CHAPTER 4 D

SIGNIFICANCE AND APPLICATION OF THE SUNNAH IN LEGAL ASPECT OF ISLAM

The proper conception of law requires complete perception of the totality of human life, on the earth for all times to come, and the type of human life Hereafter. The life in both the worlds is inter connected. The Hereafter is only the other phase of the life being led in this world. It is possible of Allah Almighty alone to know with precision what rules of conduct are most expedient for the majority of humanity in this world. Only he can tell whether the two phases of human life have been casually interrelated or not. If so, what rules of conduct in this world cause good or bad effects in the Hereafter. He therefore, blessed the human beings with the Divine guidance through revelation and gives them the body of rules of conduct, most suitable for all in this world. The conformity to those rules causes good effect (the Heaven) in the Hereafter, while the non-conformity leads to bad results (the Hell).

The Islamic law, therefore, is defined as the body of rules of conduct revealed by Allah to His Rasul ﷺ whereby the people are directed to lead their life in this world.

The Salient features of the Islamic law

There are fundamentally two primary sources, the Qur'an and the Hadith from which whole system of jurisprudence has been derived. Besides these two primary sources _ijtihad_ and _qiyaṣ_ are two secondary sources, on the basis of these four sources Islamic law as compiled by Muslim Jurists like Imam Abu Hanifah, Imam Malik, Imam Shafi'i Imam Ahmad emerges etc.

Islam is a religion that takes care of the individual as a whole. It makes use of both moral and legal sanctions, because it realizes that both morality and law are necessary for the smooth working of political and social life. Law without morality can not make righteous, and morality without law cannot prevent evil-doing.

The sphere of law in Islam is very wide. There is no field of life which is not ruled by law. There can be no life without law and there has to be some authority to enforce law. Islam is a religion which demands respect for law
because it stands for orderly, disciplined and regular habits of life and dislikes indiscipline, lawlessness, and care-free methods of work. The Islamic law is supreme and binding even over political authority. The ruler or leader does not create the law. The Divine law is the real sovereign and the highest authority is an Islamic state. Even the ruler is subject to this law.

Islam has a definite and clear-cut system of law. As far as the Islamic conception of law is concerned, the entire Shari'ah stands as synonymous with law. Because the entire code of life has been decreed by Allah. Anyhow, we can apply (narrowly) the term 'Islamic law' to those portions only which demand the sanction of state power for their enforcement. The main object of the Shari'ah is to construct human life on the basis of marufat (virtues) and to cleanse it of the munkarat (vices). It lays down the entire scheme of life in such a manner that virtues may flourish and vices may not venom human life. The Shari'ah is a complete scheme of life and an all-embracing social order, nothing superfluous, nothing lacking.

As we mentioned above the primary and main sources of Islamic law are two i.e. the Qur'an and the Sunnah. They are called (olutely sure proofs) while other two sources 'ijma' and qiyas which are secondary are called (arguments obtained by exertion. Thus the original source from which all principles, law and ordinances of Islam are drawn is the Book called al Qur'an, the Sunnah or Hadith is the second among the main sources from which the laws of Islam are drawn. Sunnah, in conjunction with the Qur'an, formulates and completes the supreme law of the real sovereign. However, Islam does not totally exclude human legislation. But this, according to Islam, is and should be subject to the supremacy of Divine law and within the limits prescribed by it. This type of legislation and the first means of affecting movement and evolution in Islamic law is ijtihad.

The word ijtihad literally means to put in the maximum of effort in performing a job, but technically it signifies 'maximum effort' to ascertain, in a given problem or issue, the injunction of Islam and its real intent. The basic idea of ijtihad is that man should try to bring under the governance of the Shari'ah even those matter regarding which the Qur'an and Sunnah have not laid down any clear-cut injunctions. Thus as regards ijtihad or original legislation, it requires the jurist to have not only a deep knowledge of Islamic law but also a developed sense of interpreting matters in the true Islamic spirit.

The purpose of ijtihad is not to replace 'Divine law' by man-made law. Its real object is to properly understand that supreme law and to impart dynamism to the legal system of Islam by keeping it in conformity with the fundamentals of the Shari'ah and abreast of the changing conditions of the world. That is why we can say that Islamic law has been so constituted as to combine successfully two
contradictory characteristics. From one angle, Islamic law is rigid and immovable and no changes in the social environment of man can alter it (al Qur’an al Hadith). From another angle, Islamic law is sufficiently flexible and broad to remain capable in all circumstances of fashioning human life according to its eternal norms.

Legislative aspect of the Sunnah

The whole superstructure of Sunnah is based on the verses of the Qur’an revealed gradually during a period of 23 years. Thus both the Qur’an and the Sunnah constitute one complete whole. Both are fundamentally interdependent. This is like one organic body constituted by different parts. Together they make a living organism but divided they mean death. In the words of the Qur’an the relationship of the Qur’an and the Sunnah is that of a book and a light.

O People of the Book! There hath come to you Our Rasul, revealing to you much that ye used to hide in the Book, and passing over much [that is now unnecessary]: There hath come to you from Allah a [new] light and a perspicuous Book. (al Ma’idah 5:15)

The book cannot be read in the darkness. Similarly, light cannot be beneficial unless it is utilized for some purpose. The light of the Sunnah is useful and essential for reading the Book of Allah the Qur’an.

When we say that there are two basic sources of Islamic law, it is for the sake of description and explanation. As a matter of fact there is only one source, that is, revelation as applied and exercised in the society set up by the Rasul-Allah ﷺ and his Companions. Islam is the organic whole with the Qur’an and the Sunnah as its constituents. Islam is the tree with the Qur’an and the Sunnah as its roots and the Islamic law as its fruit. The jurists by saying that the Qur’an and the Sunnah are the basic sources, only tends to describe the details of the Islamic legal system. For the purpose of laying down the law, both are interdependent and work together. The Qur’an says:

Fūll ʿātīʿūmawā ALLâhâa Wâllâhâs-suulâ Fīs-suulâ Fīs-suulâ AAllâhâm Lâ

Yiḥyb’ Allâk-fîrīn
Say: Obey Allah and His al Rasul: but if they turn back, Allah loveth not those who reject Faith. (al ‘Imran 3:32)

But those who disobey Allah and His Rasul and transgress His limits will be admitted to a Fire, to abide therein: and they shall have a humiliating punishment. (al Nisa 4:14)

Ahmad Ibn Hanbal said

Allah guided Rasul-Allah and sent him with the religion so that he may make it dominant over all other religions. That book was revealed to him which is guidance for those who want to practice it. Allah has given the right to His Rasul to tell the people the manifest and the latent meanings of the Qur’an, its general and its specific, its repealing and repealed injunctions etc.214

The following instances will illustrate how these two sources of Islam interplay and function for the purpose of legislation. It will be seen that this function observes strict harmony and follows systematic rules. Theses rules were discovered by the jurists and are generally called the rules of interpretation and secondary sources of Islamic law. The discovery/deduction of these rules made it convenient and expedient to derive and codify the laws from the system of Islam.

i) The meaning of the Qur’an is general, the Sunnah makes it specific and particular, the Qur’an says:

وَلَكُمْ يُصْفَعُ مَا تَرَكَ أَرْوَاحُكُمْ إِنْ لَمْ يَكُنْ لَهُمْ وَلَدٌ وَلَدٌ،
فَإِنَّ كَانَ لَهُمْ وَلَدٌ فَلْتَكُمْ أَرْوَاحُكُمْ مَا تَرَكُونَ مِنْ بَعْدِ وَصْيَتِكُمْ بِهَا أَوْ دَيْنٌ وَلَهُمْ أَرْوَاحُكُمْ مَا تَرَكُونَ مِنْ بَعْدِ وَصْيَتِكُمْ بِهَا أَوْ دَيْنٌ وَلَدٌ فَلْتَكُمْ أَرْوَاحُكُمْ مَا تَرَكُونَ مِنْ بَعْدِ وَصْيَتِكُمْ بِهَا أَوْ دَيْنٌ
In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused [to anyone]. Thus is it ordained by Allah; and Allah is All-Knowing, Most Forbearing. (al Nisa 4:12)

Those are limits set by Allah; those who obey Allah and His Rasul will be admitted to Gardens with rivers flowing beneath, to abide therein [forever] and that will be the Supreme achievement. (al Nisa 4:13)

Thus Allah made it plain that father and wives are among those He named in various circumstance, the terms are general; but the Sunnah of the Rasul-Allah indicated that it is intended to mean only some fathers and wives, excluding others, provided the that religion of father, children and wives is the same (Islam), and that each heir is neither a killer nor a slave.

Rasul-Allah specified that the bequests must not exceed one-third of the deceased’s estate, and the heirs receive the two-thirds; and he also made it clear that debts take precedence over bequests and Inheritance and that neither the bequests nor the inheritance should be distributed until the creditors are first paid. These instances illustrated the principle of general and specific.
(ii) The Sunnah may add and supplement the legal provisions of the Qur’an. A marriage is unlawful if a man marries his wife’s sister because the Qur’an prohibited the taking of two sisters as wives, or if a man takes fifth woman, because the Qur’an permitted four at a time and the Rasul-Allah made it clear that Allah prohibited the taking of any additional one. Marrying one’s wife’s aunt, paternal or maternal, is prohibited by the Rasul-Allah. Marrying a woman during her ‘idah has been also prohibited by the Rasul-Allah.

(iii) The Quranic injunction is sometimes implicit and the Sunnah makes it explicit by providing essential ingredients and its details.

All women are prohibited to men except in one of the two ways nikah and by virtue of possession. These are the two ways made lawful by the Qur’an. But the Qur’an is silent about how to solemnize a valid marriage. Rasul-Allah laid down in the Sunnah the modes in which the nikah (marriage) makes a previously forbidden woman lawful, such as the need for a guardian, the testimony of witnesses, the consent of the spouses and the dower.

(iv) The absolute declarations of the Qur’an are qualified by the Sunnah.

The Qur’an says that the hands of male thief as well as the female thief are to be amputated. Rasul-Allah qualified this injunction with the condition like the convict should not be lunatic, should not be child, the punishment should not be inflicted in the cases of trifles, the punishment should be suspended during war and the stealing of food is not punishable.

(v) The Sunnah makes certain exceptions to the general rules made by the Qur’an.

The Qur’an made a general declaration that one may bequeath his property by will in the manner he likes. The Sunnah has created the exception in the rule that one cannot make a will in favour of one’s legal heirs.

(vi) The gradation in the provisions of obligations and prohibitions (five values) is possible for a jurist only if he has in mind the complete whole of Qur’an and the Sunnah, the context of every injunction and the situation in which the orders were made. Every order of the Qur’an is not obligatory ((required)) for instance, Allah has said, and marry from amongst the women, two or three or four but polygamy is not obligatory. Similarly every act and order of the of Rasul-Allah is not obligatory. There is a gradation. The jurists have classified the prescription of Shari’ah obligations as obligatory (required), desirable (recommended) and permissible (permissible) and graded the prohibition as prohibited (forbidden) and undesirable (haram).

An insight in the Sunnah makes a person capable to discover this hierarchy. Rasul-Allah lived a life. His personal practice or his reaction to the practice of his Companions gives an injunction its proper place in the hierarchy. The manner of the Rasul-Allah’s behaviour and the way of his expression is the only
standard to place a certain provision on the scale of gradation. We cannot
ourselves classify that these acts are in his personal capacity and others are in his
capacity as a Rasul-Allah. Only he has got the authority to explain that such and
such act is obligatory such and such is simply an etiquette and other is his personal
liking. There are no two capacities of his personality. He has only one capacity for
us, and that is that of the Rasul-Allah, Rasul-Allah his Companions used to
presume his every act and direction to be binding unless he himself told that the
same was not binding and was only a suggestion. The famous Hadith of
pollination witnesses that when Rasul-Allah objected to their act of
pollination, they stopped it and refrained from doing so till he himself told
that it was not a binding direction and that they might continue doing so. Similarly
at the occasion of the battle of Badr, Hibab Ibn Manzar had a suggestion in mind
about the fixation of the tent. But before giving his suggestion he enquired from
Rasul-Allah whether his decision about the fixation of the tent was under
revelation. The general presumption was that his every act is taken to be in the
capacity of Rasul-Allah unless he himself specified a certain act to be his
personal liking, a matter of simple etiquette or peculiarity with him. The acts
done by him are all in the capacity of Rasul-Allah and are graded according to
the degree of emphasis put by him.

The sum and substance of the whole discussion of the primary sources is
that the reservoir of Islamic law is the ‘social system’ established by the Qur’an
and the Sunnah. The situations arose in the life and society of Rasul-Allah and
his Companions. Rasul-Allah provided the solutions in the light of Revelation,
both direct and indirect i.e., the Qur’an and the Sunnah. These concrete precedents
which were provided during the twenty-three lunar years in every walk of life,
became numerous enough to give a complete ‘social system’ is the objective form
of behaviour. This social system is the source of Islamic law, we mean that there
are two primary sources of Islamic law. When we say that there are two primary
sources of Islamic law, we mean that the social system from which we got the
Islamic law is primarily constituted by the Qur’an and the Sunnah and for the sake
description we discuss the second source (Sunnah). The wisdom in giving the
law in the form of comprehensive and self-sufficient social system is two-fold.
Firstly, to make it objective and perceivable so that the society might be formed
and charged successfully. Secondly, unless the law is given through a social
system, it could not be universal and eternal. This aspect that how the Islamic law
becomes practicable for all the times and places is discussed below.

The Sunnah that is the sayings, acts and tacit enactments of Rasul-
Allah may be divided into two types: non legal and legal Sunnah.
Non legal Sunnah (سند غیر تشريعي) mainly consists of the natural activities of Rasul-Allah (الفعاليات الجماعية) such as the manner he ate, walked, slept, clothed and such other activities as do not seek to constitute a part of the Shari‘ah. Activities of this nature are not of primary importance to the Nabawi mission and therefore do not constitute legal norms. According to the majority of ‘ulama Rasul-Allah’s preferences in these areas, such as his favourite meals, colours, or the fact that he slept on his right side in the first place, etc. only indicate the permissibility (払حت) of the acts in question only. The reason given is that such acts could be either wajib, mandub or merely mubah. The first two can only be established by means of positive evidence: wajib and mandub are normally held to be absent unless they are proved to exist. Since there is no such evidence to establish that the natural activities of Rasul-Allah fall into either of these two categories, there remains the category of mubah and they fall in this category for which no positive evidence is necessary.215

On a similar note, Sunnah which partakes in specialized or technical knowledge, such as medicine, commerce and agriculture is once again held to be peripheral to the main function of Rasul-Allah’s mission and is therefore not a part of the Shari‘ah. As for acts and sayings of the Rasul-Allah that related to particular circumstances such as the strategy of war, including such devices that misled the enemy forces, timing of attack, besiege or withdrawal, these too are considered to be situational and not a part of the Shari‘ah.

These are certain matters which are peculiar to the person of the Rasul-Allah and his example concerning them does not constitute general law.

For instance polygamy above the limit of four, marriage without a dower, prohibition of remarriage for the widows of Rasul-Allah, sawm al wisal and the fact that Rasul-Allah admitted the testimony of khuzaimah Ibn Thabit as legal proof. The rules of Shari‘ah concerning these matters are stated in the Qur’an, which remain to be the legal norm for the generality of Muslims. According to the majority opinion, the position with regard to such matter is partly determined by reference to the relevant text of the Qur’an and the manner in which Rasul-Allah is addressed. When for example the Qur’an addresses Rasul-Allah in such terms as ‘O you Rasul’ or ‘O you folded up in garments’ (al Muzammil 73:1, al Muddathir 74:1), it is implied that the address is to Rasul-Allah above unless there is conclusive evidence to suggest otherwise.216

373
Certain activities of Rasul-Allah may fall in between the two categories of legal and non-legal Sunnah as they combine the attributes of both. Thus it may be difficult to determine whether an act was strictly personal or was intended to set an example for others to follow. It is also known that at times Rasul-Allah acted in a certain way which was in accord with the then prevailing custom of the community. For instance, Rasul-Allah kept his beard at a certain length and trimmed his moustache. The majority of 'ulama have viewed this not as a mere observance of the familiar usage at the time but that it set an example for the believers to follow. Others have held the opposite view by saying that it was a part of the social practice of the Arabs which was designed to prevent resemblance to the Jews and some non-Arabs who used to shave their beard and grew the moustache. Such practices were in other words, a part of the current usage and basically optional. Similarly, it is known that Rasul-Allah used to go to the 'Id salah by one route and return from the different route, and that Rasul-Allah at times performed the Hajj while riding a camel. The Shafi'i jurists are inclined to prefer the commendable (mandub) in such acts to mere permissibility whereas the Hanafi jurists consider them as merely permissible or mubah.

The legal Sunnah consists of the exemplary conduct of Rasul-Allah be it an act, saying, or a tacit approval, which incorporate the rules and principles of Shari'ah. This variety of Sunnah may be divided into three types, namely the Sunnah which Rasul-Allah laid down in his capacities as Rasul-Allah, as the Head of State or Imam, or in his capacity as a judge. We shall discuss each of these separately as follows:

(a) In his capacity as Rasul of Allah, Rasul-Allah has laid down rules which are, on the whole complementary to the Qur'an, but also rules on which the Qur'an is silent. In this capacity, the Sunnah may consist of a clarification of the genre (mujamal) parts of the Qur'an or of specifying and qualifying the general and the absolute contents of the Qur'an. Whatever that Rasul-Allah has authorized pertaining to the principles of religion especially is the area of devotional matter and rules expounding the lawful and the unlawful, that is the ( and constitutes general legislation ( whose validity is not restricted to the limitations of time and circumstances. All commands and prohibitions that are imposed by the Sunnah are binding on every Muslim regardless of individual circumstances, social status, or political office, in acting upon these laws, the individual normally does not need any prior authorization by a religious leader or the government.
The question arises as to how it is determined that Rasul-Allah act ed in one or the other of his three capacities as mentioned above. It is not always easy to answer this question in categorical terms. The uncertainty which has arisen is the main cause of juristic disagreement among the fuqaha. The 'ulama have the whole attempted to ascertain the main thrust or the direction of the particular acts and sayings of Rasul-Allah. An enquiry of this nature helps to provide an indication as to the value of the Sunnah in question whether it constitutes an obligation, commendation, or on the one hand, or a prohibition versus abomination on the other.

When the direction of an act is known from the evidence in the sources there remains no doubt as to its value. If, for example, Rasul-Allah attempts to explain an ambiguous ruling of the Qur'an, the explanation so provided would fall in the same category of values as the original ruling itself. According to the majority of 'ulama, if the ambiguous of the Qur'an is known to be obligatory, or commendable, the explanatory Sunnah would carry the same value. For example all the practical instructions of Rasul-Allah which explained and illustrated the obligatory would constitute wajib and his acts pertaining to the supererogatory salah such as on the occasion of lunar and solar eclips would constitute a. Alternatively, the Sunnah may itself provide a clear indication as to whether a particular role which it prescribes is or merely permissible. Another method of ascertaining the value of a particular act is to draw an analogy between an undefined act and an act or saying whose value is known. Furthermore the subject-matter of the Sunnah may provide a sign or an indication as to its value. With regard to salah, for example the call to prayer and the call which immediately precedes the standing to congregational salah is one indication as to the obligatory nature of the salah. For it is known from the rules of Shari'ah that and (الاذان) precede the obligatory only. A salah which is not obligatory such as the (صلوات العصر) or (صلوات الاستمارة), that is salah offered at the time of drought are not preceded by the preliminaries of or . Another method of evaluating an act is by looking at its opposite, that is its absence. If it is concluded that the act in question would have been in the nature of a prohibition had it not been authorized by Rasul-Allah, then it would imply that it is obligatory. For example, circumcision is evaluated to be an obligation. Since it consists essentially of the infliction of injury for no obvious cause, had it not been made into an obligation,
and then it would presumably be unlawful. Its validation by the Shari'ah in other words is taken as an indication of its's (证实). This explanation is basically applicable to all penalties that the Shari'ah has prescribed punishment is understood from the direct rulings of the relevant texts. And lastly an act may require belated performance (延期 or a ( kadar) and as such its value would correspond to that of its prompt performance ada. 218

The foregoing are the categories of acts whose direction and value can be ascertained. However, if no such verification is possible, then one must look at the intention behind its enactment. If the Nabawi act is intended as a means of seeking the pleasure of Allah, then it is classified as ( منصوب) and according to a variant view, as ( منصوب). However, if the intention behind a particular act could not be detected either, then it is classified as ( منصوب) and according to variant view as ( منصوب) but the matter is subject to interpretation and ( احتمال).

All the rulings of Sunnah which originate from Rasul-Allah in his capacity as Imam, or the Head of State such as allocations and expenditure of public funds, decisions pertaining to military strategy and war, appointment of state officials distribution of booty, signing of treaties, etc. partake in legal Sunnah which, however, does not constitute general legislation ( منشور علة). Sunnah of this type may not be practiced by individuals without obtaining the permission of the competent government authorities first. The mere fact that Rasul-Allah has acted in a certain way, or said something relating to these matter, does not bind the individuals directly, and does not entitle them to act on their own initiative without the express permission of the lawful authority. To give an example, according to a Hadith, 'whoever kills warrior in the battle may take his belongings.


One who kills person and brings evidence on it, deserves a property belongs to a person killed. 219

The 'ulama have differed as to the precise import of this Hadith. According to one view, Rasul-Allah uttered this Hadith in his capacity as Imam in which case no one is entitled to the belongings of his victim in the battle field without the express authorization of the Imam. Others have held the view that this Hadith lays down a general law which entitles the soldier to the belongings of the deceased even without the permission of the Imam.

It has been observed that Rasul-Allah might have uttered this Hadith in order to encourage the Companions to jihad in light of
the then prevailing circumstances. The circumstances may have been such that an incentive of this kind was required; or may be it was tended to lay down a general law without any regard for particular situations. According to Imam Shafi’i the Hadith under consideration lays down a general rule of Shari’ah. For this is the general norm with regard to the Sunnah. The main purpose of Rasul-Allah’s mission was to lay down the foundations of the Shari’ah and unless there is an indication to the contrary, one must assume that the purpose of the Hadith in general is to lay down general law.

Sunnah which originates from Rasul-Allah in his capacity as a judge in particular disputes usually consists of two parts: the part which relates to claims, evidence and factual proof and the judgement which is issued as a result. The first part is situational and does not constitute general law, whereas the second part lays down general law with the proviso, however, that it does not bind the individual directly and none may act upon it without the prior authorization of a competent judge. Since Rasul-Allah himself acted in a judicial capacity, the rules that has enacted must therefore be implemented by the office of the Qadi. Hence when a person as a claimant knows of a similar dispute which Rasul-Allah has adjudicated in a certain way, this would not entitle the claimant to take the law into his own hands. He must follow proper procedures to prove his claim and to obtain a judicial decision.

To distinguish the legal from non legal Sunnah, it is necessary for the mujtahid to ascertain the original purpose and context in which a particular ruling of the Sunnah has been issued and whether it was designed to establish a general rule of law. The Hadith literature does not always provide clear information as to the different capacities in which Rasul-Allah might have acted in particular situations, although the mujtahid may find indication that would assist him to some extent. The absence of adequate information and criteria on which to determine the circumstantial and non legal Sunnah from that which constitutes general law dates back to the time of the Companions. The difficulty has persisted ever since and it is due mainly to the shortage of adequate information that disagreement has arisen among the ‘ulama over the understanding and interpretation of the Sunnah.220

To give another example, juristic disagreement has arisen concerning a Hadith on the reclamation of barren land which reads ‘whoever reclaims barren land becomes its owner’.

\[\text{من أحدا أرضًا مضتتْ فمثَنَّ لهُ} \]

One who fertilize barren land he will become owner of that land.221

377
The ‘ulama have differed as to whether Rasul-Allah ﷺ uttered this Hadith in his Nabawi capacity or in his capacity as Head of the State. If the former is established to be the case then the Hadith lays down a binding rule of law. Anyone who reclaims barren land becomes its owner and he need not obtain any permission from the Imam or anyone else. For the Hadith would provide the necessary authority and there would be no need for official permission. If on the other hand it is established that Rasul-Allah ﷺ uttered this Hadith in his capacity as Imam, then it would imply that anyone who wishes to reclaim barren land must obtain the prior permission of the Imam. The Hadith in other words only entitles the Imam to grant the citizens the right to reclaim barren land. The majority of jurists have adopted the first view whereas the Hanfi jurists have held the second: the majority of jurists, including Abu Yusuf, have held that the consent of the state is not necessary for anyone to commence reclaiming barren land. But it appears that later jurists and scholars prefer the Hanfi view which stipulates that reclaiming barren land requires the consent of the prevention of disputes among people. The Maliki jurists on the other hand only requires government consent when the land is close to a human settlement and the Hanbali jurists only when it has previously been alienated by another person.

Disagreement has also arisen with regard to the Hadith that adjudicated the case of Hind, the wife of Abu Sufyan this woman complained to Rasul-Allah ﷺ that her husband was a tight-fisted man and that despite his affluence; he refused to give adequate maintenance to her and her child. Rasul-Allah ﷺ instructed her to take (of her husband’s property) what is sufficient for herself and her child according to custom.

"A’isha reported: Hind, the daughter of ‘Utba, wife of Sufyan, came to Rasul-Allah ﷺ and said: Abu Sufyan is a miser man, he does not give adequate expenses for me and my children, but to take from his wealth without his knowledge. Is there any sin on me? Rasul-Allah ﷺ said: take from his property amicably which may suffice you and your children."\(^{222}\)
would only authorize the judge to issue a corresponding order. Thus it would be unlawful for a creditor to take his entitlement from the property of his debtor without a judicial order. If it is established on the other hand that the Hadith lays down a general rule of law, then no adjudication would be required to entitle the wife or the creditor to the property of the defaulting debtor. For the Hadith itself would provide the necessary authority. If any official permission is to be required then it would have to be in the nature of a declaration or clearance only.

The Hanfi, Shafi'i and Hanbali jurists have held that when a man who is able to support his wife willfully refuses to do so, it is for the wife to take action and for the qadi to grant a judgement in her favour. If the husband still refuses to fulfill his duty, the qadi may order the sale of his property from whose proceeds the wife could obtain her maintenance. The court may even imprison a persistently neglected husband. The wife is, however, not entitled to a divorce, the reason being that when Rasul-Allah instructed Hind to take her maintenance from her husband's property, she was not granted the right to ask for a divorce. The Maliki jurists are basically in agreement with the majority view with the only difference that in the event of the husband's persistent refusal, the Maliki jurists entitle the wife to ask for divorce. Not withstanding some disagreement as to whether the court should determine the quantity of maintenance on the basis of the financial status of the husband, the wife or both, according to the majority view, the husband's standard of living should be the basis of the court-decision. Thus the 'ulama have generally considered the Hadith under consideration to consist of a judicial decision of Rasul-Allah, and as much it only authorizes the judge to adjudicate the wife's complaint and to specify the quantity of maintenance and the method of its payment.

Sunnah which consists of 'general legislation often has the quality of permanence and universal application to all Muslims. Sunnah of this type usually consists of commands and prohibitions which are related to the Qur'an in the sense of endorsing, elaborating or qualifying the general provisions of the Book.

**Sunnah as an independent source of law**

An adequate answer to the question as to whether the Sunnah is a mere supplement to the Qur'an or a source in its own right necessitates an elaboration of the relationship of the Sunnah to the Qur'an in the following three categories in brief, we have already discussed these capacities in chapter No: 1 in detail, it is discussed from a legal point of view below:
Firstly, the Sunnah may consists of rules that merely confirm and reiterate the Qur'an in which case the rules and legal laws concerned originate Sunnah is an independent source of law is basically redundant with regard to matters on which the Sunnah merely confirms the Qur'an as it is obvious that in such cases the Sunnah is not an independent source. A substantial part of the Sunnah is, in fact, of this variety: Ahadith which regulate homicide, theft, adultery and false testimony, etc. basically reaffirm the Quranic principles on these subjects. 

To be more specific, the Hadith that ‘it is unlawful to take the property of a Muslim without his express consent’

لا يحل مال مال امرأء مسلم لا يطلب عن نفسه

It is not lawful for any Muslim to take property of fellow Muslim without his permission.

Merely confirms the Quranic ayah which orders the Muslims to ‘devour not each other properties unlawfully unless it is through trade by your consent’ (al Nisa 4:19). The origin of this rule is Quranic and since the foregoing Hadith merely reafirms the Qur'an, there is no room for saying that it constitutes an independent legal authority in its own right.

Secondly, the Sunnah may consist of an explanation or clarification to the Qur'an, it may clarify the ambivalent of the Qur'an, qualify its absolute, or specify the general terms of the Qur'an in that it explains the Quranic. It is, for example, through this type of Sunnah that Qur'an expressions like salah, zakah, hajj and riba, etc, have acquired their juridical meanings. To give another example, with regard to the contract of sale to Qur'an merely declares sale to be lawful as opposed to riba, which is forbidden. This general principle has later been elaborated by the Sunnah which expounded the detailed rules of Shari'ah concerning sale including its conditions, varieties, and sale which might amount to riba. The same could be said of the lawful and unlawful varieties of food, a subject on which the Qur'an contains only general guidelines and the Sunnah provides the details.

Again, on the subject of bequest, the Qur'an provides for the basic legality of bequest and the rule that it must be implemented prior to the distribution of the estate among the heirs (al Nisa 4:12). The Sunnah supplement to those by enacting additional rules which facilitate proper implementation of the general principles of the Qur'an.
The foregoing two varieties of Sunnah between them comprise the largest bulk of Sunnah and the 'ulama are in agreement that these two types of Sunnah are integral to the Qur'an and constitute a logical whole with it. The two cannot be separated or taken independently from one another. It is considered that Sunnah which qualifies or elaborates the general provisions of the Qur'an on devotional matters (العبادات) on the punishment of theft, on the duty of zakah and on the subject of bequest could only have originated in Divine inspiration (wahy), for those cannot be determined by means of rationality and ijtihad only.

Thirdly, the Sunnah may consist of ruling on which the Qur'an is silent in which case the ruling in question originates in the Sunnah itself. This variety of Sunnah, referred (السنن المحسومة) or founding Sunnah, neither confirms nor opposes the Qur'an, and its contents cannot be traced back to the Book. It is only this variety of Sunnah which lies in the centre of the debate as to whether the Sunnah is an independent source of law. To give some examples, the prohibition regarding simultaneous marriage to the maternal and paternal aunt of one's wife (often referred to as unlawful conjunction) the right of pre-emption (شريعت) the grandmother's entitlement to a share in inheritance, the punishment of (ذبح) that is death by stoning for adultery when committed by a married man/woman all originates in the Sunnah as Qur'an itself is silent on these matters.227

There is some disagreement among jurists as to whether the Sunnah, or this last variety of it at any rate, constitutes an independent source of Shari'ah. Some 'ulama of the later ages (المتأخرون) including al Shatibi and al Showkani have held the view that the Sunnah is an independent source. They have further maintained that the Quranic ayah in sura al Nahl 16:44 is inconclusive and that despite its being clear on the point that Rasul-Allah (interprets the Qur'an, it does not overrule the recognition of Sunnah as an independent source. On the contrary, it is agreed that there is evidence in the Qur'an which substantiates the independent status of Sunnah. The Qur'an for example, in more than one place, requires the believers to 'obey Allah and obey Rasul' (He who obeys al Rasul obeys Allah; but if any turn away, we have not sent thee to watch over their [evil deeds]. (al Nisa 4:80)
Obey Allah, and obey al Rasul, and beware [of evil]: if ye do turn back, know ye that it is Our Rasul’s duty to proclaim [the Message] in the clearest manner. (al Ma’idah 5:92). This fact that obedience to Rasul-Allah is specifically enjoined next to obeying Allah warrants that conclusion that obedience to Rasul-Allah means obeying him whenever he orders or prohibits something on which the Qur’an might be silent. For if the purpose of obedience to Rasul-Allah were to obey him only when he explained the Qur’an, then ‘obey Allah’ would be sufficient and there would be no need to add the phrase ‘obey the Rasul’. Elsewhere the Qur’an clearly places submission and obedience to Rasul-Allah at the very heart of the faith and a test of one’s acceptance of Islam. This is the purport of the ayah which reads: ‘By thy Rabb, they will not believe till they make thee the judge regarding disagreements between them and find in themselves no resistance against the verdict, but accept it in full submission (al Nisa 4:65). Furthermore, the proponents of the independent status of the Sunnah have quoted the Hadith of Mu’adh Ibn. Jabal in support of their argument. The Hadith is clear on the point that the Sunnah is authoritative in cases on which no guidance could be found in the Qur’an. The Sunnah in other words, stands on its own fact regardless as to whether it is substantiated by the Qur’an or not.

According to the majority of ‘ulama, however, the Sunnah in all its parts, then when it enacts original legislation, is explanatory and integral to the Qur’an. Imam Shafi’i’s views on this matter is representative of the majority position in his al Risalah, Imam Shafi’i stated:

I do not know anyone among the ‘ulama to oppose that the Sunnah of Rasul-Allah is of three types: First is the Sunnah which prescribes the like of what Allah has revealed in His Book; next is the Sunnah which explains the general principles of the Qur’an and clarifies the will of Allah; and last is the Sunnah where Rasul-Allah has ruled on matters on which nothing can be found in the Book of Allah. The first two varieties are integral to the Qur’an but the ‘ulama have differed as to the third.

Imam Shafi’i continues to explain the views that the ‘ulama have advanced concerning the relationship of Sunnah to the Qur’an. One of these views, which receives strong support from al Shafi’i himself, is that Allah has explicitly
rendered obedience to Rasul-Allah into an obligatory duty. In his capacity as Rasul-Allah, Rasul-Allah has introduced laws some of which originate in the Qur'an and others do not. But all Nabawi legislation emanate in Divine authority. The Sunnah and the Qur'an are of the same provenance and all must be upheld and obeyed. Others have held the view that the Nabawi mission itself, that is the fact that Rasul-Allah is the chosen Rasul of Allah, is sufficient proof for the authority of Sunnah. For it is through the Sunnah that Rasul-Allah fulfilled his divine mission. According to yet another view there is no Sunnah whose origin cannot be traced back to the Qur'an. This view maintains that even the Sunnah which explains the number and contents of salah and the quantities of zakah as well as the lawful and forbidden varieties of food and trade merely elaborate the general principles of the Qur'an. More specifically, all the Ahadith which provide details as to the lawful and unlawful varieties of food merely elaborate the Quranic declaration that Allah permitted wholesome food and prohibited that which is unclear.

The majority view which seeks to establish an almost total identity between the Sunnah and the Qur'an further refers to the sayings of Rasul-Allah’s widow ‘A’isha, when she attempted to interpret the Quranic epithet (اُلْهَ). ‘A’ishah is quoted to have said that ‘his (Muhammad’s) was the Qur’an (الْقُرْآنُ) in this context means the conduct of Rasul-Allah, his acts, sayings and all that he has approved. Thus it is concluded that the Sunnah is not separate from the Qur’an.

Furthermore, the majority view seeks to establish an identity between the general objectives of the Qur’an and Sunnah. The Sunnah and the Qur’an are unanimous in their pursuit of the three fold objectives of protecting the necessities (حُجُومًا), complementary requirements (حُجُومًا) and the embellishments (حُجُومًا). It is then argued that even when the Sunnah broaches new grounds; it is with the purpose of giving effect to one or the other of the objectives that have been validated in the Qur’an. Thus the identity between the Qur’an and the Sunnah is transferred, from one of theme and subject, to that of the main purpose and spirit that is common to both.

And finally, the majority explains that some of the rulings of the Sunnah consist of an analogy to the Qur’an. For example, the Qur’an decreed that no one may marry two sisters simultaneously. The Hadith which prohibits simultaneous marriage to the maternal and paternal aunt of one’s wife is based on the same effective cause (الْعَدَدِ) which is to avoid the severance of close ties of kinship (تَفَعُّلُ الْعَدَدِ). In short the Sunnah as a whole is no more than a supplement to the Qur’an. The Qur’an is indeed more than comprehensive and provides complete guidance on the broad outline of the entire body of the Shari’ah.
In conclusion it may be said that both sides are essentially in agreement on the authority of the Sunnah as a legal source and its principal role in relationship to the Qur'an. They both acknowledge that the Sunnah contains legislation which is not found in the Qur'an. The difference between them seems to be one of interpretation rather than substance. The Quranic ayah on the duty of obedience to Rasul-Allah, and those which assign him the role of the interpreter of the Qur'an, are open to variant interpretations, these passages have been quoted in support of both the views that the Sunnah is supplementary to the Qur'an, and that it is an independent source. The point which is basic to both these views is the authority of Rasul-Allah and the duty of adherence to his Sunnah.

In the mean time, both sides acknowledge the fact that the Sunnah contains legislation which is additional to the Qur'an. When this is recognized, the rest of the debate becomes largely redundant. For what else is there to be achieved by the argument that the Sunnah is an independent source! The two views have, in effect, resolved their differences without perhaps declaring this to be the case. Since the Qur'an provides ample evidence to the effect that Rasul-Allah explains the Qur'an and that he must be obeyed, there is no need to advance a theoretical conflict between the two facets of a basic unity. Both views can be admitted without the risk of running into a logical contradiction. The two views should therefore be seen not as contradictory but as a logical extension of one another.

**Imam Ibn Taimiyah’s legal theory**

Imam Ibn Taimiyah’s legal theory is based on the Qur’an and the Hadith. Long before the time of Ibn Taimiyah in the seventh and eight centuries after the hijrah, the body of Islamic law according to the four major schools of Imam Abu Hanifah, Imam Malik Imam Shafi’i and Imam Ahmad Ibn Hanbal and according to the other schools of the Shari'ah, Ithna ‘Ashariyah, and Zahiri’s etc, had been collected compiled and written down. Moreover, by his time, they had been so interpreted and reinterpreted, and expanded by the numerous jurists and disciples of each of the various schools that there was hardly a contemporary legal issue that had not been tackled by one school or another. This itself may be that major reason why creative interpretation had become so stagnant by Imam Ibn Taimiyah’s time that there was an instant readiness on the part of the ‘ulama to attack him for his interpretative efforts. Be that as it may, the fact remains that large systems of law had been in existence, and were available to anyone interested and equipped to study them.

It was in the study of law (fiqh) that Imam Ibn Taimiyah first achieved his intellectual maturity and independence, for as has been seen, this was the profession of his father and grandfather before him. And it was to Islamic law that
his intellectual consciousness was first awakened. Born into Hanbali family he naturally studied it first; at length, the responsibility of completing Muswaddat al usul, a work on the Hanbali School started by his grandfather and continued by his father, fell upon him. Yet he simultaneously studied other schools, and became well-versed in comparative Islamic law, as is evident in his frequent reference to the various opinions of the major jurists.\textsuperscript{231}

Besides the motivation of intellectual curiosity which impelled him to study the four schools of law, Imam Ibn Taimiyyah in so doing reflects a sense of religious obligation and an unquestionable appreciation for them. His monographic titled Rafa' al a'lam 'an al aima ala 'lam epitomizes his devotion to them for the unequalled leadership they had given to the Muslims of all generations after them. In his introduction, he wrote:

\begin{quote}
It is incumbent upon Muslims after showing obeisance to Allah and his Rasul, to show obeisance (\textit{muwalah}) to the faithful... especially to the doctors ('ulama) who are heirs of Anbiya', and whom Allah gave the status of the stars for guidance in the darkness of land and sea. Muslims are unanimous on their enlightenment and knowledge. For while the teachers of other nations before the advent of Muhammad Rasul-Allah were their most iniquitous, the Muslim 'ulama are their righteous choice. They are the successors of Rasul-Allah, the resuscitators of what may have been forgotten from his Sunnah: and by them the Book is upheld.\textsuperscript{232}
\end{quote}

He puts forward the thesis that the four \textit{a'imah} are unanimous and in sure accord regarding the obligation to follow Rasul-Allah, and that none of them had intentionally offered a deviant opinion. However, in the remainder of his book, Imam Ibn Taimiyyah offers three excuses for any divergence from an authentic Hadith of Rasul-Allah. These excuses are lack of knowledge of the specific Hadith or possibly doubting that Rasul-Allah had said it, his belief that it does not pertain to the issue in question; and his belief that it had been abrogated. Although such reasons, prove their fallibility but do not in any way reduce their inestimable worth for all Muslims. Rather, they are applauded for their initiative and their scholarly enterprise. For to err in \textit{ijtihad}, in spite of one's sincerity and capability, is not unpardonable. If a qualified \textit{mujtahid} (one who assumes the task of creative interpretation) achieves correct opinion, he deserves a double reward: a reward for assuming the task, and a reward for making the mark; if he errs, Imam Ibn Taimiyyah says, he still is entitled to a reward for his initiative and effort, where a \textit{mujtahid} to be condemned for error he ask rhetorically, who will dare then to do

385
Imam Ibn Taimiyah stipulates, however, that when divergence must exist they confined to the applications (ْمُثَلَّة) of texts, and not in the fundamental doctrines (ْحمى). Where the four scholars appeared to hold different doctrinal views, Imam Ibn Taimiyah explained that such differences were of detail (ِْمَتَّع) not of essence in doctrine. He adds, the differences are nearly all semantic (ِْمُذْجِّف).

Among the collected legal opinions (ْمُتَّفَقَة) of Imam Ibn Taimiyah, there are many which embark upon an extensive comparative study of the four schools, and the vast majority made repeated references to them. Such detailed Companions are apparent in opinions including, for example, the fatwa on warfare, the fatwa on the effects of natural disasters, and the fatwa on contracts and stipulations.

A segment of his legislation on contractual conditions, for example, shows a reasoned preference, in this particular instance, for interpretations of the school of Malik. He contends that, in comparison to the rulings of his own Hanbali School, the school of Malik is rightly closer to the traditional custom of Islam in the case of conditions relating to the marriage contract. Imam Malik rules that such conditions ‘are not binding unless they (legally) authorized’ or unless they verify the legality of what they dictate (ِْمَعَاكِدَة، ِْمَعَاكِدَة) (muakadah li muqtada). For this reason, Imam Malik concludes, Ibn Rushd stated, that absolute (or binding) conditions in the marriage contract should be specified and made known by the scholars in order that they may take effect; as is said of Abu Shahab that he had known judges who acted on the premise of the Rasul-Allah’s Hadith requiring the primacy of the conjugal relationship in the marriage contract. The insistence by certain courts on stipulating such a condition expressly in the marriage contract, Imam Malik suggests is out of order, because, according to the madhab and to custom (ْغَيْف) it is more desirable than obligatory. Therefore, it is not admissible in a marriage contract. Another such unnecessary condition is the stipulation by one party that the other does not marry another spouse while carried to the one being contracted. The contract is valid, and the condition is unnecessary, and would not be binding, any way, although to meet it is desirable mustahab. Imam Ibn Taimiyah concurs with the prohibition of the stipulation of conditions in a marriage contract.

Imam Ibn Taimiyah -A Hanbali jurisconsult

Although Imam Ibn Taimiyah occasionally adopted the legal opinions of the other three lawmakers of Islam, and though he sometimes assumed independent legal positions, he considered the school of Ibn Hanbal nearer the
ideals of Islamic law than the others. He declared his allegiance to it by asserting that:

Ahmad was more knowledgeable in the contents of the Book and the Sunnah than others as well as in the opinions of the Companions and their righteous successors. For this reason, there can hardly be found an opinion of his/him in contravention of a text (of Hadith) as is the case with the others. There is not one weak opinion in his school but that it is balanced by an opinion strongly supported. The majority of his unique rulings (mfarid), none of which is in contravention (of the texts), are more likely to be valid such as: his favoring the testimony of Muslims when necessary, the (declaration of a) will before a journey, the prohibition of the marriage of an adulteress until she repent etc.237

Imam Ibn Taimiyyah gained knowledge of Ibn Hanbal’s fiqh through his thorough study of the works of Ibn Hanbal himself and of the works of his disciples, including his own grandfather’s uncle Ibn ‘Abd Allah, as well as his own father. On the basis of his extensive study, both of Ibn Hanbal and of the other a’imah, Ibn Taimiyyah thus states that when Ibn Hanbal took a solitary legal stance, he was more plausibly nearer an accurate reflection of the text on which he based his stance. He further suggests that if Ibn Hanbal and Imam Malik stood unsupported by the others in a decision, it is still to be considered more valid. The reason, as deduced by Abu Zahrah238, may be that Ahmad Ibn Hanbal’s school contained such a diversity of opinions (he was an avid collector of the Hadith) that if in one place the argument regarding a given issue is weak, there is certain to be another reference within the madhhab that would be stronger: If it became impossible for (Ahmad) says Abu Zahrah, to verify the transmission (of a Hadith) personally, he depended on the authoritative concurrences with Imam Malik: (Ibn Hanbal) never resorted to analogy except in extreme cases of need.239

**Hadud**

The penal laws of Islam are called hadud which is plural of had meaning restraint, or limit. Hence means a restrictive ordinance respecting lawful and unlawful things. In jurisprudence, hadud means all laws of crimes of which punishment has been prescribed in the Qur’an and Hadith. The offences where of the punishments have not been prescribed by the Qur’an and the Hadith are generally called ta’zir (minor punishment). The punishment of these minor crimes has been left entirely at the discretion of the rulers or a’imah, and consequently of the judges and magistrates of the state. The major crimes for which punishment

387
have been ordered are the following: a) Murder b) Dacoity and rebellion c) Adultery d) Theft e) Accusation of adultery:

Ibn Taimiyah said, it is obligatory for the rulers to cut the right hand of thief, Allah said: If a man or woman commits theft their right hand shall be cut off, and if they repent after this punishment Allah will forgive them, He is a forgiver and merciful. When theft is proved either by evidence or by thief’s own confession, those at the helm of affairs should not make any delay to cut his right hand, because implementation of hadud is also part of worship. Hadud Allah is mercy of Allah on mankind. Rulers should take firm stand in this regard they should not show any mercy or leniency for guilty person once his guilt is proved by established law. If ruler will suspend hadud Allah without any legal or moral justification, it will not only cause chaos and disorder in the State, criminals will take advantage of this suspension resultant public life, property and honour will become insecure. Ruler should not penalize people to settle his personal rivalry nor should he punish anybody to cool his anger. Ruler should behave like a father who sometimes punishes his son to reform him and to teach him ethics and good manners, if father too will show mercy and leniency as mothers used to show for their children, definitely children will become arrogant and disobedient.

Intercession is not recommended in the matter of legal punishment

Narrated ‘A’isha: Quriash people became very worried about the Makhzumiya lady who had committed theft. They said: (nobody can speak in favour of the lady) to Allah’s Rasul, and nobody dares do that except Usama who is the favourite of Allah’s Rasul. When Usamah spoke to Allah’s Rasul about that matter. Allah’s Rasul said: (do you intercede (with me) to violate one of the legal punishment of Allah?) Then he got up and addressed the people, saying: (O!People) The nations before you went astray because if a noble person committed theft they used to leave him but if a weak person among them committed theft, they used to inflict the legal punishment on him. By Allah, if Fatimah, the daughter of Muhammad committed theft. Muhammad will cut off her had).
Imam Ibn Taimiyyah said there is a great lesson in this matter for all jurists and judges. Banu Makhzum and Banu Manaf were two respected clans of Qurash, Fatimah bint al Aswad belonged to Banu Makhzum and was respected woman and who interceded on her behalf was beloved of Rasul-Allah ﷺ, but Rasul-Allah ﷺ not only rejected his intercession out rightly but he was angry over Usamah Ibn Zaid for his intercession in the matter of legal punishment then Rasul-Allah ﷺ said: by Allah, if Fatimah, daughter of Muhammad Rasul-Allah ﷺ were to steal, I would have her hand cut off. 242

‘A’isha further said: it was a good repentance on her behalf, and she later on married and used to come to me after that, I conveyed her needs (and problems ) to Allah’s Rasul ﷺ.243

There was a wonderful change in her, she not only receive the punishment willingly, but repented for what she had done and came out of this with ordeal with firm determination of purge her soul of all sorts of impurities and lead a life of piety. This process of the regeneration of the soul has been described in the next verse (al Ma’idah 5:39) pertaining to theft in the Qur’an.

Ibn ‘Umar reported that the Rasul-Allah ﷺ said: to establish an ordained sentence out of the ordained sentence of Allah is better than rain for 40 nights in the cities of Allah.244

‘A’isha reported that the Rasul-Allah ﷺ said: Drive off the ordained punishment from the Muslims as for as you can. If there is any place of refuge for him, it has his way, because the leaders mistake in pardon is better than his mistake in punishment.245
‘Ubadah Ibn Samit narrated: We were with Nabiyy in a gathering and he said: ‘Take oath of fealty to me that you will not worship anything besides Allah, will not steal, and will not commit illegal intercourse’. And then Nabiyy recited the whole verse (i.e. al Mumtahanah 60:12). Nabiyy added: And whoever among you fulfils his pledge, his reward is with Allah; and whoever commits something of such sins and receives the legal punishment for it that will be considered as the expiation for that sin; and whoever commits something of such sins and Allah screens him, it is up to Allah whether to forgive or perish him.246

Khuzaimah Ibn Thabit reported that Rasul-Allah said: whoever commits a crime, the ordained sentence of that crime shall be inflicted on him. That will be its expiation.247

The punishment of those who wage war against Allah and His Rasul, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter; (al Ma’idah 5:33)

Imam Ibn Taimiyah said: to fight and punish these (مهاجرون) is also jihad and important duty of the ruler because they are making highways insecure for the people, they use arms to loot and kill people, mostly they are ‘Arab villagers, Turks and Kurds and other criminal groups. Imam Ibn Taimiyah narrated Hadith from Imam Shafi‘i.248

٤٣٠
Narrated Ibn ‘Abbas about highwaymen: if they kill and loot property they shall be killed and crucified and if they kill only did not take property they shall be killed and crucified and if they take property but did not kill then cutting of hands and feet from opposite sides in their punishment and if they make highways insecure but did not loot property they shall be exiled from the land.  

Punishment for theft

As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in Power. Full of Wisdom. But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is Oft-Forgiving, Most Merciful. (al Ma‘idah 5:38-39)

The Qur’an is silent, about the minimum limit of theft for which hand of a thief shall be cut off, Imam Ibn Taimiyah narrated following Hadith to determine the limit of theft for which punishment is imposed.

‘A’isha reported from the Rasul-Allah who said: the hand of a thief shall not be cut off except for one forth of a dinar or more.

Ibn ‘Umar reported that the Rasul-Allah cut off the hand of a thief for a shield price of which was three dirhams.
The hand of thief shall be cut off from the wrist joint:

وَقَطَعَ عَلَىٰ كِفَٰلَةٍ

And ‘Aliyy cut off the hand at the wrist.\(^{252}\)

Imam Ibn Taimiyah said hand of a thief shall be cut off for one fourth of a *dinar* or more. Imam Ibn Taimiyah further said thief's hand shall not be cut off for the theft of what cannot be guarded, or is not worth guarding, being found in the land in great quantity, such as dry wood, hay, grass, reeds, game, fish, lime, etc also such foods as are quickly perishable, as milk, meat, fresh fruit, etc Imam Ibn Taimiyah narrated some more Ahadith to prove his point.

‘Amr Ibn al ‘As narrated that, Rasul Allah ﷺ was asked about fruit which was hung up he said: if a needy person takes some with his mouth and does not take or steal away in his garment, there is nothing on him, but he who carries any of it is to be fined twice the value and punished, and he who steals any of it from the place where dates are dried to have his hand cut off if their value reaches the value of a shield. If he steals a thing less in value than it, he is to be fined twice the value and punished.\(^{253}\)

He [Jabir] said: through this chain: Rasul Allah ﷺ said: cutting of the hand is not to be inflicted on one who is treacherous. His version adds: cutting of the hand is not to be inflicted on one who snatches something.\(^{254}\)

According to Imam Ibn Taimiyah hand of a pick pocket shall be cut off if he steals one-fourth or more from the pockets of others.\(^{255}\)

*Note: when the thief’s hand is cut off, it should be cauterized and it is recommended that the cut off hand be tied to his neck.
According to majority of jurists there is no cutting of hand in case of theft in the houses of relatives within prohibited degrees, nor for theft committed in a journey, expedition on holy war, nor for theft committed by a servant or slave nor for criminal misappropriation, nor for theft committed by a marauder of dacoit, all those who committed these crimes will be punished by ta‘zir laws.

Punishment for adultery

The woman and the man guilty of adultery or fornication flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment. (al Nur 24:2)

The Qur’ān tells us about the punishment for adultery of unmarried man and woman only (al Nur 24:2) and is silent, if married man and woman committed this crime:

‘Ubadah Ibn Samit reported :that Rasul-Allah ﷺ said :take from me take from me. Allah chalked out a way for them [fornication] a virgin with a virgin 100 stripes and exile for a year, and one married person with another married person 100 stripes and stoning to death.

Imam Ibn Taimiyah said Rasul-Allah ﷺ ordered stoning to death to Ma’iz Ibn Malik, a woman from Ghamdia tribe, a Jew man and woman, a woman who committed a dultery with her servant all were married. Aft er Rasul-Allah ﷺ his successors too used to order stoning to death all those married man and woman who committed adultery.
No punishment for rape victim

Wa’il Ibn Hujr reported that a woman was forced to commit adultery at the time of the Nabiyy, then he cancelled the ordained punishment from her enforced it against one who compelled her. He did not mention whether he fixed for her any dowry.258

Punishment for Sodomy

According to Imam Ibn Taimiyyah Companions of Rasul-Allah were in agreement about the punishment of death for both persons involved in sodomy whether they are married or unmarried Imam Ibn Taimiyyah narrated Hadith in this regard:

Ibn ‘Abbas reported that Rasul-Allah said :whomsoever you find doing the deed of the people of lut, kill the doer and one on whom it is done. Companions of Rasul-Allah were in agreement about the death penalty for both involved in this crime but they had different opinion about the killing of these persons. Ibn ‘Abbas narrated ‘Aliyy burnt them both and Abu Bakr threw a wall upon them.259

Punishment for drinking Wine

Punishment for drinking wine is proved by the sayings of Rasul-Allah and there is a consensus of Islamic scholars on it. Imam Ibn Taimiyyah narrated Hadith about the said punishment:

Anas Ibn Malik reported that a drunkard came to Rasul-Allah, Rasul-Allah lashed him with date leaf of stalks and shoes.260

Imam Ibn Taimiyyah narrated another Hadith about the punishment for drunkard.
Ma‘wiyah reported that Rasul-Allahﷺ said: whoever drinks wine flog him, again if he drinks wine flog him again if he drinks flog him again, if he drinks again and forth occasion kill him. 

Punishment for accusation of adultery

And those who launch a charge against chaste women, and produce not four witnesses, [to support their allegations], flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors; unless they repent thereafter and mend [their conduct]: for Allah is Oft-Forgiving, Most Merciful. (al Nur 24:4-5)

According to Imam Ibn Taimiyyah above mentioned verse prescribes punishment for those who accuse chaste women of adultery. He further said when a free person accuses chaste man or woman of adultery and sodomy, he will be punished for this accusation and punishment for this qadhf (accusation) is eighty flogs. If he accuses chaste man or woman for any other guilt he will be punished by ta‘zir laws. According to Imam Ibn Taimiyyah it is a right of accused to demand punishment for accuser and if he did not demand punishment, accuser will not be punished. There is a consensus among the Islamic scholars on this issue. Majority among the Islamic scholars are of this opinion that, if accused person forgives accuse he will not be punished.

Some scholars said accused has no right to forgive accuser even if he forgives accuser punishment to accuser will not be cancelled because right of Allah is more prominent than right of a person in this guilt of qadhf (accusation). According to Imam Ibn Taimiyyah punishment for(accusation) becomes obligatory only when accused person is chaste, Muslim, free and
charactered, if accused person is known sinner there will be no punishment for accuser.262

Imam Ibn Taimiyyah said there is no punishment for accuser if he accused infidel and slave but he will be punished by ta‘zir laws. Similarly if accuser is a slave he will get half punishment for his guilt. If slave is accused of adultery and wine drinking he will get half punishment of what has been prescribed for free man, but if has committed a crime for which prescribed punishment is death only, he will be killed, there arises no question of half punishment in that case.263

Punishment for Murder

Imam Ibn Taimiyyah says there are three kind of killing:

1st: Intentional killing which constitutes an attack on a man who is (not deserving to be killed) with an instrument which is usually fatal and which kills by cutting as, for example a sword, or by its weight, an anvil or a bleacher or in any other way such as burning, drowning, throwing from a high place, strangling, crushing the testicles until death supervenes, suffocating until the victim expires, poisoning and the like. Any one who commits one of these acts should suffer retaliation, that is, be given up to the near relatives of the killed who may kill him, if they choose, or may forgive him or ask for a blood money. Imam Ibn Taimiyyah narrated Hadith:

Abu Shurah al Khaza‘i reported that :Rasul-Allah said :he of whom a near relative has been [unjustly] killed or [who was] wounded has one of three choices, if he insists on a fourth [choice], then restrain him to kill [the killer] or forgive to take a blood money. He who makes one of these [choices] then makes a further revenge, for him in the fire of Hell to abide in it for ever.264

Secondly: killing by mistake resembling intention:
'Abd Allah Ibn ‘Amar reported that there is in the killing by mistake resembling intention—being effected by a whip or a stick—blood money of a hundred she camels, forty of which should be pregnant with the fact in their wombs.\textsuperscript{265}

Rasul-Allah has called this kind of killing ‘killing by mistake resembling intention’ because (the guilty) intended aggression by beating only, which often does not lead to death. He intended aggression and did not intend to kill.

Third is killing (purely) by mistake or in similar circumstances, for example if a man were shooting at game or at a target and he hit another man unintentionally, such cases do not imply the death penalty, but they impose the blood money and a expiations.\textsuperscript{266}

One who helps killer

Ibn ‘Umar reported that Nabiyy said: when a man keeps hold of a man and another kills him, the man who has killed is to be killed, and the man who has caught him is to be imprisoned.\textsuperscript{275}

Retaliation for Wounds

Retaliation in the case of wounds is also indicated in the Book, in the Sunnah and by consensus (of the Muslim scholars), provided there is parity (between the wounder and the wounded): if a man cut off the right hand of another man from the joint, the other man may cut off the hand of the former in like manner, if he dislocated another’s tooth, the other may dislocate his tooth, and if he made a wound in another’s skull or face going deep to the bone (causing of fracture), the other may retaliate in the same way. But if retaliation in the same manner is impossible, as in the case of an internal fracture or a wound which does not go deep enough to expose the bone, no retaliation is allowed, but a relative fine should be paid. Common beating with the hand or with the whip or with the stick implies, in the opinion of a group of learned men, no retaliation. It necessitates, however, \textit{ta’zir}, since it is impossible to retaliate in such cases, in an exact manner.\textsuperscript{268} Imam Ibn Taimiyyah’s above mentioned views regarding retaliation for different wounds is based on various Ahadith, one important Hadith about retaliation of wounds is as follows:
Abu Bakr reported that Rasul-Allah wrote to the inhabitants of Yemen, and there was in his letter, who so kills a believer unjustly will suffer retaliation for what his hand has done unless the relatives of the murdered man consent otherwise. And therein it was: A man shall be killed for (the murder of) a woman. And there in it was: for the (murder of) a life, there is blood-wit of 100 camels, 1000 dinars on the owner of gold, for a nose which has been cut off from the root, its indemnity of murder in case of teeth, there is indemnity of murder in case of lips, there is indemnity of murder in case of testicles, there is indemnity of murder in case of penis, there is indemnity of murder in case of the backbone, there is indemnity of murder in case of one foot, there is one-third of blood-wit in case of wound in the head, there is one-third of blood wit in case of wound in the stomach. In case of the fracture of a bone in hand there is indemnity of 15 camels, in case of a finger out of the fingers of hand and each toe there are 10 camels, and in case of tooth, there are 5 camels.\(^{269}\)

Retaliation in connection with dishonouring others is also lawful. If a man curses another man or invokes Allah to maltreat him in some way, the other man may retaliate similarly, when who abuses some other are by mentioning certain demerits of his, he too can return same for same. Imam Ibn Taimiyyah narrated Hadith from which he derives his views:

\[\text{عند من يدعى بحري أو يدعى بدردشة أو يدعى بفخر إذا ذكرناه في الجاهلية عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه عن أبيه.} \]

Abu Huriarah reported that Rasul-Allah reported the two who Abuse each other, whatever they may say-he who has begun is to blame, unless the oppressed (Abused preliminarily) has retaliated in excess :has exceeded (lawful) reparation.\(^{270}\)

**Punishment for Spy**

Imam Malik and certain other jurists agreed that some of the crimes, for which no hadd penalty is assigned, may be punished (even) by death for example in the case of a Muslim spy who spies on his fellow Muslims at the instigation of
the enemy. Imam Malik and certain followers of the Hanbali school, like Ibn, 'Aqil allowed that such a spy should be killed, Abu Hanifah, al Shaf'i and certain other followers of the Hanbali school, like the judge Abu Ya'la, forbade that.

**Punishment for one who initiates innovation and punishment for Wizard**

Certain followers of the schools of al Shaf'i and Ahmad as well as other schools, agreed that the initiator of innovation which are contrary to the precepts in the Book and the Sunnah be put to death. There is the same attitude towards the wizard; the majority of the learned men in the law maintain that he should be put to death. Imam Ibn Taimiyyah quoted Hadith about Wizard:

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لا أخزَنَّ مَيْسِعَ عَدَّلَنا أَبُو مُعاوِيَةَ عَنْ إِسْمَيْلَ بْنِ مُسْلِمِ عَنْ النَّبِيِّ ﷺ قَالَ فَالْهَرْجَانُ اللَّهُ
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Jundub reported that Rasul-Allah ﷺ said :that penalty imposed on the wizard is a stroke with the sword.

There are no legal penalties or expiation for some disobedience:

1. The case of the man who kisses a boy or a woman unrelated to him.
2. The case of the man who flirts without intercourse.
3. Eats a forbidden thing like blood or dead animal.
4. Who defames people other than adultery.
5. Who steals a thing unguarded or of mean value.
6. Who misappropriates things entrusted to him, as for example the exchequers, the trustees of charitable institutions, the guardians of orphans, the agents and the partners when they defalcate.
7. Who cheats in his dealings (with others) like merchants.
8. Who debases the commodities such as foodstuffs and clothes.
9. Who gives short measure (of capacity or weight).
10. Who bears false witness or encourages others to bear false witness.
11. Who accepts bribes to pass favourable judgements or who judges contrary to what Allah has enjoined.
12. Who exercise aggression on his subjects.
13. Who challenges others as was done in the pre Quranic (pagan age) period or answers the challenge.
14. All those should suffer correction by flogging (in three degrees) (تعرّب) to inflict corporal pain on them and make them dispirit in the eyes of their
people (تنكر) to beat them without mercy, as to make of them a warning to others (تهد) to discipline them.273

What is Ta‘zir

Ta‘zir is not a definite punishment, it is generally an infliction of some pain on a man by word or action or by avoiding saying a good word to him or doing a good deed for him. It may be by harsh admonition or reproach, it may be by forsaking him and neglecting to salute him until he repents if this is likely to have the desired effect, it may be deposing him from office, as the Rasul-Allah ﷺ, and his Companions used to do, it may be by excluding him from the Muslim army, as the warrior, who flees during the march to the enemy, would be excluded – To cut off the salary is a kind of ta‘zir. If the viceroy, further committed a scandalous action, his deposition from viceroyalship is also a ta‘zir.

Ta‘zir also may be by imprisonment, by beating, by daubing the face black or by making the guilty ride, backwards on a donkey. The maximum ta‘zir (by flogging) should not exceed, as is sometimes said, ten stripes.

Further, many jurists maintain that ta‘zir should always be inferior to legal penalty. Some of them say it should not attain even to the minimum of legal penalties. Thus a free man, who is to be punished by ta‘zir should not receive the forty or eighty stripes which is the regular flogging for a guilty free man.274

To sum up, punishment is of two kinds, first, the punishment because of previous crime which one has earned, an exemplary punishment from Allah, as for example the penalty imposed on the drinker of wine and the accuser of the chaste man and woman, the second kind being the penalty with the object of making the punished person carry out an enjoined duty or avoid a forbidden action in the future. To this latter kind belongs the punishment of a renegade who is asked to repent (to-embrace-Islam) if he does not, he should be put to death. Similar to that is the case of the person who neglects to perform salah, to pay zakah he should be punished again and again until he starts to carry out (the neglected duty) again.

The ta‘zir for the second category of crimes should be more severe than that in the first category. Therefore, it is permitted to flog the guilty (of the second category of crimes) frequently until he perform the enjoined salah or any other obligatory duty.

Imam Ibn Taimiyyah said about the Hadith:
Abu Burdah reported that Rasul-Allah ﷺ said: Nobody should be given more than ten strips except in the case of overstepping one of the limits set up by Allah.  

That this Hadith has been explained by a group of learned men in the law, they said: by the limits of Allah is meant duties and prohibitions with regard to Allah. The word limits hadud in the Book and Sunnah mean the dividing lines between the lawful and the unlawful, that is, where the lawful ends and unlawful begins:

أنْفَسَكُمْ فَأَلْفَنَّ بِهَا وَأَبْتِجْفُوا مَا كَتَبَ اللَّهُ لَكُمْ وَكُلُّوا

And that is your approach on the night of the sawm. They are your garments and ye are their garments. Allah knoweth what ye used to do secretly among yourselves; but He turned to you and forgave you; so now associate with them, and seek what Allah hath ordained for you, and eat and drink until the white thread of dawn appear to you distinct from its black thread; then

Permitted to you, on the night of the sawm, is the approach to your wives. They are your garments and ye are their garments. Allah knoweth what ye used to do secretly among yourselves; but He turned to you and forgave you; so now associate with them, and seek what Allah hath ordained for you, and eat and drink until the white thread of dawn appear to you distinct from its black thread; then
complete your sawm till the night appears; but do not associate with your wives while ye are in retreat in the mosques. Those are limits [set by] Allah: approach not nigh thereto. Thus doth Allah make clear His Signs to men: that they may learn self-restraint.

A divorce is only permissible twice: after that, the parties should either hold together on e quite t erms, o r separate w ith kindness. It is not lawful for you, [men], to take back any of your gifts [from your wives], except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye [judges] do indeed fear that they would be unable to keep the limits ordained by Allah, there is not blame on either of them if she gives something for her freedom. These are the limits ordained by Allah; so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong [themselves as well as others]. (al Baqarah 2:187,229)

The application of the word hadd to the punishment of lesser crimes is a recent convention. The Hadith from the Rasul-Allah mentioned above concern’s the punishment, for in fraction of duties, by a man himself, as in the case of the husband who beats his wife for having left him in favour of another man. In punishing her, he should not exceed ten stripes.

Flogging which is enjoined by the Islamic law, is moderate flogging with the whip, neither light nor heavy. In this respect, ‘Aliyy has said ‘Beating between two extremities of beating’ neither light nor heavy, but flogging can never be with a stick nor with scourge. To flog with a dirra (bull’s pizzle, light lash or whip) is not enough (in the hadud), though it is used in ta’zir punishment in the case of lesser crimes.

Legal penalties, on the other hand should be executed with the (usual) whip. ‘Umar used to punish with the dirra, when it was a case of legal penalty, he asked for a whip.

Imam Ibn Taimiyyah said, not all the clothes of the condemned should be stripped when flogging him, but only those which prevent him from feeling the pain of the beating, neither should he be tied (to a post) if it is not necessary, nor should the blows fall on his face. Rasul-Allah has said:

Abu Huriaarah reported that Rasul-Allah said: when you execute the penalty [with beating], avoid the face of the condemned and the vital organs should not be struck.276
The object of the penalty and the punishment being to correct the guilty in the lesser crimes, not to kill him. Every other part should receive its share of the beating, namely the back, the shoulders and the hips."
CHAPTER NOTES IV

3. MU, 20.
12. TM, 3540.
16. BU, 5990.
17. Ibid, 5531.
18. MU, 4685.
19. BU, 5606.
22. MU, 4023.
23. Ibid, 64.
24. BU, 2262.
26. Agreed upon
27. MU, 1673.
29. MSH, 2962.
30. IM, 1837.
31. MU, 2545.
32. TM, 1020.
33. Ibid, 1022.
34. MU, 4754.
35. Ibid, 4770.
36. Ibid, 4717.
37. BU, 4720.
38. Agreed upon.
39. AD, 1830.
40. TM, 1082.
41. IM, 1847.
42. TM, 1081.
43. AD, 1828.
44. JS, 725.
45. BU, 5467.
46. Ibid, 5472.
47. TM, 1875.
48. MU, 4765.
49. BU, 5539.
50. IM, 3652.
51. TM, 1621.
52. TM, 1824.
53. MU, 4627.
54. Ibid, 4621.
55. BU, 5529.
56. MU, 4638.
57. BU, 5525.
58. Ibid, 5532.
59. TM, 594.
60. Ibid, 1865.
61. MSH, 3617.
62. MU, 66.
63. BU, 5557.
64. Ibid, 5561.
65. MU, 4759.
66. MSH, 3761.
67. BU, 2333.
68. Ibid, 2358.
69. Ibid, 2370.
70. IM, 2680.
71. TM, 1872.
72. AD, 4489.
73. IM, 3681.
74. BU, 5546.
75. IM, 3669.
76. BU, 5548.
77. TM, 1842.
78. TM, 1945.
79. IM, 3702.
80. TM, 1845.
81. AD, 4290.
82. BU, 1229.
83. MU, 2371.
84. AD, 4273.
85. BQ, 2783.
86. MSH, 3764.
87. BU, 2272.
88. BU, 2277.
89. MU, 4685.
90. BU, 2266.
91. IM, 3278.
92. MU, 3443.
93. TM, 2092.
94. BU, 2264.
95. MU, 4023.
96. TM, 2612.
97. TM, 1864.
98. BU, 2262.
99. TM, 1852.
200. MU, 3404.
201. BU, 57.
203. Ibid, 1/92.
204. Ibn Taimiyah, SS, op. cit., p. 29.
205. BU, 6616.
206. Ibid, 6614.
207. Ibid, 2885.
208. MU, 3443.
209. Ibid, 3444.
210. TM, 1250.
211. MSH, 3545.
212. MU, 3411.
213. BU, 6570.

IV:
216. Idem.
217. Ibid, p. 66.
218. Idem.
219. AD, 1342.
221. AD, 2671.
222. MU, 3233.
225. BQ, 2361.
228. al Shafi'i, op. cit., pp. 52, 53.
229. al Sabai', op. cit., p. 388.
239. Abu Zahrah, op. cit., p. 358.
240. Idem.
241. BU, 6290.
244. IM, 2528.
245. TM, 1344.
246. Ibid, 6286.
247. MSH, 3781.
249. MS, p. 336.
250. BU, 6292.
251. MU, 6300.
253. AD, 3816.
254. Ibid, 3818.
256. MU, 3199.
258. TM, 1372.
259. Ibid, 1376.
260. MU, 3218.
261. AD, 3886.
263. Ibid, p. 211.
264. AD, 3898.
265. Ibid, 3973.
267. DQ, 1806.
269. NS, 2663.
270. MU, 4688.
272. TM, 1380.
274. Ibid, 190.
275. TM, 1383.
276. MU, 4728.