

## CHAPTER II

### AN OVERVIEW OF ISLAMIC LAW

A rudimentary study of the fundamental concepts of Islamic Law is necessary in the understanding of the rules governing Muslim marriage and divorce under the Muslim Code.

The Muslim Code has recognized the need for a reference to the sources of Islamic Law in the application of its provisions. It provides that:

*In the construction and interpretation of this Code and other Muslim laws, the Court shall take into consideration the primary sources of Muslim law.<sup>1</sup>*

It further provides that:

*Standard treatises and works on Muslim law and jurisprudence shall be given persuasive weight in the interpretation of Muslim law.<sup>2</sup>*

Muslim jurists and scholars unanimously agree that the Holy Qur'an and the Sunnah of the Holy Prophet Muhammad (S.A.W.) are the primary sources of Islamic Law. They are the divine sources to which all Muslim laws must conform. Standard treatises and works on Muslim law and jurisprudence refer not only to the juristic opinions such as *ijma*, *qiyas*, *istihsan*, *istislah*, and *istishab* but also to the works of the modern great Muslim scholars.

This goes to show that the rules provided under the Muslim Code for its construction and interpretation are in conformity with the Islamic precept.

## *A. Nature of Islamic Law*

Islamic Law has been divided into two aspects: the Shari'ah aspect and the juristic aspect. The former refers to Islamic Law or Shari'ah while the latter refers to Islamic jurisprudence or *Fiqh*. They will be explained one after another:

### 1. Islamic Law or Shari'ah

Shari'ah, as alluded to in the Holy Qur'an is best translated as 'the way of religion.'<sup>3</sup> It is a guidance (*hidayah*) from Allah (S.W.T.) for mankind in order that they may reach the goal intended by Him for them.<sup>4</sup> Allah (S.W.T.) says to the effect:

*Then we put thee on the right way of religion: so follow thou that way, and follow not the desires of those who know not.*<sup>5</sup>

The Shari'ah is a creation of Allah (S.W.T.), the Lord of this world and the Lord of the next world, the Creator of the Heaven and the Earth, Who caused the Sun, the stars and the moon to move in the fathomless ocean of the universe, and Who caused the perpetuation of lives in this world until doomsday.

The Shari'ah was revealed to Prophet Muhammad (S.A.W.) within a very short period from the time of his conferment of prophethood to the time when the following *ayyah* of the Holy Qur'an was revealed:

*This day have I perfected your religion for you, completed my favour upon, and have chosen for you Al-Islam as your religion.*<sup>6</sup>

The Shari'ah is a complete and comprehensive law. It covers all the possibilities of both the infinite past and the infinite future. It is perfect and immutable. It was promulgated in such a manner that time, space and circumstances would not change it. Allah (S.W.T.) says, in effect: "No change can there be in the words of Allah."<sup>7</sup>

The Shari'ah is not meant exclusively for any particular community, nation or state. It is designed for the entire humanity, including the Arabs and the non-Arabs, the people of the East, as well as of the West, however vast the difference may be between their mores, customs, traditions and history.<sup>8</sup>

In short, Shari'ah is a complete code of faith and practice.<sup>9</sup> It is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects.<sup>10</sup> It is so universal and extensive that it cannot be exhausted by human intellect. It is embodied in the Holy Qur'an which is the book of Allah (S.W.T.) and the Sunnah of the Holy Prophet (S.A.W.).

The Holy prophet (S.A.W.), in his last sermon at Mount Arafat during his farewell pilgrimage, said:

*I am leaving you with the book of Allah (S.W.T.) and the Sunnah of His Prophet. If you follow them you will never go astray.<sup>11</sup>*

That is the Shari'ah, eternally in force, exquisite and wonderful, beyond human imagination.

## 2. Islamic Jurisprudence or Fiqh

**Fiqh**, literally, means understanding or knowledge.<sup>12</sup> Technically, it is the scientific study and elucidation of the Shari'ah by jurists (*fuqahah*).<sup>13</sup> It is the knowledge of one's rights and obligations derived from the Qur'an or Sunnah or deduced therefrom, or about which the

learned have agreed.<sup>14</sup> It is therefore the law as a science.

Jurists have divided *fiqh* into two portions: the Usul al-Fiqh and the Ilm al-Furur.<sup>15</sup> Usul a-Fiqh, literally means the roots or the foundation of the law.<sup>16</sup> Some scholars have described it as the methodology of law.<sup>17</sup> A more comprehensive definition is that it is the science of the sources and methodology of law.<sup>18</sup> It is an extensive science that deals with the sources of law such as the Qur'an and the Sunnah of the Holy Prophet (S.A.W.), and the methods of reasoning such as Analogy (Qiyas), Juristic Preference (Istihsan), Presumption of Continuity (Istishab), etc.,<sup>19</sup> by which the Hukm (Rules of law) is formulated.<sup>20</sup>

Ilm al-Furu, literally means the branches of the law.<sup>21</sup> It is the science that deals with the application of hukm (rules of law) in terms of human act in detailed areas of life.<sup>22</sup> In modern terminology, it refers to substantive law.<sup>23</sup>

From the foregoing explanation we have discussed substantially the relationship between Shari'ah and Fiqh as well as their distinctions. To summarize it: Shari'ah is a divine law from which the bases of the science of law (fiqh) are formulated by the jurists. Shari'ah is comprehensive, complete, perfect and immutable. Fiqh on the other hand is limited to the wisdom of the jurists; it is growing, developing and dynamic; it is affected by the time, place and circumstance; as formulated by human beings, it is subject to error; it is susceptible to abrogation.<sup>24</sup> There can be no fiqh without Shari'ah, but there can be Shari'ah even without fiqh. That is the reason why fiqh is said to be having a divine origin.

### ***B. Development of Islamic Law***

Islamic law developed through various periods. The first period of its growth and development is called the revelation period (13 B.H. to 10 H.). This revelation is of two kinds: the direct inspiration which refers to the revelation of the Holy Qur'an through Angel Gabriel to the Holy Prophet (S.A.W.), and the indirect inspiration which refers to acts, saying and approval or Sunnah of the Holy Prophet (S.A.W.).<sup>25</sup>

The direct inspiration began when the following ayyah of the Holy Qur'an was revealed to the Holy Prophet (S.A.W.):

*Proclaim! (or Read!) in the name of thy Lord and Cherisher, Who created - Created man, out of a (mere) clot of congealed blood: Proclaim! and thy Lord is Most Bountiful, He Who taught (the use of) the Pen, taught man that which he knew no.*<sup>26</sup>

The revelation took 23 years and was completed when the following ayyah was revealed:

*This day have I perfected your religion for you, completed my favour upon you, and have chosen for you Islam as your religion.*<sup>27</sup>

This direct inspiration is now compiled in a form of a book called the Holy Qur'an.

The Sunnah of the Holy Prophet (S.A.W.) is preserved in the Ahadith (Reports) transmitted, collected, written, and compiled in voluminous books. The most important of them are the six authentic books of hadith: the Sahih of a Imam al-Bukhari, the Sahih of Imam Muslim, the a Sunan of Abu Dawud, the Jami or Sunan al-Tirmidhi, the Sunan of al-Nasa'i, and the Sunan of ibn Majah.<sup>28</sup>

The Holy Qur'an and the Sunnah of the Holy Prophet (S.A.W.) are the Divine law or Shari'ah. It is a comprehensive, complete, perfect and immutable law. It is the supreme law to which all islamic laws must conform.

The second period of great significance in the growth and development of Islamic Law is the period of the Orthodox Caliphate (10 A.H. - 40 A.H.), the reign of the first four successors of the Holy Prophet

(S.A.W.). Two important achievements were made at this period: the collection, editing and compilation of the Holy Qur'an into a book (mushaf), and the close adherence of the successors to the Sunnah of the Holy prophet (S.A.W.).<sup>29</sup>

The third period is the reign of the Umayyad dynasty (41-132 A.H.). During this period, jurists were divided into Ahl al-Hadith (Traditionists) and the Ahl al-Ra'y (Rationalists). The former centered in the Hijaz (Makkah and Madina). They adhered to the manifest meaning of the text without searching for their effective causes to extend to similar cases. The latter, flourished in Iraq (Basrah and Kufah). They did not confine themselves to the text but tried to discover the reasons for the rulings (ahkam) and whenever necessary, they applied them to parallel and analogous cases.<sup>30</sup>

The fourth period is the reign of the Abbasid dynasty (132-350 A.H.). During this period, two important achievements in the development of Islamic Law occurred: first, the emergence and development of the four Sunni Schools of law; and second, the scientific collection and compilation of Hadith were made.

The Hanafi School, the oldest among the four Sunni Schools, was named after Imam Abu Hanifah Nu'man ibn Thabit (80/699 to 130/766), known as the Great Imam. This school was famous for using analogical reasoning (qiyas) for the formulation of legal principles. It also relied upon Ijma, Istihsan, and Custom as secondary sources. Among the famous jurists of the Hanafi School who expounded its views were: Abu Yusuf, Muhammad al-Shaibani, Zufar ibn al-Hudhayl, and Hasan ibn Ziyab.<sup>31</sup>

The Maliki School is the second school of law in the point of time. It was named after Imam Abu 'Abd Allah Malik ibn Anas (90 or 97/713 to 179/795). The greatest work of Imam Malik is the *Muwatta'*, a collection of Traditions which he arranged according to the topics of jurisprudence. It is one of the earliest compilations of the Traditions of the Holy Prophet (S.A.W.). This school of law was famous for its reliance on the Hadith next to the Holy Qur'an as the source of law. Thus, it earned the title Ahl al-Hadith (People of the Traditions). He also relied on the Ijma al-Madinah or the practice of the people of Madinah as a source of

law. He adopted *Istislah* or public interest as a legal method for the interpretation of certain question of law.<sup>32</sup>

The Shafi'i School, the third surviving Sunni School of law, was named after its founder Imam Muhammad ibn Idris al-Shafi'i (150/767 to 204/820). Imam Shafi'i was regarded to have been the first who scientifically expounded the principles of the sources and methodology of laws (Usul al-Fiqh) in his treatise *al-Rizalah*. He was an eclectic who tried to reconcile the Traditional school of law of the Maliki School and the Rationalist school of law of the Hanafi School. Besides the Qur'an and Hadith as the paramount sources of law, he also accepted Ijma and Qiyas as secondary sources of law.<sup>33</sup> He introduced the principle of Istishab or presumption of continuity as a method of reasoning.<sup>34</sup>

The Hanbali School, the last among the four surviving Sunni Schools of law was named after its founder Imam Abu'Abd Allah Ahmad ibn Hanbal (164/780 to 241/855). Imam Hanbal's famous works are the *Musnad*, a collection of more than 40,000 traditions of the Holy Prophet (S.A.W.), and the *Masail*, his answers to questions relating to dogmatics, ethics and law.<sup>35</sup>

The second important achievement in the development of Islamic Law during this period was the scientific collection and compilation of the Traditions of the Holy Prophet (S.A.W.). Strict conditions were made by the compilers in order to discard the forged and fabricated ones. Foremost among them were Imam Bukhari, Imam Muslim, Abu Dawud, al-Tirmidhi, al-Nasa'i, and ibn Majah.<sup>36</sup>

The fifth period is the period of imitation (Taqlid). Upon the growth and full development of the four Sunni Schools of law, if Islamic Law were likened to a tree, it had attained its full development. Its divine aspect was completely revealed and properly compiled into a book form such as the Holy Qur'an and the voluminous Ahadith. Its juristic aspect was likewise fully expounded. The jurists at that period felt that there was no question of law which had not been fully expounded by the four schools of law. This led to the birth of the principle of taqlid (imitation). As the jurists cannot surpass the achievements reached by their predecessors, what they did was that each jurist singled out and followed a school of

law and crystallized the principles laid down by such school of law. Jurists at that period were known as *Muqqallidun*.

The last and current period is the period of codification, modification and revision. As the result of the disintegration of the Islamic Ummah from the hand of Abbasid Dynasty and the birth of the several Muslim states, each state codified its own laws. The first of these codifications was the *Majallah al-Ahkam al-Adliyyah* (commonly known as the Majelle) which was codified in 1876 as the Ottoman Civil Code and the Code of Civil Procedure, and which relates to Civil Transactions. This was codified in Imperial Turkey with the approval of the Sultan. Later on, with certain amendments, it was adopted in Iraq, Syria and Jordan.<sup>37</sup>

Regarding the family and the law of inheritance, the first to be codified was the Iranian Civil Code which was promulgated between 1927 and 1935. This example was followed by the Codes on personal law in Syria (1935), Tunisia (1956), Morocco (1958), and Iraq (1959). Other Muslim countries followed later.<sup>38</sup>

There are thirty-five countries all over the world that have Muslim majorities, and another twenty countries that have Muslim minorities.<sup>39</sup>

Some of these countries that have Muslim minorities have also codified the family laws of the significant Muslim minorities, like Singapore and the Philippines.

From time to time as the case may arise, these codified Muslim laws are subject to modification and revision in keeping with the Muslim interests provided that it is within the framework of the comprehensive principle of Shari'ah.

### ***C. Sources of Islamic Law***

By sources we mean the places where the principles of laws are first to be found. Jurists always used the expressive term "roots" from which the rules of law are deduced. Jurists are of the opinion that the fundamental sources of Islamic Law are the Holy Qur'an and the Sunnah

of the Holy Prophet (S.A.W.). Juristic opinions are mere secondary sources such as consensus of opinion (Ijma), analogical deduction (qiyas), juristic preference (Istihsan), public policy (Masalihah/Istislah), and presumption of continuity (Istishab).<sup>40</sup> They will be explained one after another:

### 1. The Holy Qur'an

The Holy Qur'an is admitted by the Muslims as the compilation of all the revealed words of Allah (S.W.T.) to His Messenger Muhammad (S.A.W.) through Angel Gabriel. Therefore, to the Muslims, the Holy Qur'an is the supreme law, the fundamental law, to which all laws must conform. No law shall be valid if it contravenes the mandate of the Holy Qur'an.

The Holy Qur'an was revealed to the Holy Prophet (S.A.W.) in parts as circumstances arose within 23 years of his prophethood (13 B.H. to 10 A.H.). The first revelation was the first five ayyat of Surah al-Alaq (96) of the Holy Qur'an and the last revelation was ayyah<sup>40</sup> of Surah al-Ma'ida (5) which is cited above in the revelation period under the subject matter of the development of Islamic Law.

The whole of the Holy Qur'an was committed into writing, though in scattered materials and into the memories of the companions of the Holy Prophet (S.A.W.) before his death, which ensured the certainty of belief by the Muslims that the Holy Qur'an contains the true words of Allah (S.W.T.).

The Holy Qur'an is a complete and comprehensive source of law; it covers the infinite past and the infinite future. It is absolute and immutable because time, places, and circumstances do not affect it. Allah (S.W.T.) says to the effect: "No change can there be in the words of Allah."<sup>41</sup>

The Holy Qur'an is not a code of laws in the modern sense. It is basically a book of religious guidance. Nevertheless, it contains some legal principles which have been roughly estimated as follows: 70 on family law; 70 on civil law; 30 on penal law; 13 on jurisdiction and procedure; 10 on constitutional law; 25 on international law; and 10 on economic

and financial order.<sup>42</sup>

## 2. The Sunnah of the Holy Prophet (S.A.W.)

The Sunnah literally means way, custom, habit of life. Technically, it is defined by the jurists as the utterance and personal acts of the Holy Prophet (S.A.W.) and the acts and sayings of others tacitly approved by him.<sup>43</sup>

The Sunnah is also a divine inspiration (ilham) which explains and demonstrates the Holy Qur'an. Allah (S.W.T.) says to the effect:

*... and We have sent down unto thee (also) the Message; that thou mayest explain clearly to men what is sent for them, and that they may give thought.<sup>44</sup>*

Therefore, to understand the Holy Qur'an, it is indispensable to learn and understand the Sunnah as its complement. These are the divine sources of Islamic Law which is otherwise known as the Shari'ah.

Except for a few which were written, most of the Sunnah was only committed into memory during the lifetime of the Holy Prophet (S.A.W.). Even after his death, the Sunnah was transmitted from generation to generation by narration or report which is called Hadith (Plural: Ahadith). To prove the authenticity and veracity of the Sunnah due to the trustworthiness of the narrators, the names of the chains of narrators from the last narrator to the Holy Prophet (S.A.W.) were also mentioned in the narration. This portion of the narration or Hadith is called *isnad* or *sanad*.<sup>45</sup>

To determine the authenticity and veracity of a hadith, the names background, trustworthiness and honesty of every narrator were properly and scientifically investigated. This is a branch of the science of Hadith known as *Mustalah al-Hadith*.<sup>46</sup>

In view of the different background as well as trustworthiness of the narrators and the different mode of chains of narrations, the hadith has been categorized into sound (sahih), good (hasan), or weak (da'if). A sound hadith is one whose chain of authority is carried back without interruption to a companion by a chain of narrators each of whom is trustworthy. A good hadith is one whose sanad, though complete, has one weak link but is confirmed by another version.<sup>47</sup> While a weak hadith is one that has a doubt either to the chain of narration or to the character of the narrator. Therefore it has no weight in Islamic jurisprudence.

The compilation of hadith began by the companions as early as during the life time of the Holy Prophet (S.A.W.) like the written constitution of the Muslim state of Madinah, treaties, instruction to tax-collectors, etc. After his death, the collection and compilation of hadith were developed through stages until a written form was arrived at.<sup>48</sup> In the last stage, the hadith were collected together and compiled properly. Out of all the collections, six of them (sahih-sittah) are the most authentic. They are the following: (1) Sahih Bukhari, (2) Sahih Muslim, (3) Sunan Abu Dawud, (4) Sunan Termidhi, (5) Sunan Nasa'i, and (6) Sunan ibn Majah.<sup>49</sup>

The Holy Qur'an and the Sunnah of the Holy Prophet (S.A.W.) are the divine sources of Islamic Law to which all Islamic laws must conform.

We shall explain the juristic opinions as the sources of law. Classical Muslim writers on jurisprudence have divided juristic opinions into two kinds of unequal importance: the ijma (consensus) and the qiyas (individual analogical deduction).

### 3. Ijma (consensus of opinions)

Ijma is defined by the jurists as an agreement of the jurists among the followers of Muhammad (S.A.W.) in a particular age over a question of law.

After the death of the Holy Prophet (S.A.W.), some of the leading companions residing in Madinah served informally as a consultative body

to help the Caliph in solving any complicated question which did not find a solution directly in the Qur'an or in the Sunnah.<sup>50</sup> The principle of law they unanimously agreed upon which is within the framework of the Shari'ah was acknowledged as a third source of law.<sup>51</sup> Whoever denies its authority is to be considered an infidel.<sup>52</sup>

Ijma as a source of law has its bases in the Holy Qur'an as well as in the Sunnah of the Holy Prophet (S.A.W.).

Among its qur'anic bases are the following:

*O you who believe! obey Allah, and obey the Prophet, and those charged with authority among you....*<sup>53</sup>

*When there comes to them some matters touching (Public) safety or fear, they divulge it. If they had only referred it to the Prophet, or those charged with authority among them, the proper investigators would have tested it from them...*<sup>54</sup>

*If anyone contends with the Prophet even after guidance has been plainly conveyed to him and follows a path other than that becoming to men of faith, We shall leave him in the path he has chosen, and land him in Hell, - what an evil refuge!*<sup>55</sup>

From the sayings of the Holy Prophet (S.A.W.), the following may be cited as the bases of the Ijma as a source of law:

1. My people will never be unanimous in error.<sup>56</sup>
2. The hand of Allah (S.W.T.) is over the collectivity, and whoever quits it, is sent to hell.<sup>57</sup>

Classical jurists have different views with regard to the generation of jurists or group of jurists or people whose consensus of opinion would be valid as a source of law: Imam ibn Hanbal and al-Zahiri asserted that Ijma must be limited to the companions. Imam Malik, on the other hand, confines Ijma to the Muslim community in Madinah. The majority view is that Ijma should not be limited in a certain generation or in a certain community but that a consensus of opinion of jurists in a particular age on a particular question of law should be considered Ijma as a source of law.<sup>58</sup> The Ijma of a later generation may abrogate the Ijma of the former.<sup>59</sup> However, it is a historical fact that after two generations from the death of the Holy Prophet (S.A.W.), the Muslim jurists were dispersed into the various Muslim provinces. The consensus of their opinions were almost impossible to attain. Thus, it gave an impetus to the utmost exercise of an individual juristic opinion (Ijtihad).

Ijtihad, literally, means exertion to the utmost degree to attain an object. Technically, it refers to the exercise of intelligence by a scholar in order to form an opinion on the interpretation or application of provision in the Shari'ah to be applied to a case which is not expressly covered by a provision in the Shari'ah.<sup>60</sup>

Through Ijtihad, - qiyas and other subsidiary legal principles come into prominence.

#### 4. Qiyas (individual analogical deduction)

Qiyas is defined as a process of deduction by which the law of the text is applied to cases which, though not covered by the language, are governed by reason of the text.<sup>61</sup> The jurists derived qiyas from the fundamental juridical premise that all rules are based upon objectives and interests, and such objectives and interests are the causes for the rules. Thus, from the rules they deduced their causes. Having done so in any particular problem, they were able to apply the same rule to another problem whenever the case for both was identical.<sup>62</sup>

In order that Qiyas or analogy may be employed, it is essential that the following four requisites must be present: (1) the original case (asl)

upon which the attainment of qiyas is based; (2) the new case (far') which is the subject matter to be referred back to the original case; (3) the effective cause (illah) upon which the original rule is based; and (4) the rule (hukm) governing the original case which is going to be applied to the new case.<sup>63</sup>

The schools of law differed over the extent to which legal analogy could be relied upon. The Hanafite jurists used it extensively; the Malikites used it only sparingly; the Hanbalites used it only in dire necessity. The anti-analogy groups alleged that there was no need for it because the Qur'an and Sunnah were sufficient. They asserted that analogy was guess work and could not be relied upon.<sup>64</sup> The Shafi'ites tried to limit the use of analogy to questions of detail when there is no relevant text in the Qur'an, Sunnah or Ijma. Imam Shafi'i established a balance between those who used analogy extensively and those who rejected it as a source of law.

Apart from qiyas, there are other supplementary sources of law which are exclusive to each particular school of law. They are: (1) the Istihsan (legal preference) of Imam Abu Hanifa; (2) the Istislah or al-Masalih al-Mursalah (public interest) of Imam Malik; and (3) the Istishab (presumption of continuity) of Imam Shafi'i. We shall explain them one after another:

### 5. Istihsan

Istihsan has been variously translated as "legal preference," "favorable construction" and "juristic equity." It was advocated by Imam Abu Hanifa to expand and liberalize the application of qiyas. It was founded upon a desire for beauty or symmetry and on the removal of discrepancies or inequities in law.<sup>65</sup> Technically, it denotes the abandonment of the opinion, to which reasoning by qiyas would lead, in favour of different opinions supported by stronger evidence. Such a departure from analogy may be necessarily based on or supported by the Sunnah or Ijma or it may be another type of analytical deduction hidden in nature.<sup>66</sup>

It was argued that Istihsan is one of the two qiyases which are contradictory to each other. Let us take, the former qiyas and the latter qiyas. The latter qiyas is more liberal, equitable and supported by strong evidence. Thus, the jurists are allowed to prefer the latter over the former. This is called Istihsan.

This legal principle is based on the following Qur'anic ayyat:

*... Allah intends every facility for you, He does not want to put you to difficulties...<sup>67</sup>*

*Those who listen to the word and follow the best (meaning) in it: those are the ones whom Allah has guided, and are the ones endowed with understanding.<sup>68</sup>*

#### 6. Istislah or al-Masalih al-Mursalah

Istislah or al-Masalih al-Mursalah has been translated as "public good" or "public interest." It has been defined as the establishment of a principle (hukm), which is recommended by reason of being advantageous.<sup>69</sup> It was originally introduced by Imam Malik as a name given to the methodology of law contained in Maslahah. According to necessities and needs of circumstances, it consists in prohibiting or permitting a thing simply because it serves a "useful purpose" or Maslahah.<sup>70</sup>

The useful purpose has been divided into three kinds.<sup>71</sup>

1 - The useful purpose which meets an absolute necessity (daruri), e.g. preservation of life, protection of property (as law on qisas on the former and cutting off of hands for theft in the latter); preservation of offspring (prohibition of adultery); preservation of faith (killing of an apostate); and preservation of reason (prohibition of alcoholic drinks).

2 - The useful purpose which meets no absolute necessity but is merely expedient (ijarah), e.g. building a residential house.

3 - The useful purpose which serves as an end like the promoting of good morals.

There are three conditions for the adoption of *istislah*.<sup>72</sup>

1 - The case should not be one relating to religious observances;

2 - The interest to be protected should be in conformity with the Shari'ah; and

3 - It should be a necessity and not a luxury, or it should be for the betterment of life, instead of mere show.

#### 7. *Istishab*

*Istishab* has been introduced by Imam Shafi'i. It has been translated as "permanency," "concordance" or "presumption of continuity." Technically, it is used to indicate that things whose existence or non-existence has been proven in the past should be presumed to have remained as such until the contrary is proved.<sup>73</sup> It may be expressed in such rules as: freedom from obligation is presumed until the contrary is proved, or established legal facts are presumed to be existing until the contrary is proved.<sup>74</sup>

This goes to show that jurists have different methodologies in formulating principles of law as the bases or sources of rules of law. That is the reason why jurists have different views on the detailed interpretation of Shari'ah. However, each of them acknowledged the others as equally orthodox.

## Notes

1. Code of Muslim Personal Laws of the Philippines (otherwise known as Presidential Decree No. 1083 which took effect on February 4, 1977), Art. 4 (1). (To shorten the citation, this Code shall be cited in this dissertation as M.C.).
2. M.C., art. 4(2).
3. The Holy Qur'an, Surah al-Jathiyah (45):18; Abdullah Yusuf Ali, The Holy Qur'an: Text, Translation and Commentary, Note 4746, 1359 (1946). (To shorten the citation, the Holy Qur'an shall be cited in this dissertation as Q.).
4. Anwar Ahmad Qadri, Islamic Jurisprudence in the Modern World, 17 (1986).
5. Q., Surah al-Jathiyah (45):18.
6. Q., Surah al-Ma'ida (5):4.
7. Q., Surah al-Yunus (10):64.
8. Abdul Qadir 'Oudah Shaheed, Criminal Law of Islam, 16 (1987).
9. Supra Note 4 at 16.
10. Joseph Schacht, An Introduction to Islamic Law, 1 (1971).
11. Sunan ibn Majah, Chapter: Manasik, Hadith No. 84, (1987).
12. See Pama L. Muti, "The Family Code and the Muslim Code: Confluence and Divergence," Mindanao Law Journal, 7 (1989).
13. Hosny M. Gaber, The Early Islamic State with Special Reference to the Evolution of the Principle of Islamic International Law, 632-750 A.D., 28 (1983).
14. Se Asaf A.A. Fyzee, Outline of Muhammadan Law, 8 (1949).
15. Id., 20.

16. Ibid.
17. Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 1 (1989).
18. Ibid.
19. Id., 1-2.
20. Supra Note 4 at 239.
21. Supra Note 14 at 20.
22. Supra Note 4 at 238.
23. Supra Note 14 at 20.
24. Supra Note 4 at 21.
25. Supra Note 14 at 22.
26. Q., Surah al-'Alag (96):1-5.
27. Q., Surah al-Ma'ida (5):4.
28. Hamid Aminoddin Barra, The Code of Muslim Personal Laws: A Study of Islamic Law in the Philippines, 18 (1988).
29. Supra Note 14 at 22.
30. Supra Note 28 at 26.
31. Supra Note 14 at 23
32. Ibid.
33. Id., at 24.
34. Supra Note 28 at 22.
35. Id., at 27.

36. Id., at 28.
37. See Foreword by Mr. Justice S.A.A Rahman, H. Pk. in The Mejlle (Translated by C.R. Tyser, B.A.L., et. al.) N.D.
38. Supra Note 28 at 30-31.
39. Matthew Lippman, et. al., Islamic Criminal Law and Procedure: An Introduction, 1 (1988).
40. Supra Note 4 at 174-175.
41. Q., Surah al-Yunus (10):64.
42. Supra Note 28 at 13-14.
43. Supra Note 4 at 189.
44. Q., Surah al-Nahl (16):44.
45. Supra Note 13 at 36.
46. Supra Note 28 at 11.
47. Supra Note 13 at 36.
48. Muhammad Hamidullah, Muslim Conduct of State, 19 (1945).
49. Supra Note 4 at 193.
50. Supra Note 13 at 37.
51. Ibid.
52. Supra Note 48 at 22.
53. Q., Surah al-Nisaa (4):59.
54. Q., Surah al-Nisaa (4):83.
55. Q., Surah al-Nisaa (4):115.

56. Sunan al-Termidhi, Hadith No. 1759, vol. II, 232 (1988).
57. Sunan al-Nasa'i, Hadith No. 3753, vol. III, 844 (1988).
58. See Supra Note 28 at 20.
59. See Supra Note 48 at 22.
60. Supra Note 13 at 38.
61. Supra Note 4 at 211.
62. Supra Note 13 at 39.
63. Supra Note 28 at 21.
64. Supra Note 13 at 46.
65. Supra Note 4 at 222-223.
66. *Id.*, at 222.
67. Q., Surah al-Baqara (2):185.
68. Q., Surah al-Zumar (39):18.
69. Supra Note 4 at 224.
70. *Ibid.*
71. *Id.*, at 224-225.
72. *Ibid.*
73. *Id.*, at 226.
74. Supra Note 13 at 42.