwār Ahmadī press, Lucknow in 1326/1908 with his short annotation.[11]
3) *Kitāb Ikhtilāf al-'Ulamā' fī ma Yahill min al-Ashriba wa Yahrum wa Hujja Kull Fariq Minhum,* by Abū Muḥammad 'Abdullah b. Muslim (d. 213 H.)[12]
4) *Kitāb ma Ikhtalafa fibī Abū Ḥanifa wa Ibn Abī Laila'an Abī Yūsuf.*
5) *Kitāb Ikhtilāf Mālik wa al-Shāfi'ī*
6) *Kitāb Siyar al-Auzā'ī.*
7) *Kitāb al-Radd 'alā Muḥammad Ibn al-Ḥasan.*
8) *Bab al-Wasiy min Ikhtilāf al-'Iraqiyyīn.*
9) *Wa Turjam fī Siyar al-Auzā'ī al-Sabiy Usba thumma Yamut*
10) *Wa Turjam fī Ikhtilāf Mālik wa al-Shafi'ī bāb al-Manbudh.*
11) *Wa Turjam fī Ikhtilāf al-'Iraqiyyīn Bāb al-Salam.*
12) *Wa Turjam fī Ikhtilāf al-'Iraqiyyīn fī Bāb al-Rahn.*
13) *Wa fī Ikhtilāf al-'Iraqiyyīn fī Bāb Bay' al-Thamar Qabl 'an Yabdu Salahuha.*
14) *Wa fī Bab al-Da'wā min Ikhtilāf al-'Irāqiyyīn.*
15) *Wa fī Ikhtilāf al-'Irāqiyyīn fī Bāb al-Hiwala wa al-Kafala wa al-Dain.*
16) *Wa fī Ikhtilāf al-'Irāqiyyīn fī al-Kafala wa al-Hammala wa al-Dain.*
17) *Wa Turjam fī Ikhtilāf al-'Iraqiyyīn Bab al-Sharika wa al-'Itq wa Ghairihi.*

[11] Cf. *Ma'sumi,* Ṭaḥawī's Ikhtilāf al fuqahā' in *Islamic Studies,* Islamabad, 1969, vol. 8, p. 215

[12] Cf. Brockelmann, Geschichte der Arabischen Litterature, Leiden, 1937, Supp. 1, p. 120.

18) *wa fi Ikhtilāf al-'Iraqiyyīn fī Bāb al-'Āriya wa Akl al-Ghila.*
19) *Wa fī Bāb al-Ghasb min Ikhtilāf al-'Irāqiyyīn.*
20) *Wa fī Bāb al-Sadaqa wa al-Hibba min Ikhtilāf al-'Irāqiyyīn.*
21) *Wa fī Ikhtilāf al-'Irāqiyyīn.*
22) *Fī Ikhtilāf al-'Iraqiyyin Bab al-Ajīr wa al-Ijāra.*
23) *Wa fī Awwal Ikhtilāf al-'Irāqiyyīn.*

The works mentioned above were composed by Shāfi'ī, (d. 204 H.) and are included in his remarkable work *al-Umm*, published in Cairo several times in seven volumes.

It seems that the trend of writing which appears in this period concentrated mostly on comparison between two or three scholars. The scholars who were frequently mentioned in this literature were Abū Ḥanīfa, Mālik b. Anas, Abū Yūsuf, Muḥammad b. al-Ḥasan, al-Auzā'ī, Shāfi'ī, Zufar and Ibn Abī Laila.

In the course of time legal studies increasingly extended over many parts of the Islamic world, which resulted in the production of a large number of eminent scholars who specialised in Islamic jurisprudence. During this period the divergence of opinions became wider and more varied than in the previous period. This tendency causes the changing of the previous trend of *Ikhlitāf* literature, which mostly concentrated on comparison between two or three different scholars. Instead more ideas related to the *Fiqh* and more names of scholars occupied with it appear, and the title which was currently used was *Ikhtilāf al-Fuqahā'*.

Scholars who were frequently mentioned in works of *Ikhtilāf* literature in the second half of the third century and the fourth century, other than those whom I have just mentioned above were 'Uthmān al-Buttī, 'Ubaidullah b. al-Ḥasan, al-Ḥasan b. al-Ḥay, Ibn Shabrama, Abū Bakr, al-Rabi', al-Ḥasan b. Ziyād, Ibn Samma'a, Abū al-Qasim, Iyās b. Mu'awiya, 'Ubaidullah b. Ja'far, Ibn Abi 'Umar, al-Layth, al-Thauri, Aḥmad, Isḥāq, Rabi'a, Ibn Abī Zanad, Yahya b. Sa'id, Abū 'Ubaid and Abū Thawr.

WORKS OF IKHTILĀF IN THE SECOND HALF OF THE THIRD CENTURY AND THE FOURTH CENTURY

The following are works written in the second half of the third century and the fourth century;

1) *Kitāb Ikhtilāf al-Fuqahā' al-Kabīr, Kitāb Ikhtilāf al-Fuqahā' al-Ṣaghīr,* by Aḥmad b. Nasr al-Marwazīr[13]

[13] Ibn Nadim, *al-Fihrist,* Cairo 1929, p. 299

2) *Kitāb Ikhtilāf al-Fuqahā''*, *al-Khilāfiyyāt*,[14] by Abū Yaḥya Zakariyya b. Yaḥya b. 'Abdul Raḥmān al-Sājī (d. 307 H.)
3) *Kitāb Ikhtilāf al-Fuqahā'*[15] by Abū Ja'far b. Jarīr al-Ṭabarī (d. 310 H). Parts of this work have been published by Schacht, Leiden 1933, and by F. Kern, Cairo 1902.
4) *Kitāb al-Ikhtilāf baina al-Fuqahā'*,[16] by Abū Ja'far Aḥmad b. Muḥammad al-Ṭaḥawī (d. 321 H.). This work was partly published by the Islamic Research Institute, Islamabad, 1971.
5) *Kitāb al-Ishrāf fi Ikhtilāf al-'Ulamā'*,[17] by Abū Bakr Muḥammad b. al-Mundhir (d. 310 H).

2. BIRTH OF THE SCIENCE OF AL-KHILAFIYYĀT 138

During the second half of the third century and the fourth century, as I have just mentioned, the development of *Ikhtilāf* literature increased. Islamic juridprudence as a whole had reached the zenith of its development when the door of *Ijtihad* was closed in the fourth century.[19] Consequently only four legal schools have been recognised and have to be followed.[20] Thus the period of *Taqlid* came into being.

This tendency certainly had an effect on the later development of legal activities which centred only on the ideas of the recognised schools. Polemic between followers of these schools began. The followers of each school had to justify their *Imams* and their *Madhāhib* which they followed and for which they argued against their opponents. Thus the beginning of the science of *al-Khilāfiyyāt* came into being in Islamic literature.[21]

The science of *al-Khilāfiyyāt* was introduced by 'Abdullah b. 'Umar al-Dabusī (d. 430 H.) in his important work *Ta'sīs al-Naẓar*. This book is

[14] Cf. Subki, *Ṭabaqāt al-Shāfi'iyya*, Cairo 1906, vol. 2, p. 226

[15] Cf. Ibn Nadīm, *op. cit.*, p. 327

[16] Ibid., p. 292

[17] Subkī, *op. cit.*, vol. 2, p. 126

[18] The term *'al-Khilafiyyāt'* was used by Haji Khalfa in his *Kashf al-Ẓunūn*, vol. 3, p. 165, and also Ibn Khaldūn in his *Muqaddima*, vol. 1, p. 819; also used was *'Ilm*

[19] Cf. Schacht, *Theology and Law*, Otto Harrassowitz 1971, pp. 21, 22, Abu Zahra, *op. cit.*, vol. 2, p. 79.

[20] Ibn Khaldūn, *op. cit.*, vol. 1, pp. 818, 819

[21] Ibid., p. 819

divided into eight sections which contain his analysis of the root of divergence ' ' among jurists.[22] This work has been considered the first of its kind on this subject; therefore its author is regarded as a founder of the science of *al-Khilaf*[23] ( ).

A great number of works on the subject were produced in this period, by either Ḥanafites, Shāfi'ites, Mālikites, or Ḥanbalites, but Shāfi'ites and Ḥanafites were more active than others in this respect.[24] The ideas in the works of this period no longer present the direct view of founders of the schools although their names are mentioned, but they present the views of the *Madhāhib.*

WORKS OF IKHTILĀF IN THE FAITH AND SIXTH CENTURIES

The following are works composed during the fifth and sixth centuries (A.H.):

WORK OF ḤANAFITES

1) *Kitāb al-Khilāfiyyat,*[25] by Aḥmad b. Husain al-Baihaqī (d. 458 H.)
2) *Mukhtaṣar al-Khilāfiyyāt,*[26] by Abū 'Abdullah b. Farḥ. This work is a summary of the work of al-Baihaqī, *al-Khilāfiyyāt.*
3) *Al-Wasā'il fī Furūq al-Masā'il,*[27] by Ibn Jama'a al-Shāfi'ī (d. 480 H.)
4) *Kitāb al-Durrat al-Muḍīyya fī ma Waqa'a fihī al-Khilāf baina al-Shāfi'iyya wa al-Ḥanafiyya,*[28] by Abū al-Ma'ālī 'Abdul Mālik b. Aḥmad al-Juwainī, Imam al-Haramain (d. 445 H.)
5) *Kitāb al-Nukt,*[29] by Abū Ishaq Ibrāhīm b. 'Alī al-Fairuzabadhi al-Shīrazī (d. 476 H.)

[22] Cf. Dabusī, *Ta'sīs al-Naẓar,* Cairo (n.d.), pp. 8,9

[23] Cf. Ibn Qutlubugha, *op. cit.*, p. 36. Goldziher mentions that Flugel accepted this view which was mentioned in his *Uber die Klassen der Hanefitischen Rechtsgelehrten,* p. 301, "This 'ilm al-Khilaf was established by Abu Zayd 'Abdullah al-Dabusi with his *Ta'sis al-Nazar fi Ikhtilaf al-a'imma".* (see Goldziher, loc. cit.)

[24] Cf. Ibn Khaldūn, *op. cit.*, vol. 1, p. 819

[25] Cf. Subkī, *op. cit.*, vol. 3, p. 4

[26] Cf. MS Aḥmad 3, no. 1080

[27] Cf. Ṭabarī, *op. cit.*, p. 5

[28] Cf. Brockelmann, *op. cit.*, suppl. 1, p. 673

[29] Cf. Subkī, *op. cit.*, vol. 3, p. 88

6) *Mukhtaṣar al-Kifāya,*[30] by al-Abdārī al-Shāfi'ī (d. 493 H.)
7) *Hilya al-'Ulamā' fī Ikhtilāf al-Fuqahā',*[31] by Abū Bakr Muḥammad b. Aḥmad al-Shashi al-Shāfi'i (d. 507 H.)
8) *Tariqat al-Khilāf baina al-Shāfi'iyya wa al-Ḥanafiyya,*[32] by Qadi Abū 'Ali al-Husain b. Muḥammad al-Maruruzī (d. 462 H.)

Works of Ḥanafites

1) *Kitāb al-Tajrīd, Kitāb al-Taqrīb fī Masā'il al-Khilāf,*[33] by Aḥmad b. Muḥammad b. Aḥmad al-Qadduri (d. 428 H.)
2) *Ta'sīs al-Nazar,* by 'Ubaidullah b. 'Umar al-Dabūsī (d. 430 H.)
3) *Mukhtalaf al-Riwāya,*[34] by 'Ala al-Dīn Muḥammad b. 'Abdul Ḥamid al-Samarqandī (d. 552 H.)
4) *Al-Tariqat al-Ridawiyya,*[35] by Radi al-Dīn al-Sarakhsī (d. 544 H.)
5) *Manzuma,*[36] by Najm al-Dīn al-Nasafī (d. 537 H.)
6) *Ru'us al-Masā'il,* by Maḥmud Ibn 'Umar al-Zamakhsharī (d. 538 H.)

Works of Malikites

1) *Ru'ūs al-Masā'il,*[37] *'Uyūn al-Adilla,*[38] by Ibn al-Qaṣār
2) *Mukhtaṣar fī Uṣūl al-Fiqh,*[39] by Ibn al-Sa'ātī
3) *Kitāb al-Talkhiṣ,*[40] Abū Bakr Muḥammad b. 'Ali al-'Arabi (d. 543 H.)
4) *Al-Isbrāf 'Ala Masā'il al-Khilāf,* by 'Abdul Wahhab b. 'Ali al-Baghdādī (d. 422 H.). It was published in Tunis (n.d.) in two volumes.

Works of Hanbalites

1) *Kitāb al-Funun,* by Abū al-Wafa 'Ali b. 'Aqīl al-Baghdādī (d. 431 H:), Beirut (n.d.), edited by G. Maqdisi.

[30] Cf. Ṭabarī, loc. cit
[31] Ibid
[32] Cf. MS Egyptian National Library, no. 1523 (Fiqh Shāfi'ī)
[33] Cf. Ibn Qutlubugha, *op. cit.*, p. 7
[34] Cf. Ṭabarī, *op. cit.*, p. 6
[35] Cf. MS Egyptian National Library, no. 1165 (Fiqh Ḥanafī)
[36] Ibn Qutlubugha, *op. cit.*, p. 72
[37] Cf. Sheikh Shanqiti, loc. cit
[38] Cf. Ibn Khaldūn, *op. cit.*, vol. 1, p. 820
[39] Ibn Khaldūn, *op. cit.*, vol. 1, p. 820
[40] Ibid

2) *Ru'ūs al-Masā'il*[41] by 'Abdul Khāliq al-Hāshimī (d. 470 H.)
3) *Al-Ta'līq al-Kabīr fī Masā'il al-Khilāfiyyat baina al-A'imma,*[42] by Abū Ya'la Muḥammad b. al-Ḥusain (d. 526 H.)
4) *Al-Ishrāf 'ala Madhabib al-Ashrāf,*[43] by Abu al-Muzaffar 'Awn al-Dīn Yahya b. Hubaira (d. 555 H.)

II

THE (SCOPE OF APPLICATION OF) CLASSICAL THEORY OF *'UṢŪL* OF JURISPRUDENCE TO THE *IKHTILĀF* LITERATURE

1. THE CLASSICAL THEORY OF 'UṢŪL OF JURISPRUDENCE

Most jurists are in the habit of dividing the sources of Islamic Law into four principles or sources; the Qur'ān, the Sunna, the Ijma' (consensus), and the Qiyās[44] (analogy). This classical theory was originally introduced by Shāfi'ī in his famous work *al-Risāla,*[45] and Schacht claims that the essentials of the theory were created by Shāfi'ī.[46]

But this classification was by no means a decisive or authoritative one. There are at least a dozen more sources as fully canonical for the laws regulating the life of the faithful in all its different aspects.[47]

These four sources, with the exception of the Book of God; the Qur'ān and the Sunna, were subject to controversy as the their validity and even definition. Schacht has given detailed accounts indicating the conflicting views between the legal schools on these principles.[48]

We are not going to discuss these principles in detail, because our main concern here is to discuss their application to the *Ikhtilāf* literature.

[41] Cf. Ibn Rajab, *loc. cit.*

[42] Cf. Ma'sumī, *op. cit.*, vol. 8, p. 218

[43] Ibid., p. 217

[44] Cf. 'Abdul Wahab Khallāf, *'Ilm' Uṣūl al-Fiqh*, Cairo 1972, p. 12

[45] Cf. Hamidullah, Sources of Islamic Law – A new approach, in *Islamic Quarterly*, 1954, vol. 1, pp. 205, 206

[46] Cf. Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford 1967, p. 1

[47] Cf. Hamidullah, *op. ci.t*, p. 205

[48] Cf. Schacht, *An Introduction to Islamic Law*, Oxford 1964, p. 60

2. THE APPLICATION OF THE THEORY

This classical theory is recognised by most jurists of the orthodox legal schools. Their attitude to this subject is clearly seen in the writings where theory is applied. Nevertheless they differ from each other on the priority accorded to these principles, or on the individual case. This tendency certainly resulted in dissimilarity between legal schools in rulings arrived at and evidence adduced. We find also a variety of evidence on the same case advanced within the same school.

To illustrate this problem the following rulings are selected as examples:

i DIFFERENT CONSIDERATIONS ON THE PRIORITY OF THE RECOGNISED PRINCIPLES

Performance of the minor ablution (wuḍu') with *nabīdh* (date wine) is valid according to the Ḥanafites, who derive it from a tradition that one night the Prophet had used *nabīdh* for performing his minor ablution.[49] The Mālikites say that this minor ablution is not valid on the grounds of the Qur'ān, 5.6[50] " .,. . . if ye find no water, then take for yourselves cleand sand or earth".[51] The Shāfi'ites and Ḥanbalites[52] have the same view as the Mālikites on the case, but both of them appear to base it on reasoning to the effect that as *nabīdh* is a liquid which is not valid for performing the minor ablution at home it is not valid either for use during a journey.[53]

ii DIFFERENT INTERPRETATION OF THE SAME PRINCIPLES

a) *Qur'ān*

A person was flogged for a false accusation of unlawful intercourse (qadhf); then he repented. According to the Ḥanafites, his evidence (shahada) is not in future valid. They base this on the Qur'ān, 24.4[54] : And

[49] Zamakhsharī, *Ru'ūs al-Masāil*, (unpublished Ph.D. Thesis, St. Andrews univ, 1976/77), pp. 1, 2

[50] Cf. Baghdādī, *al-Ishrāf 'ala Masā'il al-Khilaf*, Tunis (n.d.), vol. 1, p. 3.

[51] Translation A. Yusuf 'Ali, *The Holy Qur'ān*, Beirūt 1965, vol. 1, p. 242

[52] Cf. Hashimi, *Ru'ūs al-Masā'il*, Damascus, no. 2744, fo. 1, MS *al-Zahiriyya*

[53] Cf. Zamakhsharī, *op. cit*, p. 2 and see also Hāshimī, *op. cit.*, loc. cit.

[54] Ibid p. 230

those who launch a charge against chaste women, and produce not four witness (to support their allegation) – flog them with eighty stripes and reject their evidence ever after; for such men are wicked transgressors."[55] But the Shāfi'ites consider that his evidence is valid. They base this on the same evidence (Qur'ān 24. 4,5) but adduce the verse[56] " . . . Unless they repent thereafter and mend (their conduct); for God is Oft – Forgiving, Most Merciful".[57] The Mālikites[58] and Ḥanbalites[59] are of the same view as the Shāfi'ites on the rulings and the evidence.

b) *Sunna*

The last moment of the time of the afternoon prayer (waqt al-Zuhr) is when each thing is half the length of its shadow. This is the view of the Hanafites, who base it on a tradition that, "Gabriel came down and prayed with the prophet two days; the first day he prayed when the sun passed the meridian, and the second day when the length of the shadow of each thing was as long as the thing itself . . ."[60] But the Mālikites,[61] the Shāfi'ites[62] and the Ḥanbalites[63] are of the opinion that the last moment of the afternoon prayer is when the length of the shadow of each thing is as long as that thing. They also base their opinions on the tradition mentioned.

iii DIFFERENT PREFERENCES IN CHOOSING EVIDENCE ON THE SAME PRINCIPLE

a) *Qur'ān*

A person performs his prayer facing in the direction of Qibla on the ground of *Ijtihād;* after completing it he realises that he was seriously mistaken in

[55] Cf. A. Yusuf 'Ali, *op. cit.*, vol. p. 897.

[56] Cf. Zamakhshari, *op. cit*, p. 230

[57] Cf. A. Yusuf 'Ali *loc. cit.*

[58] Cf. Baghdādī, *op. cit.*, vol. 2, p. 289

[59] Cf. Ibn Ḥazm, *al-Muhalla*, Cairo 1351, vol. 9, pp. 431.

[60] Cf. Zamakhshari, *op. cit*, p. 18

[61] Cf. Baghdādī, *op. cit.*, vol. 1, p. 57

[62] Cf. Zamakhshari, *op. cit*, p. 18

[63] Cf. Hāshimī, *op. cit.*, fo. 20

deciding the direction of *Qibla.* The Hanafites consider that the prayer performed is valid and its performer is not required to repeat it; they base this on the Qur'ān 2.115[64] : " . . . whithersoever ye turn, there is the Presence of God . . ."65 The Mālikites express the same view as the Ḥanafites on both the ruling and the evidence. The former add other evidence from a tradition which indicates that the prophet had approved a prayer in the circumstances mentioned, and from the *Qiyās.*[66] The Ḥanbalites are also of the same view as the Ḥanafites, but they appear to base this on the tradition and the *Qiyās* mentioned by the Mālikites.[67] the Shāfi'ites say the prayer performed is not valid, and the performer has to repeat it; they base this on the Qur'ān 2.150[68] : "From whencesoever thou startest forth, turn thy face in the direction of the Sacred Mosque; and whencesoever ye are, turn your face thither . . . "[69]

b) *Sunna*

Performance of *Sujud al-Sahw* should be after the performing of the *Salam,* according to the Ḥanafites, who base this on the tradition that the prophet had given such an instruction.[70] The Malikites express the opinion that the performance of *Sujud al-Sahw* for the incomplete performance of prayer as required should take place before performing the *Salam,* but should be performed after the *Salam* if additional action occurred unintentionally during the *salah.* They derive this from the tradition that the prophet had practised it.[71] The Hanbalites have the same view as the Mālikites on the ruling and the evidence.[72] But the Shāfi'ites say it should be performed before the *Salam;* they base this on the tradition that the prophet had done it.[73]

[64] Cf. Zamakhsharī, *op. cit,* p. 22

[65] Cf. A. Yusuf 'Ali, *op. cit.,* vol. 1, p. 49

[66] Cf. Baghdādī, *op. cit.,* vol. 1, p. 70

[67] Cf. Hāshimī, *op. cit.,* fo. 26

[68] Cf. Zamakhsharī, *op. cit,* p. 22

[69] Cf. A. Yusuf 'Ali, *op. cit.,* vol. 1, p. 60

[70] Cf. Zamakhsharī, *op. cit,s, p. 31*

[71] Cf. Baghdādī, *op. cit.,* vol. 1, p. 98

[72] Cf. Hashimī, *op. cit.,* fo. 43

[73] Cf. Zamakhsharī, *op. cit,* p. 31

c) *Qiyās*

Two persons make a contract for the purchase of an object on condition of *Khiyār* (option) for both parties. The Ḥanafites say that the object during the period of *Khiyār* belongs to the seller, on the ground that the condition of *Khiyār* during the making of the contract for himself indicates that the seller does not permit the ownership of the object to be transferred. Therefore it belongs to him at that moment, on the basis that if the *Khiyār* fails the object returns to him without the need of a new contract.[74]

The Mālikites are of the same view as the Ḥanafites on this case, but they appear to use a different expression in formulating their argument that the ownership can be transferred if the performance of contract is completed with offer and acceptance, but if there is a condition of *Khiyār* in the contract the offer is not complete, because its decision depends on consent or non-consent of the seller in the future . . .[75]

The Shāfi'ites have a different view; that the ownership is transferred to the buyer, on the basis that the contract performed is valid and therefore the ownership should be transferred. It is like a contract without a condition of *Khiyār*.[76] The Ḥanbalites are of the same opinion as the Shāfi'ites on the case and the evidence.[77]

iv DIFFERNET EVIDENCE ON THE SAME RULING IN THE SAME LEGAL SCHOOL

There is a vast amount of evidence on the same case within the same legal school. We are here not in a position to produce this evidence from every school; in order to demonstrate the problem, it is enough to choose a ruling of the Shāfi'ite legal school as an example:

Shāfi'ite scholars unanimously consider that a dog's skin is not purified by tanning. But the sources from which this is drawn are dissimilar. Shāfi'ī, founder of the Shāfi'ite school, bases this case on *Qiyās*. He says that uncleanness is associated with a dog and a pig while alive, whereas the skin of an animal that can be purified by tanning is that of an animal which is clean while it is alive[78]

[74] Ibid p. 75

[75] Cf. Baghdādī, *op. cit.*, vol. 1, p. 249

[76] Cf. Zamakhsharī, *op. cit*, p. 75

[77] Cf. Hāshimī, *op. cit.*, fo. 126

[78] Cf. Shāfi'ī, *al-Umm*, Cairo 1967, vol. 1, p. 8

Shīrāzī, a jurist of the fifth century, also bases this case on *Qiyās*, but he says that because it is a dirty animal while it is live, its skin is not purified by tanning. It is like a pig, since a dish if lichked by this animal must be washed it is the same as a pig.[79]

On the other hand Ibn Farḥ mentions that Baihaqi, also a jurist of the fifth century, derives this case from the traditions that the prophet said, "The wicked earnings are . . . the price of a dog"[80] another tradition he said, "The price of a dog is vicious (Khabith)."[81] Moreover Zamakhshari reports that the Shāfi'ites had based this ruling on the Qur'ān 5.4[82] : "Forbidden to you (for food) are dead meat . . ."[83]

v THE QUR'ANIC RULINGS

The discipline of the rule of *'Uṣūl* was not applied properly to the works of the later period. This phenomenon may be observed in the works of *Ikhtilāf* in which a number of rulings which originated from the Qur'ān appear to be derived from tradition and *Qiyās*.

To find the solution to this problem we have to refer back to the writings of Shāfi'ī, as a model, on the basis that he was a pioneer of the science of *'Uṣūl* and applied its theory properly in handling the legal rulings.

Two rulings are chosen for our discussion; a) Performance of the ritual *'Umra*, and b) A person who is in a state of major impurity walks across the mosque.

a) *Performance of a ritual 'Umra*

The performance of the ritual *'Umra* is a point of different consideration between the Ḥanafites and the Shāfi'ites. The former consider that it is recommended (sunna) on the basis of Prophetic tradition,[84] whereas the latter consider that it is obligatory (wajib) on the ground of

[79] Cf. Shirāzī, *al-Nukt*, fo. 6a

[80] Cf. Ibn Farḥ, *Mukhtasar al-Khilafiyyāt*, fo. 6a

[81] Cf. Ibn Farḥ, *loc. cit.*

[82] Cf. *Text*, p. 66

[83] Cf. A. Yusuf 'Ali, *op. cit.*, vol. 1, p. 239

[84] Cf. Zamakhshari, *op. cit*, p. 66

another tradition from the Prophet.[85] The problem here, as appears in our text, arises originally from conflicting interpretation of tradition.

The problem in question in fact, according to our examination, arose originally from the Qur'ān, 2. 196: " ". Scholars appear to have offered different interpretations of the word " ". Some interpret it as "Complete the *Ḥajj* and the *'Umra* when you perform them . . ."86 The scholars who prefer the first interpretation consider that the performance of the *'Umra* is recommended. According to Zamakhsharī's analysis, the injunction is a command to complete the *Hajj* and teh *'Umra*, but evidently it has no indication of either obligation or recommendation. The command to complete, in fact, includes both duties obligatory and recommended, and he is inclined to say that in the case of Q 2, 196, the command to complete is a command to perform on the basis that a variant reading is recorded: ' ' Perform the *Ḥajj* and the *'Umra* ,. . . .' The command originally imposes obligatory duties unless there is other evidence which gives a different effect to it . . . It is also reported that the prophet said when he was asked, " . . . the pilgrimage is *Jihad* (effort) and the *'Umra* is recommended . . ."; therefore *'Umra* is excluded from the category of the *Ḥajj*, and thus the Ḥajj alone is obligatory.[87]

Shāfi'ī prefers the second interpretation to the effect that the *'Umra* is obligatory, on the ground that it is near to the literal meaning of the Qur'ān, and it is preferred by the scholars (ahl al-'ilm) "as I know . . ."[88] Shāfi'ī, in other words, has adopted a particular exegesis of the verse.

Whatever conclusion has been reached on the subject, both sides appear to have agreed that the *'Umra* is originally from the Qur'ān and not from the tradition. Thus it is a Qur'anic ruling.

b) *A person who is in a state of major impurity walks across the mosque*

The other ruling on a similar rpoblem concerns a person who, in a state of major impurity (junub), walks across the mosque. The Ḥanafites consider that it is prohibited on the basis that the prophet prohibited a person who is in a state of major impurity or who is in a state of menstruation.[89] But the Shāfi'ites are of the opinion that it is permitted on

[85] Ibid., ff. 66, 67

[86] Cf. Qurtubī, *Jami'li Ahkam al-Qur'ān*, Cairo 1964, vol. 2, p. 365

[87] Cf. Zamakhsharī, *al-Kashshaf*, vol. 1, p. 261

[88] Cf. Shāfi'ī, *op. cit.*, vol. 2, p. 113

[89] Cf. Zamakhsharī, *Ru'ūs al-Masāil*, p. 26

the basis of *Qiyās*.[90] The text seems to consider that the conflict arises essentially from different sources.

The question here again is a question of the Qur'anic origin, the reference being to the Qur'an. 4.43: " " " " The conflict arises from different interpretations of the word ' '. Some interpret it as "prayer" and others interpret it as "Places of prayer (mosque)." According to the first interpretation, the text is, "O ye who believe, approach not prayer . . . in a state of ceremonial impurity except those who are travelling. He who lacks water, let him perform *Tayammum* and pray . . ." The Hanafites adopt this view. The second interpretaion becomes, "O ye who believe, approach not places of prayer . . . in a state of ceremonial impurity except those who merely walk across . . ." This is the view of the Shāfi'ites.[91]

The scholars who prefer the first interpretation consider that the ruling which is here involved has no connection with the above injunction. But Shāfi'i prefers the second interpretaion, to the effect that it is permitted to a person in a state of major impurity to walk across the mosque on the grounds of the Qur'ān 4.43.[92] Mālik also reports that Zaid b Aslam said, "It is permitted (la ba'sa) to a person who is in a state of major impurity to walk across the mosque." And he says, "Zaid means Qur'ān 4.43 . . ."[93]

3. *Conclusion*

Examination of the works of *Ikhtilāf* which are to hand, reveals that the rulings which were produced had mostly been developed before the fifth century. Therefore no new achievement had been made in this respect except that they are reproduced in a new and more concise manner.

In spite of this, the jurists of all legal schools were very active in producing new evidence derived from the principles mentioned and other for existing rulings. In fact the evidence which appears and develops at that time can no longer be considered as the original source or evidence for such rulings; mostly it is supplementary evidence, which is polemically designed to support the view of the particular *Madhhab* against opponents.

[90] Ibid

[91] Cf. Qurṭubī, *op. cit.*, vol. 5, p. 202

[92] Cf. Shāfi'i, *op. cit.*, vol. 1, p. 46

[93] Cf. Mālik, *al-Mudawwanat al-Kubra*, Baghdad 1970, vol. 1, p. 32

It seems that as a rule the *'Uṣūl* in this period no longer carried its original function of deciding where and how to find a new ruling or solve new problems. Its function here is to create and develop further evidence for existing rulings in favour of the particular *Madhhab*. We have also seen that the discipline of the theory of *'Uṣūl* was not applied objectively.