

The Book

*L*aw (Fiqh, Shari'ah) was regarded as an integral part of Islam from

the very beginning. We have already pointed out that the Qur'an was revealed to lay the bare foundation of the Islamic code of behaviour and the Prophet was given the responsibility of passing it on, explaining and practicing it and establishing it (establishing a community to practice it). This point is frequently emphasised in the Qur'an. This naturally led to the recognition of the Qur'an and Sunnah as the two major sources of Islamic law as early as the lifetime of the Prophet. However, the formulation, and development of Islamic law into a legal system, and the formation of the Islamic schools of law took place in several distinct stages. At least five major schools of law and quite a few not so major ones established themselves in the course of the development of Islamic law. This process of growth and development took place throughout different eras and in different stages in different schools of law. The four major Sunni schools of law established themselves earlier than the Shi'ite school of law. This is mainly due to the different concept and interpretation of the second source of Islamic law, namely that of Sunnah (Islamic traditions, i.e. the words, deeds and tacit approval of the infallible persons-*ma'sum*). Both the Sunnis and the Shi'ite schools recognize the authority of the Sunnah as the second source of Islamic law. But the Sunni schools regard Sunnah as the words, deeds and tacit approval of the Prophet (pbuh) and to some extent those of the Khulafa al-Rashidin (his immediate successors). The Shi'ite school include in Sunnah the words, deeds and tacit approval of the Imams (from Ali, the first Imam (640/661) and the eleven Imams after him, to Mohammad, the last Imam(329/940)). The Shi'ites nevertheless based the authority of the Imams, in this respect, on the authority of the Prophet himself (pbuh). Of course, some Imams, specially the fifth (Muhammad al-Baqir) and the sixth (Ja'far al-Sadiq) provided copious materials that later on helped the jurists to formulate Shi'ite Islamic law and establish the Shi'ite school of law.

However, our main concern here is to explain the position of Sheikh al-Tusi and his book *Al-Nihayah* in pioneering and formulating the

Shi'ite school of law. As soon as the first phase of the development of the Shi'ite school of law ended, (collections of reports, Sunnah) which lasted until the major occultation of the twelfth Imam in 329/ 940, the task of compiling and collecting traditions started. Sheikh al-Tusi himself was the compiler of two of the four major collections. The formulation of Shi'ite law as a legal system and the formation of the Shi'ite school of law thus could not really start before the production of these major early collections and before the occultation of the twelfth Imam. It was at this crucial time that Mohammad ibn Ali known as Sheikh al-Saduq (305-381AH), the author of *al-Muqna'* and *al-Hidayah*, Sheikh al-Mufid, (334-413AH) the author of *al-Muqni'ah*; Sayyid Murtada 'Alam al-Huda, (355-436 AH) the author of *Jumal al-'ilm wa al-'Amal*, and of course Sheikh al-Tusi pioneered the formulation of Shi'ite Islamic law and laid the foundation of the Shi'ite school of law.

Sheikh al-Tusi undertook the task of formulating Shi'ite law from the raw materials of Sunnah. Of course the idea of formulating Shi'ite law had existed before and his two major forerunners and masters, namely Sheikh al-Mufid and Sharif al-Murtada should be recognised and credited as the contributors to this process. But it is Sheikh al-Tusi who should be appreciated as the major formulator of the Shi'ite law and as the scholar who systematised it from the recently [previously] developed sources of Shi'ite Islamic law. This is probably why he was given the honorific title of Sheikh al-Ta'ifat al-Imamiyyah (The Head of the Shi'ite school of law and community). This title was not given to any jurists before him and has not been given to anybody ever since. However, he humbly admits his debt to his masters, especially in his book *'Udat al-Usul*. His initiative and pioneering approach in the field of Shi'ite Islamic law may be appreciated better by studying his style in his book, *al-Nihayah*. The reader can detect that in certain parts of this book legal opinions are occasionally expressed in terms of the actual reports and quotations from the Imams. However, he provided Shi'ite law with its own structure, features, scope, characteristics, course of development, philosophy, methodology and objectives. He was truly the pioneer, or one of the major architects, of Shi'ite Islamic law as a legal system. Sheikh al-Tusi developed what used to be a collection of reports and narratives from

credible and infallible sources (Ma'sum, Imams) on legal matters (le loi) into a legal system with a systematic method of dealing with legal issues (le droit). Comparing what was produced and written before him with what he produced in this field, one can easily appreciate his contribution in formulating the Shi'ite legal system. Not only did he help the development of Shi'te law (fiqh), he also contributed quite a lot in the development of Shi'te jurisprudence ('ilm al-usul (

Issues in jurisprudence had been dealt with before him and a book on Shi'ite Islamic jurisprudence ('ilm al-usul) was produced by Sayyid al-Murtada, known as 'Alam al-Huda, under the title *Al-Dhari'ah*. But Sheikh al-Tusi dealt with jurisprudence as an independent legal discipline, as the methodology of Islamic law and not as a collection of jurisprudential issues and principles .

Due to his pioneering initiative, Shi'ite law became a legal system to which even Imams were subjects. He expresses this point in quite a few places of *Al-Nihayah*, especially in the in the section dealing with Punishments and Compensations (al-hudud wa al-diyat) where he states that even Imams have no right to forgive a perpetrator at the expense of the right of the victims and their heirs. I believe that by Imam he means the Imam-the person who is referred to by this term in Shi'ite theology: i.e. the infallible Imam, or Ma'sum). Due to his initiative Shi'ite law was no longer a collection of raw materials of quotations of Imams and individual religious reports. A proper legal system must provide provision for lawyers to seek the advice and expertise of non-lawyers who are qualified in fields other than law wherever it is necessary to do so, for example, medical doctors when injuries and crimes are involved. Sheikh al-Tusi, in sections dealing with qisas and diyat in *Al-Nihayah*, openly states that lawyers and administrators of law must consult other specialists (ahl al-khibrah) and seek their advice in the their area of expertise ..

We do not know the exact time and period in Sheikh al-Tusi's life in which he produced *al-Nihayah fi Mujarrad al-Fiqh wa al-Fatawa*, but judging by the title of the book, which he himself chose for the work and recorded it as such in his other book, *al-Fihrist*, we may conclude that it was one of his later works in the field of Shi'ite Islamic law and that it was produced in the later years of his life. We strongly believe that *al-Nihayah* (a Concise Description of Islamic Law and Legal Opinions) was

written after al-Mabsut (a Detailed Description of Islamic Law). However, it has been suggested by some biographers that al-Nihayah was one of his early works . Some have even suggested that al-Nihayah is his first book in Islamic law. We know for sure that it was written after his other book Tahdhib al-Ahkam because he refers to this book quite a few times in Al-Nihayah. Al-Nihayah was used as a text book for quite a while and later remained as a reliable and major reference of early Shi'ite Islamic law up to modern times. There are quite a few commentaries on al-Nihayah . Najm al-Din Ja 'far known as al-Muhaqiq al-Awwal and 'Allamah al-Hilli (602-676 AH) produced a large useful commentary on al-Nihayah called al-Nihayah wa Nukatuh. He in turn helped the Shi'ite Islamic law by producing a great book in the field called al-Sharayi' which in the course of time became another recognised text book alongside al-Nihayah. The style of the work in al-Nihayah has been adopted and its approach has been followed more or less by many of later generations of Shi'ite lawyers. A few scholars have translated al-Nihayah into the Persian language and it has been published many times in quite a few different places. The work is arranged in twenty-two books (kitab/ /chapters) and each chapter/book is divided into sections (bab, pl. abwab) making up 214 sections, beginning with the rules and regulations of physical cleanliness and ritual cleansing and ending with a section on crimes against animals

This brings us to the point as to the reason why it was decided to translate an early Islamic law book, which was written in the first half of the eleventh century. This is because this undertaking explains how the law was formed, formulated and how it has been developing ever since during the course of the history of Islamic law. The discovery and formulation of the divine law is a process of continuous growth throughout the history of Islamic law and thus systematically divided into distinct stages, phases and periods. Having this point in mind one may realise the importance of the classical texts of Islamic law. How can one understand the history of Islamic law and what Islamic law stands for if one does not have access to its early classical texts?

There is another important point to be made here. Although the book of al-Nihayah is written by a Shi'ite jurist on Islamic law according

to the Shi'ite school of law it should be treated as an Islamic legal text. This is because, in Islamic law in general and in the field of methodology of Islamic law the general concepts, principles, terms, vocabulary, branches and categories are found and used in all schools of law. It should be thus appreciated that, as a general rule, no major difficulty or differences are experienced or faced by the Jurists of other schools of Islamic law in the understanding, translation of terms and vocabulary and even in the application of the principles, spirit, concepts or even rules of law used by jurists belonging to different Islamic schools of law. It is in the light of the fundamental unity of Islamic law, that this book should be appreciated as a reliable text on Islamic law in general .

This similarity and unity provides jurists of one school of law with a great opportunity and facility in understanding the others. The actual rules of law in one or another school of law may differ, but jurists of different schools of law understand without any major difficulty what they are about; the concept, principles, methodology, approach and sources used are understood; their context, nature and circumstances appreciated. After all, they are all members of the same family of law, i.e. the family of Islamic law. There may be some dissimilarity between the understandings of the same concepts by different jurists of different schools but in the long run they end up expressing the same principle. Let us take for example the doctrine of the authority of the consensus of opinion (ijma'Ý). The Sunni schools base its authority and validity on the principle of the infallibility ('ismah) of the Muslim community/ummah, expressed by a well quoted tradition from the Prophet (pbuh). The Prophet is reported to have said "My community shall never agree on an error." The Shi'ite school of law bases its authority and validity on the principle of the infallibility of the community too but represented by the infallible (ma'sum) Imam and that ijma' includes the opinion and sanction of the Imam. Thus after a careful analysis one realizes that all Islamic schools of law base the authority of ijma'' on the same principle/doctrine namely that of the doctrine of the bounty (lutf, mercy, love and blessing) of Allah expressed either by the community directly or through an infallible Imam .

One of the main features of al-Tusi's juristic approach is inspired by his familiarity with all Islamic schools of law and that he tried to

incorporate Shi'ite law with other Islamic law. Tusi has been credited for trying and to some extent succeeding in establishing a form of harmony between the Shi'ite school of law and other schools of Islamic law. This makes the study of al-Nihayah more interesting for non-Shi'ite lawyers.

The student of the secular legal system may find it difficult to appreciate the point that the Islamic law is an inclusive code of practice, covering all areas, fields, issues, needs of human behaviour, legal or otherwise. Islamic law covers rituals and religious duties along with other legal issues. The definition of law as that which is made by the authority, enforced by the authority and accordingly rewarded and punished by the authority for respecting or disrespecting it truly and fully applies to the Islamic law. The rituals, religious obligations and prohibitions are all prescribed and made by the law maker (shari'/Allah) and are reward able and punishable accordingly, if not here then in the Hereafter and thus in a way enforceable. This divine basis of the law may be compared with Kelsen's Ground norm, the extra-legal norms explaining why laws are binding. They are thus covered by the definition of law and regarded as a legal code of behavior by Islamic law. This is partly why Islamic law books start with the rituals ('ibadat) and in the case of al-Nihayah it starts with the rituals and ends up with the section on "Animal rights "

It was found appropriate to give the title Early Islamic Law, a Concise Description to this translation of al-Nihayah, because we believe that Sheikh al-Tusi meant the book to be a concise description of Islamic law in comparison to his other book al-Mabsut, (the Detailed Description of Islamic Law) which was produced and introduced by him as a detailed description of Islamic law.