

# **USUL AL FIQH**

**(Islamic Jurisprudence)**

By

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## Preface

This book on Islamic Jurisprudence (Usul Al Fiqh) was prepared as an aid to a course on this subject conducted through internet in 1999 to an International Student Population on the request of Witness-Pioneer (an internet based Islamic International Intellectual Movement). The book has been modelled on classical 'Usul' books, the chapter planning has been done on the lines of the book "Principles of Islamic Jurisprudence" by Dr. Hashim Kamali. This book will help in understanding the essentials of 'Usul'. However, to master the subject and get the details, the reader has to turn to the old and new 'Usul' works. Names of old and new Usul Books have been mentioned in the Introduction and in the Bibliography.

I am indebted for this work to Witness-Pioneer movement, to Wohidul Islam (a Harvard Student), who was my Teaching Assistant, Mr. Shafiquer Rahman, a Pioneer member who helped me in conducting the course and to my students of the course who helped me to improve the course through their questions.

Knowledge of 'Usul' is essential to save us from mis-interpretation of the 'Quran' and the 'Sunnah'. I pray to Allah that He may accept this book for the benefit of "Ummah".

**Shah Abdul Hannan**

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## USUL AL FIQH (Islamic Jurisprudence)

### 1. Introduction

Usul al Fiqh discusses both the sources (Adillah) of Islamic law and the law (Fiqh). This view is held by a group of jurists, according to Nurul Anwar written by Sheikh Ahmad Ibn Abu Sayiid, known as Mullah Jaiun, who was the house tutor of Aurangzeb, the Mughal emperor. However, primarily Usul al Fiqh deals with the sources or roots of Islamic law.

Usul al Fiqh (Usul is plural of Asl) the bases or roots of Islamic Law, expound the methods by which Fiqh (detail Islamic law) is derived from their sources. In this view, Usul is the methodology and the Fiqh is the product.

Usul deals with the primary sources of Islamic law, the Quran and the Sunnah, i.e. Usul discusses the characteristics of the Quran and Sunnah, and what are the methods of deduction of law from the Quran and the Sunnah. In doing that, Usul discusses various kinds of words used in the Quran and the Sunnah in particular and Arabic language in general such as the Amm (general) and the Khas (particular), Mutlaq (unconditional) and Muqayyid (conditional), Haqiqi (literal) and the Majazi (Metaphorical), various types of clear words and unclear words. Methods of deductions from the legal verses of the Quran and the legal Ahadis (singular Hadis) are what the Fuqaha (jurists) have called Ibarah al Nass (whereby Ahkam or rules are derived from the obvious words and sentences themselves), Isharah al Nass (where Ahkam are inferred from signs and indications inherent in the text) Dalalah al Nass (where Ahkam are derived from the spirit and rationale of a legal text) and Iqtida al Nass (whereby Ahkam are derived as a requirement of the provision of the text though the text is silent on the issue). Details may please be seen in the chapter on Interpretation coming later.

Usul al Fiqh also discusses the secondary sources of Islamic law, the Ijma (consensus), Qiyas (analogical deduction), Istihsan (Juristic preference) and other methods of Ijtihad (reasoning and investigation). All the secondary sources are either directly or indirectly based on the primary sources of Islamic law, the Quran and the Sunnah. For instance, three main elements of Qiyas, that is Asl (original case), Hukm (ruling on asl) and the Illah (effective cause) are based on primary sources. Usul al Fiqh also discusses other main issues involving Islamic law such as the effect of custom on law or custom as a source of law, and grades of the Islamic legal provision (i.e. what is Haram, what is Maqruh; what is Farz, what is wazib and what is Mandub (recommended) and also the methods of removal of conflict (i.e. Taa'rud).

In some books of Usul, grammar of Arabic language is discussed at length. Of course the knowledge of Arabic language and grammar is a must for one who

wants to be a Usuliun or a jurisprudent. However, this is not really a subject matter of Usul.

The benefits of the study of Usul al Fiqh are many. From a study of Usul, we come to know the methods of interpretations of the Quran and Sunnah, all the secondary sources of Islamic law, the views on Usul of major scholars of the past and present, the rules of Qiyas and other methods of Ijtihad, the history of development of Islamic law and legal theory. All these make anybody who studies Usul cautious in approach to Islamic law. He develops respect for the methodology of past masters and becomes aware of the need to follow rules in the matters of deduction of new rules of Islamic law. He then is likely to avoid careless utterance and action. Ummah can produce great mujtahid only by study of Usul in addition to other sciences. The principal objective of Usul is to regulate Ijtihad and guide the jurist in his effort at deducing the law from the sources.

Imam Shafii is considered to be the father of the science of Usul. This is true in the sense that the systematic treatment of the principles of Usul al Fiqh was first made by him. Before him, the jurists of course followed some principles in the deduction of law but these principles were not integrated and systematized. After Shafii, many scholars have contributed in the study of Usul, of them, the most famous are : Abul Hasan al Basri (d. 436), Imam al Haramayn al Juwayni (d.487), Abu Hamid al Gazali (d.505), Fakhruddin al Razi (d. 606), Saifuddin Al Amidi, Abul Hasan Al Karkhi (d.349), Fakhruddin Al Bazdawi (d. 483), Abu Bakr Al Jassas (d. 370), Sadr Al Shariah (d. 747), Tajuddin Al Subki (d.771), and Al Shatibi. There have been many writers on Usul in modern times, particularly in Arab lands.

Initially two approaches developed in the study of Usul, the theoretical and the deductive. The theoretical approach was developed by Imam Shafii who enacted a set of principles which should be followed in the formulation of Fiqh. On the other hand primarily the early and later Hanafi scholars looked into the details of law given in the Quran and Sunnah and derived legal rules or Usul principles therefrom. However, the later scholars combined the two approaches and presently the subject essentially follows the some format.

## 2. The Quran

In some classical books of Usul (such as Nurul Anwar by Sheikh Ahmad Ibn Abu Said or Manar by Sheikh Abul Barakat Abdullah Ibn Ahmad Nasafi) most of the discussion of Usul have been made under the heading "*Kitabullah*" (that is the Quran). Such discussion include discussion on the classification of words in the Quran (or Arabic language), grammatical issues pertinent to interpretation of the Quran and Sunnah, such as *Haruful Maa'ni* (words with meaning), *Haruful Atf* (conjunction), *Haruful Zar*, (a 'Haruf' which gives 'Zar' to the noun when it is

used before noun), *Haruful Asmauz Zaruf* (Haruf which indicate time, place, etc.) and *Haruful Shart* (haruf which indicates conditions). Discussion under Kitabullah also include the methods of interpretation such as *Ibaratun Nass* (based on explicit meaning), *Isharatun Nass*(based on indicatived meaning), etc.

However, in our discussion on Usul under the "Quran" we shall not discuss any of the aforesaid things. In following some modern Usul scholars we shall take the discussion on the methods of interpretation and classification of words under "Methods of Interpretation" We shall not discuss rules of grammar in Usul and ask the readers to study Arabic language and its grammar separately. In this part we shall discuss some of the characteristics of Quran as its introduction.

Quran is the book which Allah revealed in His speech to His Prophet Muhammad (SM) in Arabic and this has been transmitted to us by continuous testimony or *tawatur*.

There are 114 suras of unequal length. The contents of the Quran are not classified subjectwise. The Quran consists of manifest revelation (*Wahy Zahir*) which is direct communication in the words of Allah. This is different from *Wahy Batin* (non-manifest revelation) which consists of inspiration and concepts. All the Ahadis of the Prophet fall under this category.

Hadis Qudsi, in which the Prophet (SM) quotes Allah in the Hadith, is also not equivalent to the Quran. In fact, this kind of Hadith is also subject to examination of *Isnad* (chain of narrators from the Prophet (SM) to the compiler of the Hadith compilation). If the *sanad* (chain) is weak, the *hadith* will be treated as weak, even though it is *Hadis Qudsi*. It should be noted that the Prophet (SM) did not make any distinction between Hadis Qudsi and other Hadis.(Ref; Abdul Wahab al Khallaf; 'ILM - Usul al Fiqh', also Dr.Hashim Kamali, Principles of Islamic Jurisprudence.)

Only meaning (*Maa'n*) or text (*Nazm*) is not the Quran. The jurisprudents agree that text and meaning together constitute the Quran.

Quran was revealed in stages (*Bani Israil, 17:106*), and gradually (*Al-Furqan,25:32*). Graduality in the revelation afforded opportunity to reflect over it and memorize it. The Ulama are in agreement that the entire text of the Quran is "*Mutawatir*", i.e. its authenticity is proven by universally accepted testimony.

The larger part of the Quran was revealed in Mecca (about 19/30<sup>th</sup> part) and rest in Madinah. The Meccan revelations mostly deal with beliefs, disputation with unbelievers and their invitation to Islam. But the Madinan suras, apart from the aforesaid, deal with legal rules regarding family, society, politics, economics, etc. The sura is considered Meccan if its revelation started in Mecca, even if it contains Madinan period Ayats. The information regarding

which one is Makki or Madani are based on the sayings of the Sahabis or the following generation.

The legal material of the Quran is contained in about 500 Ayats, according to various estimates. These injunctions were revealed with the aim of repealing objectionable customs such as infanticide, usury, gambling, unlimited polygamy; prescribing penalties and core Ibadah like Salat, Siam, Zakat, Hajj. Other legal Ayats deal with charities, oaths, marriage, divorce, Iddah, revocation of divorced wife (Rijah), dower, maintenance, custody of children, fosterage, paternity, inheritance, bequest; rules regarding commercial transaction such as sale, lease, loan, mortgage, relations between rich and poor, justice, evidence, consultation, war and peace.

One of the things that has been discussed is about *Qati* (definitive) and *Zanni* (speculative). *Qati* and *Zanni* concepts have been discussed in terms of text and in terms of meaning. The whole of the Quranic text in *Qati* (definitive) that is its Riwyah (report) is conclusive and beyond doubt. Only other text, which has been considered *Qati* is only Mutawatir Sunnah or Hadith (at least in essence). Other Hadith and *Ijtihad* are *Zanni* material. (Principles of Islamic Jurisprudence, Dr. Hashim Kamali, Islamic Texts Society, Cambridge).

The text of the Quran which has been reported in clear words (*Alfaz al Waziha*) which has only one meaning are considered *Qati* also in terms of meaning (*Dalalah*). Any text of Hadith which is similarly clear in meaning is also considered *Qati* in terms of meaning. *Qati* and *Zanni* have significance in the matter of belief and in the gradation of Ahkam into *Farz*, *Wazib*, *Sunnah*, *Haram*, *Makruh*, etc. Articles of faith can be determined only by *Qati* text with *Qati* meaning. A person can be declared Kafir if he denies the *Qati* text of the Quran or Mutawatir Sunnah. Otherwise not. Similarly *Farz* is determined only by *Qati* text with *Qati* meaning (Principles of Islamic Jurisprudence, Dr. Hsashim Kamali, Chapter 17).

Most of the text of the Quran are *Qati* in meaning. Example of *Zanni* in meaning are the words "banatukum" in Nisa : 23 and "yanfaw minal ard" in Maida : 33.

In the discussion on *Qati* and *Zanni*, Quran and Sunnah are integral to one another. *Zanni* of one verse can be made *Qati* by another verse or definitive Sunnah. Similarly, the *Zanni* Sunnah can be elevated to *Qati* by *Qati* Ayat of the Quran or by other corroborative evidence of *Qati* Sunnah.

By far, the large part of the Quranic legislation have been given in broad outlines, only in a few area, the Quran has given instruction in considerable details. Hardly there is anything where Quran has given all details. We are dependent on Sunnah and *Ijtihad* to fill up the gaps or for explanations.

One issue of concern is whether it is permissible to research the cause (talil) of Ahkam. Majority of scholars hold that this is permissible, indeed a must for development of Islamic law through Ijtihad (primarily Qiyas).

However, a few hold, talil is not permissible and as such deny legality of Qiyas. This view is weak and appears to have been born out of misunderstanding the purpose of talil.

Another issue is Asbab al Nazul or events which are related to revelation of the Ayats. The Hukm (law) is not limited to the events or circumstances. Asbab al Nazul helps to understand the Quran and its law. .

### 3. The Sunnah

Literal meaning of Sunnah in Arabic is beaten track or established course of conduct. Pre-Islamic Arabs used the word for ancient or continuous practice. According to Ulama of Hadith, Sunnah refers to all that is narrated from the Prophet(sm), his acts, his sayings and whatever he tacitly approved. The Jurisprudents exclude the features of the Prophet (SM) from Sunnah. In the Hadith literature, there are uses of the word Sunnah in the sense of source of law, for instance in THE Prophet's farewell Hajj address and at the time of sending Muadh(R.A.) to Yemen.

The term Sunnah was introduced in the legal theory towards the end of the first century. It may be noted that in the late 2<sup>nd</sup> Century Hijra Imam Shafii restricted the term to the Prophetic Sunnah only. In the Usul al Fiqh Sunnah means the source of Shariah next to the Quran. But to the Ulama of Fiqh Sunnah primarily refers to a Shariah value which is not obligatory but falls in the category of Mandub or recommended. But as a source, Sunnah can create obligation (wajib), Haram, Makruh, etc. In the technical usage Sunnah and Hadith have become synonymous to mean conduct of the Prophet (SM). The Sunnah of the Prophet (SM) is a proof (Hujjah). The Quran testifies that Sunnah is divinely inspired (53:3). The Quran enjoins obedience to the Prophet(SM) [59:7; 4:59; 4:80; 33:36] Allah asked the believers to accept the Prophet as judge (4:65) One classification of Sunnah is Qawli, Faili and Taqriri (verbal, actions and tacit approval)

A very important classification is legal and non-legal Sunnah. Legal Sunnah (Sunnah tashriyyah) consists of the Prophetic activities and instructions of the Prophet (sm) as the Head of the State and as Judge. Non-legal Sunnah (Sunnah Ghayr tashriyyah) mainly consist of the natural activities of the Prophet (Al-afal-al-jibilliyyah), such as the manner in which he ate, slept, dressed and such other activities which do not form a part of Shariah. This is called adat (habit) of the Prophet in the Nurul Anwar, a text -book of Usul. Certain activities

may fall in between the two. Only competent scholars can distinguish the two in such areas. Sunnah which partake of technical knowledge such as medicine, agriculture is not part of Shariah according to most scholars. As for the acts and sayings of the Prophet that related to particular circumstances such as the strategy of war, including such devices that misled the enemy forces, timing of attack, siege or withdrawal, these too are considered to be situational and not a part of the Shariah. (Khallaf: 'ILM - Usul al Fiqh', Mahmud Shalutat: Al Islam, Aqidah wa Shariah)

Certain matters are particular to the Prophet (SM) such as the case of number of wives, marriage without dower, prohibition of remarriage of the widows of the prophet (sm). The Quran has priority over Sunnah, because of nature of revelation (wahy zahir over wahy Batin), authenticity and also because Sunnah is basically and mostly an elaboration of the Quran. In case of real conflict, the Quran should prevail. Never the Quran was abandoned in favor of the Sunnah.

It may be noted that Sunnah in many instances confirms the Quran. There is no disagreement on this. Sunnah also explains and clarifies the Quran as in the case of Salat, Zakat, Hajj, Riba and many other matters of transactions. Another part of Sunnah which is called Sunnah al Muassisah or founding Sunnah (such as prohibition of marrying paternal or maternal aunt or the right of pre-emption in property (shuf') cannot be traced in the Quran and originate in the Sunnah.

It may be noted from 'Usul' books that the experts in Hadith literature at the stage of collection of Hadith examined all Hadith before recording in their collections (particularly the claim of transmission from the Prophet [SM] downward) and classified Hadith into strong (sahih/hasan), weak (daif) and forged (Mawdu). It is easy for an expert in Hadith to find out the status of Hadith. Even now re-examination of Hadith literature is continuing. In current century, Nasiruddin Albani had good work on this subject. Anybody who knows Arabic well, can look into Albani's works (see also M.M. Azami, Studies in Hadith methodology, published by American Trust Publications. Mutawatir Hadith has been considered Qati (definitive) in concept (Mutawatir bil Ma'na) mostly. There are only a few hadith which are Mutawatir bil Lafz (Mutawatir word by word). Also note that because of large number of reporters of Mutawatir Hadith, diversity of residence of the reporters, it is impossible to concoct a lie in this manner. The main conditions of Mutawatir Hadith are: (a) large number of reporters (b) reports must be based on direct knowledge and through sense perception, (c) reporters must be upright, (d) reporters are free from sectarian or political bias of that time. According to the majority of Ulama of Usul, the authority of Mutawatir is equivalent to the Quran. It gives positive knowledge, the denial of Mutawatir Hadith or Sunnah is equivalent to denial of the Quran.

Mashhur Hadith is a kind of Hadith, which is reported by one or two companions, then become well known. The majority of Ulama considered Mashhur as a kind of Ahad Hadith and it gives speculative knowledge, not positive knowledge. Ahad Hadith (in most cases reported by a single companion and which did not become well-known in the 2 or 3 generations) does not give positive knowledge. Majority of Jurists hold that if Ahad is reported by reliable reporters, it establishes a rule of law. Some hold acting upon Ahad is only preferable. Aqidah (beliefs) or Hadud (prescribed punishment) should not be based on Ahad. (Dr. Hashim Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge).

If a hadith is narrated by a number of narrators and there is additional words in some of them, then it should be looked into whether the hadith was originally uttered in one sitting. In that case, the words narrated by more narrators will be accepted. Imam Malik did not rely on Ahad, if it was in conflict with the practice of Madinah. Most Imams considered Ahad to be authoritative in principle if reported by reliable reporters. Majority of Ulama do not insist on verbatim transmission (rewait bil Lafz) of Ahad. Transmission of a part of Hadith is permitted, if it is not in conflict with the full hadith.

What is the difference between Muttasil (connected) and Ghair al Muttasil (disconnected) Hadith? Mutawatir, Mushhur and Ahad are kinds of Muttasil hadith. Mursal, Mudal and Munqati are various types of Ghair al Muttasil Hadith. According to majority, Mursal means that a successor (Tabii), narrates a hadith without mentioning the name of companions. Majority of Ulama of Hadith do not accept the Mursal as evidence. Imam Ahmad and Imam Shafii do not rely on Mursal unless reported by famous successor, even then Mursal have to meet certain conditions as mentioned in books on Usul. Imam Abu Hanifa and Imam Malik are less stringent in their acceptance of Mursal. Munqati refers to a Hadith whose chain of narrator has a single missing link somewhere in the middle of the chain. The Mudal is a Hadith in which two consecutive links are missing.

The Hadith has also been classified into Sahih, Hasan and Daif. Hadith is called Sahih (that is excellent in terms of quality of narrators - not in the sense of Qati or absolutely correct), if it is reported by Thiqat Sabitun (highly trustworthy) or by Thiqat (trustworthy) narrator. A Hadith is considered Hasan if among the narrators are included (apart from the categories of narrators of Sahih hadith) some persons who are Sadiq (truthful), Sadiq Yahim (truthful but commits error) and Maqbul (accepted that is there is no proof that he is unreliable). A hadith is considered Daif if among the reporters are any Majhul person (that is unknown person in terms of identity or conduct) or if there is any Fasiq (violation of any important practice) or any liar.

#### 4. Interpretation of The Quran and Sunnah

An important issue in Usul-al-Fiqh is how to interpret the basic sources of Islam, the Quran and the Sunnah. This would require understanding the Quran and the Sunnah i.e. their text and meaning of their texts. As such a person who wants to interpret the Quran and the Sunnah at any level (in depth or otherwise) would require the knowledge of Arabic language . For this reason Ulama of Usul include the classification of words and understanding their meaning in the study of Usul-al-Fiqh.

Interpretation is not normally attempted if the text itself is self-evident. However, the greater part of Fiqh or law is derived through interpretation because most of the legal texts are not self-evident.

It should be noted that Tawil (interpretation) and Tafsir (explanation) is not the same thing. Tafsir aims at explaining the meaning of the given text and deducing a Hukum (rule) from it within the confines of its sentences. Tawil (interpretation) goes beyond the literal meaning of the text and bring out hidden meaning, which is often based on speculative reasoning and Ijtihad.

All words are presumed to convey their absolute (Mutlaq), general (Amm) and literal (Hakiki) meaning unless departure to alternative is justified. If the explanation or Tawil of one part of the Quran and the Sunnah is provided in another part of the Quran and Sunnah, it is called Tafsir Tashrii (explanation found in the Quran and the Sunnah) that is considered integral part of the law. However, if Tafsir or Tawil take the nature of opinion or Ijtihad, this is not considered integral part of the law (the status of this part of law is less than the first one, there is more difference among jurists on this part of law). Interpretation (tawil) can be relevant. This type of Tawil is accepted by all. However, interpretation can be very far-fetched which is not accepted by a majority of scholar. Zahiri scholars do not normally accept interpretation. However, this position is weak and impractical.

Clear words are of four types, according to a major classification. They are Zahir, Nass, Mufassar and Muhkam. Zahir (manifest) is a word which has a clear meaning and yet open to Tawil, primarily because the *meaning* is not in harmony with the context. Nass is a clear word *that is in harmony with the context*, but still open to Tawil. The distinction between Zahir and Nass is whether the meaning is in harmony with the context or whether the meaning is primary or secondary in the text concerned. The obvious meaning of Zahir and Nass should be followed unless there is reason to warrant recourse to Tawil.

Mufassar (unequivocal) and Muhkam (perspicuous) are words whose meaning is absolutely clear and *there is no need to take recourse to Tawil*. (Here is the difference between these words and Zahir and Nass). There is no real distinction between Mufassar and Muhkam in terms of clarity. However, the jurists have made a distinction between Muhkam and Mufassar, which one is liable to

abrogation and which one is not. They hold *Muhkam is not liable to abrogation* and *Mufassar is liable to abrogation*. However, there is not much purpose in the distinction because nothing can be abrogated now.

Unclear words (*Al Alfaz Ghairal Wadiha*) are of four types - *Khafi* (obscure), *Mushkil* (difficult), *Mujmal* (ambivalent) and *Mutashabih* (the Intricate).

*Khafi* is a word whose meaning is partly unclear. For instance the word *Sariq* (thief) is unclear as to whether it includes a pickpocket. This has important implication because if pickpocket is not included (as the majority holds) then, he would not be liable to *Hadd* (that is, punishment prescribed in the Quran or *Sunnah*) but will be liable to *Tazir* (punishment prescribed by the legislative authority in the present day world, punishment given by judges in the past). *Mushkil* (difficult) is a word which has several meanings. So *Ijtihad* and *Tawil* would be required in determining the correct position in the context (there may be difference of opinion in this area). *Mushkil* is inherently an ambiguous word, whereas *Khafi* has a clear basic meaning. A text may become *Mushkil* in the existence of conflicting text (see the conflict in verse 4:79 and 3:154 cited by Dr. Kamali in his *Principles of Islamic Jurisprudence*).

*Mujmal* denotes a word or text which is inherently unclear and gives no indication as to its precise meaning. It may have several meanings or it may be unfamiliar word or the lawgiver may not have explained the word to clarify it. . For instance the words such as *Salat Hajj*, *Riba* and *Siam*. They have lost their literal meaning and taken a technical meaning given by the lawgiver. However, these words have become totally clear or *Mufassar* due to explanations provided in the *Sunnah*. The word *Al-qariah* in the verses 101:1-5 is a *mujmal* word. However it has been explained by the Quran itself and has become clear. If the explanation provided by the lawgiver is insufficient, *Mujmal* turns into *Mushkil* which is open to *Ijtihad* and *Tawil*. *Mutashabih* (Intricate) is a word whose meaning is a mystery. *Harful Muqattaat* (such as *Alif Lam Mim*) are *Mutashabihat*. Nobody knows their meaning (please see various opinions regarding the use of these words in the text books on *Usul*). Many scholars hold that passages of the Quran which draw resemblance between man and God are *Mutashabihat*. Some scholars hold there is no *Mutashabihat* except *Harful Muqattaat*. *Mutashabihat* do not occur in the legal texts. (Please see the *Tafsir "the Message of the Quran by Muhammad Asad, Appendix*).

From the point of view of scope, words are classified into ***Amm*** (General) and ***Khass*** (specific). *Amm* is basically a word which has a single meaning and which applies to many things, not limited in number, and it includes everything to which it is applicable. *Insan* (human being) 'whoever' (in a conditional speech) are example of *Amm*. When the article *Al* (the) precedes a noun, the noun becomes *Amm*. The Arabic expressions *Jami* (all), *Kaffah* (all), *Kull* (all, entire) when precede or succeed a word, the word becomes *Amm*. An indefinite word

(al-Nakirah) when used to convey the negative becomes *Amm*. For instance the Hadith *'la darar wa la dirar fil Islam* (no harm shall be inflicted, no harm shall be accepted), When a command is issued by *Amm* words, it shall be applicable to all it applies. In determining the scope of *Amm*, reference is made not only to the rules of the language but also to the usage of the people; and in case of conflict, priority is given to the latter. *Amm* can be of 3 types –

- a) Absolutely general [ref. The words "*ma min dabbatin*" in Hud 11:6]
- b) *Amm* which is meant to imply Khas [Al Imran : 97].
- c) An *Amm* which has been specified elsewhere [ see Baqarah : 228 and Ahzab : 49 together, see also usual text books for other examples and explanations].

The word "man" (in Arabic meaning he who) is *Khas* in application but when used in conditional speech it becomes *Amm*. (ref. The Al-Quran - 4 : 92, 2 : 185). *Khas* is a word which is applied to a limited number of things but applies to everything to which it can be applied. The words one, two, one hundred, Dina, Jannah. Imran, Bobby, a horse, a human being are *Khas*. Legal rules or commands conveyed in specific terms are definite in application and are not normally open to *Tawil*. There is general agreement that *Khas* is Qati (definitive), i.e. its meaning and application are beyond doubt clear.

Ulama have differed on *Amm*, whether it is Qati or Zanni. The majority holds it to be Zanni, minority holds it to be Qati. The result of this disagreement becomes clear in the event of conflict between *Khas* and *Amm*. In the case of two rulings on the same point, one *Amm* and one *Khas* (in the Quran or the Sunnah), according to the majority, *Khas* will prevail over the *Amm*. Minority holds that *Khas* specifies the *Amm*.

According to majority, *Khas* is Qati (*Amm* is not), as such it will prevail over *Amm*. According to minority, *Amm* is also Qati, and as such, *Amm* will be specified by *Khas*, if the two rulings are chronologically parallel. *Khas* will be abrogated if *Amm* is of later origin. *Amm* will be partially specified if *Khas* is of later origin. According to majority, an *Amm* (general) proposition may be specified by a dependent clause which may occur in the same text (same verse or in another text (another verse). This may be done by introducing an *Istisna* (an exception reference - 2 : 282), a *Shart* (condition, ref. 4 : 12) or *Sifah* (quality, ref. 4 : 23) or by indicating extent of application (ghayah, ref. 5 : 6).

The effect of *Amm* is that it remains in force unless specified. Even after partial specification *Amm* remains legal authority for unspecified portion. According to the majority *Amm* is speculative as a whole, whether before or after *Takhsis* (limitation) and as such open to *Tawil*. The cause (*Sabab*) of general ruling can not limit the application of the ruling. For instance, *Asbab an Nazul* (causes of revelation of verses of the Quran) will not limit the application of law based on the verse to the cause only.

## Mutlaq and Muqayyid

*Mutlaq* denotes a word which is neither qualified nor limited in its application. When we say a book', it applies to any book without restriction. *Mutlaq* is unspecified and unqualified. When *Mutlaq* word is qualified by another word or words, it becomes *Muqayyad*. For instance, 'a red book'. Whereas *Amm* and *Khass* deal with scope of the words, *Mutlaq* and *Muqayyad* deal with essentially qualification (though *Mutlaq* has resemblance to *Amm* and *Muqayyad* has resemblance to *Khass*). An example of *Mutlaq* is "*Fa tahriru rakabatin*" (freeing a slave) in Sura Al-Maida (5 : 92). An example of *Muqayyad* is "freeing of a believing slave in Sura Nisa (4 : 92).

*Mutlaq* remains absolute in application unless there is a limitation to qualify it. When *Mutlaq* is qualified into *Muqayyad*, the latter will get priority (see Quran 5 : 3 and 6 : 145). If there are two texts on the issue, one *Mutlaq* and the other *Muqayyad*, if they differ in their ruling and cause, both will operate, neither will be qualified. This is the majority view. Imam Shafii differs somewhat. He says that if the two texts vary in ruling but has the same cause, the *Mutlaq* will be qualified by the *Muqayyad* (see verses 5 : 7 and 4 : 43 of the Quran). Early Hanafi scholars think that if *Mutlaq* and *Muqayyad* differ in their causes, one does not qualify the other.

### ***Haqiqi* (literal) and *Majazi* (metaphorical)**

Words are normally used in their *Haqiqi* (literal) sense. Literal will normally prevail over metaphorical, particularly in law. Most of the Quran is *Haqiqi*. But *Majazi* also occurs in the Quran. For instance, the Quran says in 40 : 13 that "Allah sends down sustenance from the heavens which in fact means rain" (other examples, see textbook).

If the metaphorical (*Majazi*) meaning becomes dominant, it will prevail over the literal. For instance the literal meaning of "talaq" (that is release or removal of restriction) has been abandoned for metaphorical meaning of divorce.

*Haqiqi* has sub-divisions of linguistic, customary and juridical (please see the textbook). *Haqiqi* and *Majazi* have been subdivided into "*Sarih*" and "*Kinayah*".

*Sarih* (plain) is a word where the meaning is plain. You need not ask the speaker or writer to know the meaning. *Kinayah* (allusive) is a form of speech which does not disclose the intention of the speaker, you require further explanation from the speaker to know the intention. For instance, the use of the word '*Itaaddi*' (start counting). Divorce is not clearly indicated.

A *Mushtarak* is a word which has more than one meaning. '*Ayn*' in Arabic is a *Mushtarak* which may mean eye, water-spring, gold and spy. Plurality of meaning of *Mushtarak* may be because of usage or acquisition of metaphorical

meaning over time. The rule in regard to commands and prohibitions of the Shariah is that the lawgiver does not intend to hold more than one meaning of the *Mushtarak*. The *Mushtarak* is in the nature of *Mushkil* and it is for the expert (Mujtahid) to determine the correct meaning in the context (Mujtahids may differ in this - this happens always with Ijtihad).

### Textual Implications (Al-Dalalah)

There are two major analysis regarding levels of meaning of words and texts, the Hanafi and Shafii. There is not much difference in essence between the two. The Hanafi Ulema of Usul have distinguished four levels of meaning - First level is ***Ibarah al Nass*** (the explicit meaning). *Ibarah al Nass* is obviously perceptible from the text and also represents the principal theme of the text, if there are subsidiary themes also. (For example, limiting polygamy is a conclusion derived by *Ibarah an Nass* from the verse 4:3).

Most of the *Nusus* (legal texts) of Shariah convey their rulings by way of *Ibarah Al Nass*. *Ibarah Al Nass* conveys a *Hukm Qati* (definitive ruling) on its own and does not require corroborative evidence. Second level is ***Isharah Al Nass***. This is an indicative meaning or alluded meaning present in the text. An example of indicative meaning is the verse 2:236 where it is not clearly said that marriage can be contracted without prior fixation of marital gift but deeper investigation suggests so. It may be noted that in any event marital gift has to be given to wife in terms of verse 4 : 4 of the Quran.

Third method of deduction is ***Dalalah Al Nass*** (inferred meaning). This is a meaning derived from the spirit and rationale of a legal text even if it is not indicated in the text. For instance from verse 17 : 23, we can infer that not only we can not say "Uff" to parents, we can not use any abusive language. Forth method of deduction or level of meaning is ***Iqtida Al Nass*** (required meaning) that is a meaning on which the text is silent, yet it must be assumed to fulfil proper objective. For instance in verse 4: 22, it must be assumed that prohibition of marriage of mother or daughter means who are mothers or daughters through marriage. In case of conflict, the first level (*Ibarah Al Nass*) will take precedence over second level (*Isharah Al Nass*) and so on.

The Shafiis have classified Textual implications into two basic types - ***Dalalah Al Mantuq*** (pronounced meaning) and ***Dalalah Al Mafhum*** (implied meaning). *Dalalah Al Mantuq* has been divided into *Dalalah Al Iqtida* (required meaning) and *Dalalah as Isharah* (alluded meaning). *Dalalah Al Mafhum* (implied meaning) has been subdivided into *Mafhum al Muwafaqah* (harmonious meaning) and *Mafhum Al Mukhtalifa* (divergent meaning or meaning not in accord with the purpose of text). Shafiis do not accept *Mafhum al Mukhtalifa* unless they fulfil six conditions (see Kamali for explanation and examples). They have also imposed restrictions in regards to *Sifah* (attribute), *Shart* (condition) and *Ghayah* (extent).

Hanafi scholars are more opposed to *Mafhum Al Mukhtalifa*. They do not accept any meaning which is not in accord with the text or its spirit. They do not accept it at all in the case of interpretation of the Quran and the Sunnah.

## 5. Command, Prohibitions and Naskh

### Commands and Prohibitions

A command (*Amr*) is defined as a verbal demand to do something from a position of superiority to an inferior. Command (also prohibition) may occur in a variety of form.

Command is mostly in imperative mood. In some cases, use of a simple past tense in Arabic may also indicate command to do something [Sura Baqarah : 178]. A Quranic injunction may occur in a form of moral condemnation (Al-Baqara : 189).

Quranic command may be conveyed as a promise of reward or punishment (Quran - 4 : 13-14). An important question is : What is primary in command, is it obligation, a recommendation or simple permissibility? (as 'command' may mean all these). According to the majority, command implies obligation unless there are clues to suggest otherwise. Some have held that *Amr* (i.e. command) is in the nature of *Mushtarak* or which impart all (obligation, recommendation and permission) until determined what is primary. Some have held it implies only obligation or recommendation (*Nadb*). Some others have held that *Amr* means permission to do something. Clearly, the majority opinion is more rational and justified (that obligation unless proved otherwise).

Command (*Amr*) may sometimes mean permissibility. For instance when the Quran says, "*Kulu Washrabu*" (eat and drink - ref. 7 : 31), the context suggests that it is mere permissibility. Similar examples can be seen in verse 5:2 (*wa idha halaltum Fastadu*) and 62:10 (*Fantashiru fil Ard*). A command may convey a recommendation in some cases (Sura Baqara : 282). A command in a few cases may indicate threat, i.e. advise to desist from doing a particular thing (ref. 24:33 and 17:64). A command may imply supplication or prayer also (Ref. Baqara : 286). However command (*Amr*) mostly means obligation (Farz or Wazib, depending on whether the text and meaning both are *Qati* or not.)

Majority of Ulama hold a command following a prohibition means permissibility, not obligation (ref. Quran 5:2 and 62:10). According to majority , a single instance of compliance of the command is an obligation, in the absence of indications for repeated compliance. When a command is issued in conditional terms, then it must be complied whenever it (condition) occurs (Ref. The Quran 5:7). When a command is dependent on a cause or attribute, it must be fulfilled whenever the cause is present (Ref. Quran 17:18).

As regard immediate or delayed execution of an *Amr*, it depends on the text and its indications. If the command does not itself specify time limit (such as the times of prayers), it may be delayed. As regards whether the command implies the prohibition (*Nahy*) of the opposite, the majority thinks so.

Prohibition (*Nahy*) is the opposite of command. It is a demand to avoid doing of something. Prohibition may occur in the form of a statement (ref. Quran 2 : 221) or in the form of an order not to do something (62 : 9; 22 : 30). *Nahy* may convey *Tahrim* (total prohibition) or guidance (*irshad*) or reprimand (*tadib*). *Nahy* which implies reprehension may be seen in Quran 5 : 87. *Nahy* which conveys moral guidance may be seen in Quran 5 : 104. Majority hold that *Nahy* primarily implies *Tahrim*, if there is no other indication to think otherwise.

If the act (other than *Ibadat*) is not prohibited in itself but becomes prohibited because of an extraneous reason, it is *Batil* (void) according to Shaffi's and *Fasid* according to Hanafii's. *Batil* means, it can not be corrected (there are many instances where marriage becomes *Fasid* according to some scholars and *Batil* according to other scholars - so is the case of many business transactions - see a book on marriage or on business in Islamic Law). The position is different about *Ibadat* (devotional matters). The *Fasid* here is equaivalent to *Batil*. In other words, there is only *Batil*, not *Fasid* in the area.

Prohibition requires immediate and repeated compliance, whenever the prohibition is applicable. If the prohibition is conditional, it will be applicable where the condition is present (Ref. Quran 60 : 10). When a prohibition succeeds a command, it conveys *Tahrim* (illegality).

Explicit (*Sarih*) injunctions (whether *Amr* or *Nahy*) require total compliance. However, the spirit of the Law should also be kept in view, not only letters (as for instance in "*Fasawila zikrillah*" in Quran 62 : 9). Implicit injunctions, unless made explicit elsewhere, can be understood by scholars and they may differ therein. The means which lead to observance of command or prohibition are covered by the same ruling which applies to commands and prohibitions. Only a small portion of *Nasus* (texts) gives precise meaning. The larger portion of *Nasus* have to be interpreted by *Mujtahid* or scholars in the light of the general principles and objectives of Shariah.

### **Naskh (Abrogation)**

*Naskh* literally means obliteration. *Naskh* has been defined as the suspension or replacement of one Shariah ruling by another. *Naskh* operates only in law, not in beliefs. *Naskh* operates only when, (i) two evidences are of equal strength, (ii) they are present in 2 separate texts, (iii) there is genuine conflict which can not be reconciled, and (iv) the two texts are of two timeframe (one is later to the other).

There are scholars who do not agree that there is abrogation in the Quran (Ref: Principles of Islamic Jurisprudence by Dr. Hashim Kamali, Chapter on Naskh). They say that in Ayat 2 : 106 and 16 : 106, reference of "Ayah" is not to abrogation within the Quran but abrogation of earlier scriptures by the Quran. They also say that the 'so-called' conflict in the Quran can all be reconciled. Muhammad Asad has also mentioned in his Tafsir that there is no *Naskh* in the Quran. Abdul Hamid Abu Suleman feels that it was wrong on the part of earlier Ulama to turn *Naskh* into a doctrine of permanent validity instead of understanding it as the circumstance of history. (Ref. *Islamic Theory of International Relations*, a IIIT's publication). Abu Suleman suggests that *Naskh*'s application should be limited to clear cases only such as change of *Qiblah*.

According to the majority, there is *Naskh* in the Quran and the Sunnah. According to majority, *Ijma* can not abrogate a ruling of the Quran and the Sunnah. *Qiyas* can not repeal a text of the Quran or the Sunnah. Abrogation may be explicit (*sarih*) or implicit (*dimni*). According to Imam Shafii, there are two types of *Naskh* - (a) *Naskh* of Quran by Quran and (b) *Naskh* of Sunnah by Sunnah.

According to majority there are 4 types of *Naskh* : (i) Quran by Quran, (ii) Quran by Sunnah, (iii) Sunnah by Quran, (iv) Sunnah by Sunnah. There is also another classification : (i) *Naskh al Hukm*, (ii) *Naskh al Qiraah*, and (iii) *Naskh al Hukm Wal Tilwah*. **Naskh al Hukm** means that ruling has been abrogated but the text remains. **Naskh al Qiraah** means that the text has been abolished but the ruling remains. In **Naskh al Hukm wal Tilwah**, both the text and rulings are treated as abrogated. Of the above three, *Naskh al Hukm* has some basis but the other two have very weak basis. Sayyid Abul Ala Maududi has explained in his "*Rasail wa Masail*" (*Letters and Issues*), why *Naskh al Qiraah* is not acceptable?

There is difference between *Naskh* (abrogation) and *Takhsis* (specification or qualification of a general text). There is no real conflict in *Takhsis*. Another issue is whether addition (*Tazid*) amounts to abrogation. The majority answer is negative, which is correct. On the whole, I think the views of Dr. Abu Suleman deserves serious consideration.

## 6. IJMA (Consensus Of Opinion)

*Ijma* is the verbal noun of the Arabic word *Ajma'a* which has two meanings : to determine, to agree upon something. *Ijma* is considered the third proof of Shariah after the Quran and the Sunnah. As a proof of Shariah, it is basically a rational proof. An *Ijtihad* or an Interpretation of one or a few scholars when becomes universal, becomes *Ijma*.

The classical definition of Ijma, as laid down by Ulama of Usul, is categorical on the point that the universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive Ijma. Only such Ijma are considered binding by early Usuliun (Usul scholars). However universal Ijma are indeed very few. As evidence show, it is extremely difficult to prove Ijma on particular issues, particularly in the case of issues open to Ijtihad or tawil. There is no authentication of Ijma through Isnad (chains of narrators).

The only form of Ijma upheld by majority is the Ijma of Sahabis only. Majority of Ulama of Usul think that Ijma can take place on Sharii and devotional (Ibadah) and dogmatic (Itiqad) matters. For the first time Ijma occurred among the companions of the Prophet (SM). Ijma initially helped unity of the Ummah the in some matters. Ijma also ensures correct interpretation as broad consensus is unlikely to take place on incorrect matter. Ijma also enhances the authority of the rule on which there is Ijma. Unanimity of Ulama on an issue of a particular time is a requirement of Ijma. The agreement must be expressed by clear opinion of all scholars of the time. Ijma must consist of the agreement of all majtahidun. Though many Ulama consider majority to consist Ijma.

Any agreement of majority can be a proof but can not be a binding proof because to be binding, it must fulfill the conditions stated in the Ahadith quoted in support of Ijma (which is nothing short of Ijma of all people, at least all scholars.) There is no good ground to exclude any scholar of any school of Islam, as long as the school or group itself is not considered outside Islam by the Muslims.

The Ulama have on the whole maintained that the textual evidence in support of Ijma does not amount to conclusive proof. The Ayats quoted in support of Ijma (4:59, 4:83; 4:115, etc.) are not conclusive for Ijma. Imam Gazali says these Ayats are indications, not clear Nass on Ijma. Suyuti's interpretation is the same. Abduh does not find any Ijma in these Ayat. Al Amidi says, "these give rise to probability (Zann), not positive knowledge".(Ref; Dr. Hashim Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, U.K).

About 10 Ahadith are quoted in support of Ijma. Ahmed Hassan observes that these hadith are inconclusive on Ijma (Ref: Prof. Ahmad Hasan: The Doctrine of Ijma in Islam). A number of Ulama (including Shafii and Mutazila scholars) have said that Ijma of classical definition is not feasible because of the huge number of the Ummah or its scholars or distances. It is for this reason that Imam Shafii confines the occurrence of Ijma to the obligatory duties only. For the same reason, Zahiris and Imam Ahmad refer by Ijma to the consensus of companions only.

Abdul Wahab Khallaf is of the view that Ijma of classical definition is no longer possible in modern times (because of huge number of scholars spread over

continents). Khallaf is right. Old style Ijma is no longer possible. You can have only local Ijma, which is useful in lawmaking through Parliament but they can not be (by definition) binding forever.

Ijma are of two types - Ijma al Sarih (explicit Ijma) and Ijma al Sukuti (Ijma by silence). Ijma Sukuti (which occurs when one or a few scholars agree on something and no dissent is known) is not a proof according to a majority of scholars. According to the majority Ijma must be founded in a Textual authority (Quran and Sunnah). There are 3 views on whether Qiyas can be a basis of Ijma or not . Some agree, some disagree, some partially agree (Dr. Hashim Kamali, Principles of Islamic Jurisprudence).

Ijma can be transmitted by Ahad or Mutawatir report of scholars. There is no Mutawatir report of Ijma except those of Ijma of companions. Iqbal gives a proposal to transfer performance of Ijma to the legislative assembly, which is only possible form of Ijma in modern times. Iqbal is right. His ideas require acceptance. However, such Ijma can not be of universal validity nor can it be considered binding (unless made into a local law - which then remains valid until revoked). In conclusion we can say that Ijma can be of limited use only in future. Qiyas, Istihsan, Maslaha are more important in future.

## **7. QIYAS (Analogical Deduction)**

Literally Qiyas means measuring or ascertaining the length, weight or quality of something. Qiyas also means comparison to establish equality or similarity between two things. In the language of Usul, Qiyas is the extension of a Shariah ruling from an original case (Asl) to a new case (Far') because the new case has the same effective cause (Illah) as the original case.

The original case is regulated by a text of the Quran or the Sunnah and Qiyas seeks to extend the original ruling to the new case. The emphasis of Qiyas is identification of a common cause between the original and new case. Jurists do not consider law derived through Qiyas as a new law. However, for all practical purposes , Qiyas leads to new ruling on a different matter.

Qiyas is a methodology developed by jurists through which rulings in new areas are kept close to the Quran and Sunnah because new rulings are based on the Illah (causes) discovered in the legislation of the Quran and Sunnah. Rulings on new areas could diverge a lot, if Qiyas was not applied. This is a major justification for validity of Qiyas.

Qiyas is a rationalist doctrine (because intellect is largely used to find out the Illah), but in Qiyas personal opinion (Ra'y) is kept subservient to divine revelation (in that Illah is discovered from the text of the Quran and the Sunnah). Qiyas does not change any law of the text (Quran or Sunnah) for expediency. Qiyas

as a methodology means that the jurists accept that the rules of Shariah follow certain objectives (Maqasid) which are in harmony with reason. Zahiris (a group of literalist scholars) do not accept Qiyas. However, majority is right on this point.

Qiyas does not give rise to certainty. Qiyas is therefore speculative. Law derived through Qiyas can not be of same authority as that of textual ruling (of Quran or Sunnah). There can be difference of opinion on the law derived through Qiyas, as is the case with almost all Ijtihadi law. The essential requirement of Qiyas are Asl (original case, on which a ruling has been given), Hukm (ruling on the original), Illah (cause of ruling in the original case) and Far' (new case on which ruling is to be given). In the case of prohibition of wine drinking (Maida : 90) if it is to be extended to narcotic drugs. The requirement of analogy would be fulfilled in the following manner.

Asl	Far'	Illah	Hukm
Wine drinking	Taking narcotic drugs	In toxicating Effects	Prohibition.

One condition of Asl (the subject matter of original ruling) is that the Quran and Sunnah are the source the Asl (many scholars do not consider Ijma to be basis of Asl). According to majority, one Qiyas can not form Asl of another Qiyas. However, Maliki jurist Ibn Rushd thinks a Qiyas can be basis for another Qiyas. Modern jurists Abu Zahrah and Muhammad Al Zarka agree. Minority seems to be right as long as it does not contradict Nusus (clear texts or rulings) of the Quran and Sunnah.

Conditions pertaining to Hukm (a ruling in the original case) are :

- a) It must be a practical Sharii ruling (Qiyas does not operate in the area of belief).
- b) Sharii ruling must not be an abrogated one,
- c) The Hukm must be amenable to understanding through human intellect. Hukm must not be limited to exceptional situations (in that case it can not be basis of Qiyas, such as the prohibition of marriage of widows of the Prophet (SM) with others). Qiyas is operative or extendable in Hadud (prescribed penalties), according to majority.

New case on which ruling is to be given (Far') must not be covered by Nasus (texts). Qiyas ma'al tariq (analogy with discrepancy) is not permitted.

The effective cause (Illah) must be :

- a) Munasib (proper, according to Mujtahid or scholar of Fiqh)
- b) It must be a constant attribute (mundabit)
- c) It must be evident

According to majority, Illah must be muta'addi (that is transferable to other cases). Some hold different view with regard to Tadiyah (transferability). The

effective cause must not run counter to Nasus. The effective cause may be clearly stated in the nass (text) but such cases are not many (Ref. Quran : 4:43 , 59:7).

Arabic expression such as Kay-la (so as not to), li ajli (because of ), li (for), fa (so), bi (because), anna, inna, also indicate Illah in many cases (Ref. 5:38, 4:34). The word "Sabab" (cause) is also used as a substitute for Illah. However, some scholars make distinction between the two. The distinction is not substantive or even clear. However, Illah has become popular in usage.

When the Illah is not clearly stated in the nass, it is the duty of the Mujtahid to find out the Illah (reason) for the ruling of the text through Ijtihad. This is done by a 2-stage process. The starting point is "Takhrij al manat" (extracting Illah - manat is another word for Illah).

Now Illah for a ruling may appear to be a few instead of one. In that case the Mujtahid proceeds to eliminate the improper Illah and find out the proper (munasib) Illah. This process is called tanqih al manat (isolating the Illah).

Tahqiq al manat consists of investigation of the presence or otherwise of Illah in the new case (far') where the ruling is to be extended. (whether analogy can be extended to pick-pocket from thief or whether herbal drink has the same Illah as wine).

One classification of Qiyas is (a) Qiyas-al-awla, (b) Qiyas-al-musawi and (c) Qiyas-al- adna. Qiyas al-awla (superior Qiyas) means where the effective cause is more evident in the new case (far') than the original case (asl). [Ref. 17:23]. In Qiyas-al-musawi (analogy of equals), Illah is present in Asl and Far' equally (Ref. Quran- 4: 2 ). In Qiyas-al-adna (analogy of inferior), Illah in Far' is present less clearly than the original case (Asl). This Qiyas also is accepted by Usulian.

There is another classification of Qiyas into Qiyas jali (obvious analogy) and Qiyas Khafi (hidden analogy). Qiyas is accepted by majority including 4(four) Sunni schools and Zaydi Shias. Proofs of Qiyas are in verse 59:2 of the Quran, indications in verses 4:105, 2:79 and 59:7. Sunnah also supports Qiyas in that Ijtihad has been referred to in Sunnah and Qiyas is the most important method of Ijtihad (see Dr. Hashim Kamali's book Principles of Islamic Jurisprudence on Proof of Qiyas, see also discussion under "Talil" in the Chapter on Quran).

Arguments against Qiyas have been put forward by mainly Zahiri school. They contend that Quran 6:89 ('we have neglected nothing in the Quran') is against Qiyas. They also say, Qiyas is based on Illah which is based on conjecture. They also say Quran 49:1 is against Qiyas. All these are very weak arguments and most of Ummah could not accept them. Majority hold that Qiyas is applicable in Hadud (prescribed penalties). Hanafis say that Qiyas is applicable to "Tazir" penalties (penalties which have been laid down by Parliament/Courts - not by

Quran and Sunnah specifically) but not to Hadud (punishments prescribed in the Quran and the Sunnah). Hanafi opinion in this regard is more cautious.

Qiyas is redundant where Nass is there, according to majority. Some hold that Qiyas (which is speculative) can specify or qualify speculative of the Quran and the Sunnah. Some Ulama hold that Qiyas can take priority over Ahad hadith, if Qiyas is supported by other strong evidence. Qiyas will continue to be a major instrument of Ijtihad in future, along with Istihsan and Maslaha.

## **8. REVEALED LAWS PRIOR TO SHARIAH OF ISLAM & FATWA OF SAHABA**

### **Revealed Laws Prior to Shariah of Islam**

Islam believes that all truly divine laws emanate from Almighty Allah (Ref. Quran - 42:13) The Quran contains that the Torah was a source of guidance (Maida 5:44). The question is what it means in terms of source of law after the revelation of the Quran. The general rule to be stated is that laws revealed before Islam are not applicable to the Muslims (except as mentioned hereunder)

The Ahkam (laws) of Islam (Shariah) is self-contained. The rules of Shariah should not be sought in other religion because the rules of other religions do not constitute binding proof for the Muslims.

The Quran refers to the previous Shariah in three forms :

- (a) The Quran may refer to the previous Shariah and make it also obligatory on the Muslims. For instance, fasting was prescribed on the earlier nations and has also been prescribed for Muslims (Baqarah - 2:183). Such rulings of the previous Shariah are parts of Islamic Shariah
- (b) Secondly, the Quran (or Sunnah) may refer to a ruling of previous Shariah and may abrogate it. For instance, some restrictions on food on the Jews have been withdrawn from the Muslims in the Quran (Ref. 6 : 146) Muslims can not follow previous Shariah in these respects.
- (c) Thirdly, the Quran may mention a ruling of the previous Shariah without mentioning whether it is upheld or abrogated. (for instance Maida- 5:35, 5:48). Majority of Jurists consider these to be part of Shariah of Islam which should be followed. Minority does not accept this position. Majority position is correct in this respect according to Dr. Hashim Kamali.

## **Fatwa of Sahaba (companion of the Prophet, SM)**

Fatwa (opinion or ruling) of Sahaba is indeed a very important and deserves highest consideration, they being close to the Prophet (SM) and because of their direct knowledge from the Prophet (SM). There is some disagreement as to who is a Sahabi. Majority hold that anybody who met the Prophet (SM) while believing, is a Sahabi. Minority hold that "Suhbat" (continuity of companionship) is a requirement to call a person a Sahabi of the Prophet (SM) [Imam Shawkani, Irshad; also Dr. Hashim Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, U.K.]. Both points of view have justifications and can not be ignored. The fact of being Sahabi can be established by continuous testimony (tawatur) or by affirmation of any other companion or even by own claim (if the person is upright).

Fatwa of Sahaba means an opinion reached by a Sahaba by way of Ijtihad. As regards whether fatwa of Sahaba constitute a proof on succeeding generations, there are three views : First view is that - it is an absolute proof. The proponents of this view quote the Quranic verses 9:100, 3:109. They also quote Hadith like "my companions are like stars" or "Honour my companions". First view is held by Imam Malik. Imam Shafii and Ahmad Bin Hanbal also have been quoted in its support.

Against this view, it has been suggested that these references speak of the status and dignity of Sahaba. These are not categorical (Qaati) regarding compulsion to obey their decisions). Second view is - that Ijtihad of a companion is not a proof and does not bind the succeeding generations. Hanafi jurist Abul Hasan al Karkhi, Imam Ahmed (according to one view of him) and Asharite and Mutazilite scholars hold this view. They quote the Quranic Ayat 59 : 2 ("Consider, O You who have vision"). It is argued that the Ayat makes Ijtihad an obligation of all who are competent and makes no distinction between Sahabis and others. Imam Gazali and Amidi consider it preferred view. To me this is the appropriate view.

Third view is that of Abu Hanifa himself. He says that ruling of a companion is a proof if it is in conflict with Qiyas but not when it agrees with Qiyas. The aforesaid are the main views. There are some other views which may be seen in the books of Usul.

It can be concluded that the Fatwa of a companion is a source of guidance which merits careful consideration (though not binding except in case of their clear Ijma).

## 9. ISTIHSAN AND MASLAHA

Istihsan literally means to deem something preferable. In its juristic sense, Istihsan is a method of exercising personal opinion (ray) in order to avoid any rigidity and unfairness that might result from literal application of law. Istihsan as a concept is close to equity in western law. However equity in western law is based on natural law, whereas Istihsan is essentially based on divine law.

Istihsan is not independent of Shariah, it is integral part of Shariah. Istihsan is an important branch of Ijtihad, and has played a prominent role in adaptation of Islamic law to the changing needs of society. Istihsan has been validated by Hanafi, Maliki and Hanbali jurists. Imam Shafii, Shii and Zahiri Ulama have rejected it as a method of deduction. However, in effect, majority have accepted Istihsan.

It has been mentioned that decision of Umar Bin Khattab to suspend "hadd" penalty (penalty prescribed by the Quran and Sunnah) of amputation of hand during famine is an example of Istihsan. Here positive law of Islam was suspended as an exceptional measure in an exceptional situation. A major jurist Al-Sarakhsi considers Istihsan as a method of seeking facility and ease in legal injunctions and is in accord with the Quran (2:185). Kamali says that companions (Sahabi) and successors (Tabiun) were not merely literalist. On the contrary, their rulings were often based on their understanding of the spirit and purpose of Shariah. Dr. Hashim Kamali gives a new example. Oral testimony was the standard form of evidence in Islamic law. However, now in some cases photography, sound recording and laboratory analysis have become more reliable means of proof. Here is a case of Istihsan by which method we can prefer these means of proofs over oral testimony in many cases. (Dr. Hashim Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, UK).

Hanafi jurist Abul Hasan al Karkhi defines Istihsan as a principle which authorizes departure from an established precedent in favor of a different ruling for a stronger reason. The Maliki jurists are more concerned with Istislah (consideration of public interest) than Istihsan. They validate Istihsan as more or less similar to Istislah or as a part of Istislah.

There is no Qati (definitive) authority for Istihsan in the Quran and the Sunnah. However, verses 34:18 and 39:55 of the Quran have been quoted in support. Similarly a very famous Hadith : "La darara wa la dirara fil Islam" [no harm shall be inflicted or tolerated in Islam] has been quoted in support. Istihsan is closely related to 'ray' (opinion) and Qiyas (analogical deduction). Both in Qiyas and Istihsan, 'ray' is an important component, more heavily in case of Istihsan.

Sahabis were careful not to apply 'ray' at the expense of Sunnah. Ahlul Hadith mostly avoided using 'ray'. Most Fuqaha on the other hand liberally used 'ray' in deducing law and they came to be known as "Ahlur Ray".

Many hold that one kind of Istihsan is essentially Qiyas Khafi (Hidden analogy). They think that Istihsan is a departure from Qiyas Jali (obvious analogy) to Qiyas Khafi. There is another form of Istihsan in which exception is made to the general rule for the sake of equity and justice on the basis of some 'nass' (textual evidence), approved custom, darurah (necessity) or Maslaha (public interest).

Al-Shafii has criticized Istihsan on the basis of Quranic verses 4:59 and 75:36. However, these verses are not categorical on the issue of Istihsan. Al-Ghazali has criticised Istihsan but stated that Shafii's recognize Istihsan based on the Quran and the Sunnah. Al-Amidi ( a Shafii jurist) has stated that Al-Shafii also resorted to Istihsan. Modern jurists have stated that the essential validity of Istihsan is undeniable. Progress of Islamic law largely depends in the modern times on this source.

### **Maslahah Mursalah**

Maslahah literally means benefit or interest. When qualified as Maslahah Mursalah it refers to unrestricted public interest. Maslahah Mursalah is synonymous with Istislah which is also called Maslahah Mutlaqah. Al Ghazali thinks Maslahah consists of considerations which secure a benefit or prevent a harm. Protection of life, religion, intellect, lineage and property is Maslahah.

On the basis of Maslahah, the companions decided to issue currency, to establish prisons and impose Kharaj (agricultural land tax). The Ulama of Usul are in agreement that Istislah is not a proof in respect of devotional matters (Ibadah) and in respect of specific Shariah injunctions like shares of inheritance. The majority of Ulama maintain that Istislah is a proper ground for legislation. Al-Shatibi points out that this is the purpose of Quranic Ayat No. 107 of sura Al Anbiya that "We have not sent you but as a mercy for all creatures". There is support for Maslahah in the Quran in Sura Yunus (10:7), in Sura Hajj (22:78) and in Sura Al-Maidah (5:6).

The Ulama have quoted a number of Hadith in support, such as the following : (a) "No harm shall be inflicted or tolerated in Islam". (b) "The Prophet (SM) only chose the easier of two alternatives so long as it did not amount to a sin". (c) "Allah loves to see that His concessions (rukksah) are observed, just as He loves to see that His strict laws (azaim) are observed". The above would confirm that no unnecessary rigour is recommended in the enforcement of Ahkam and that the Muslims should avail of the flexibility and concessions of Shariah.

All the Khulafa-I-Rashidun acted in pursuance of Maslahah. Abu Bakr (RA) compiled the Quran. Umar (RA) held his officials responsible for abuse of public office. Usman (RA) distributed the authenticated copy of the Quran and destroyed the copies of variant texts. Ali (RA) held the craftsmen and traders responsible for the loss of goods that were placed in their custody.

Maslahah has been upheld by the majority of Ulama. However, strong support for it comes from Imam Malik. Maslahah has been divided into three types by Shatibi and some other scholars - (a) essentials [daruriyyat], (b) the complementary [hajjiyat] and (c) beautifications [tahsiniyaat] (Ref: Shatibi: Al-Muwa fiqat). From the point of view of availability or otherwise of textual authority, Maslahah has been further sub-divided into the following :

- (a) Al-Maslahah al-Mutabarah [accredited Maslahah] which has been upheld in the Shariah such as defending the right of ownership by penalizing the thief.
- (b) Maslahah Mursalah is that which has neither been upheld nor nullified by the Shariah such as provision in law in many Muslim countries for documentary evidence to prove marriage or ownership of property.
- (c) Maslahah Mulgha which has been nullified either explicitly or by indications in Shariah.

To validate Maslahah the following conditions have to be met : a) Maslahah must be genuine, (b) Maslahah must be general (Kulliyah) - that is it secures Maslahah for all. (c) it must not be in conflict with clear Nass. In his book "Masalih al Mursalah", Al Tufi maintains that except for Ibadah (devotional matters) or specific Shariah injunctions, Masalih (plural of Maslahah) should take precedence over other proofs. However, this view is not held by majority.

As regards relation among Qiyas,- Istihsan and Istislah, - it may be stated that Qiyas and Istihsan are essentially based on Illah in the Nasus (hidden or obvious). Law is expanded by Qiyas or Istihsan on the basis of Illah of Nasus. But when law can not be made on the basis of Nasus or through Qiyas and Istihsan, law is made on the basis of Maslahah or public interest. A group of scholars have seriously disagreed with Maslahah. But they are a minority and their arguments are not very solid. To meet the new situations in the changing world, Maslahah is a major instrument in the hands of jurists of Islam. (Ref: Islamic Jurisprudence: Dr. Hashim Kamali, Islamic Texts Society, Cambridge, U.K.)

## 10. Urf and Istishab

### URF (Custom)

Urf (custom) is defined in Usul as "recurring practices which are acceptable to people of sound nature. Urf and its derivative 'Maruf' both occur in the Quran, mostly in the sense of "good" (as opposed to "bad or evil"), adherence to Allah's injunctions (The Quran - 3:110; 7:199). However, "Urf" has been used in the sense of custom also in some places in the Quran (Ref. 2:233 with regard to maintenance of children).

The Shariah, therefore, has in principle approved custom in determination of rules regarding 'halal' and 'haram'. Fuqaha also adopted Urf in the determination of the Ahkam of Shariah. The rules of Fiqh which are based on juristic opinion (ray) or Ijtihad have often been formulated in the light of prevailing custom. It is therefore permissible to depart from them if the custom on which they were founded changes in the course of time.

A rule propounded by some Fuqaha (Suyuti and Sarakhsi) is that "what is proven by Urf is alike that proven by Shariah". This was adopted by Turkish Khilafat in Al-Majallah (a major book of codification of law). However, this rule is applicable in the case of Urf of the Muslim nations and when the Urf is not in conflict with the rules, essence and spirit of Shariah. Urf of non-Muslim societies must be very carefully examined.

Customs which were prevalent in Arabia in the lifetime of the Prophet (SM) and which were not over-ruled by the Prophet (SM) are treated to have received his tacit approval and considered as a part of Sunnah taqririyyah. An example of this is payment of Diat (compensation for murder) to the family of murdered by "Aqilah" (male kinsmen of the murderer - female relations have no obligatory liability in this regard, they can, however pay, if they want), where payment of Diat has been agreed upon. For seeing the rules of Qiyas and Diat, refer to some Islamic law books. (For instance the Pakistani Act on Qisas and Diat)

The following are the conditions of Urf :

- (a) It must be common and recurrent.
- (b) Urf must be in practice at the time of transaction, i.e. past Urf is no basis.
- (c) Custom or Urf must not violate the nass or clear stipulation of the Quran and the Sunnah.
- (d) Custom must not contravene the terms of a valid agreement (valid according to Shariah)

There is difference between Urf and Ijma. Urf is essentially a local or national practice whereas Ijma is an agreement of Ulama across places and countries. There are other differences which are not substantial in character. [See Dr. Hashim Kamali's Principles of Islamic Jurisprudence]. Urf has been sub-divided into Qawli (verbal) and Fiili (actual). Verbal Urf consists of agreement of people on the meaning of words. As a result the customary meaning becomes dominant meaning and literal meaning is reduced to the status of an exception. Actual Urf is the practice of the people.

Urf Qawli and Urf Fiili are both sub-divided into two further types :

- a) Al-Urf-al amm or practice of all people everywhere (such Urf is almost non-existent).
- b) Al-Urf-al Khass is the practice of a particular country or locality or some places. This is the Urf with which Usul is mostly concerned.

Urf has also been classified as Urf al Sahih (valid Urf - valid according to the Quran and the Sunnah) and Urf-al-Fasid (disapproved Urf, not valid according to the Quran and the Sunnah).

Dr. Jamal Badwai has divided Urf into 3(three) types - positive, neutral and negative. An example of positive Urf is generosity or hospitality. A neutral Urf is preference for particular diet of a particular place. A negative Urf is a tradition which goes against Islamic law and teaching. Dr. Jamal mentions that if a local custom is negative, then it must be rejected. (Ref. : Dr. Jamal Badawi, Islamic teaching Course, Lecture No. G-23).

Urf as a source of Islamic law is quite sensitive. In this area, we should depend on the views of the majority of senior scholars. Urf has been justified on the basis of Quranic Ayats 22:78, and 7:199, but these verses are not Qati in this respect. Some traditions have also been quoted in support (Ref: Dr. Hashim Kamali, Principles of Islamic Jurisprudence) but these are also not clear evidence in support. Urf is not an independent proof on its right. However, it can play useful part in interpreting and implementing Islamic law. It is also noted that the rise of codified statutory legislation in modern states, has to some extent reduced the need for Urf.

As we have noted earlier, rules based on Urf are liable to be changed. In future also rules based on Urf or Ijtihad will continue to change, where needed.

In conclusion, I will say that Urf is no longer an important proof or source of Islamic law. However, it may help sometimes in understanding, interpreting, and implementing Islamic law. A very cautious approach should be taken in this regard.

## Istishab(Presumption)

Istishab literary means courtship or companionship. In Usul-al-Fiqh, Istishab means presumption of existence or non-existence of facts. It can be used in the absence of other proofs (dalil) of Shariah.

It has been validated by a large member of scholars, though not all. In its positive sense, Istishab presumes continuation of a fact (marriage or a transfer of ownership) till the contrary is proved. However, the continuation of a fact would not be proved, if the contract is of temporary nature (for instance, Ijara or lease). Istishab also presumes continuation of negative.

Because of its basis in probability, Istishab is not a strong ground for deduction of the rules of Shariah. Hence when it comes in conflict with another proof (dalil) the latter takes priority. Istishab is of four types :

- a) Presumption of original absence (Istishab al-adam al-asli) which means that a fact or rule which had not existed in the past is presumed to be non-existent.
- b) Presumption of original presence (Istishab al-wujud al-asli). This means that the presence of that which is indicated by law or reason is taken for granted. For instance, a husband is liable to pay "Mohr" by virtue of existence of a valid marriage.
- c) Istishab al-hukm which presumes the continuity of general rules and principles of law. For instance when there is a ruling in the law (whether prohibitory or permissive), it will be presumed to continue.
- d) Istishab al-wasf (continuity of attribute) means to presume continuity of an attribute until the contrary is established (for instance, clean water will be continued to be treated as clean water).

The Ulama of Usul are in general agreement on the first three types of Istishab. There is more disagreement on the fourth.

Some important legal maxims have been founded on Istishab, such as :

- a) Certainty can not be disproved by doubt (Al-Yaqin la Yazul bil Shakk)/
- b) Presumption of original freedom from liability (bara'ah al-dhimmah al-asliyyah).

Hasan Turabi, the famous jurist in his book "Tajdid Al Fiqh Al-Islami" highlighted the significance of Istishab. He thinks that it has the potential of incorporating within its scope the concept of natural Justice and approved customs and mores of society.

## 11. Sadd al Dharai and Hukm Sharii

### Sadd al Dharai (Blocking the means)

Dharai is the plural of Dhariah which signify means. Sadd means to block. In Usul, it means blocking the means to evil. Sadd al Dharai is often used when a lawful means is expected to produce an unlawful result.

The concept of Sadd al-Dharai is founded on the idea of prevention of evil before it materializes. There are examples of Sadd al-Dharai in the Quran (for instance, 6:108; 2:104). The means must conform to the ends (objectives of Shariah) and ends must prevail over the means. If the means violate the purpose of Shariah, these must be blocked. The purpose (Maqasid) of Shariah are identifiable from the texts.

A general principle has been adopted by jurists that 'preventing harm takes priority over securing a benefit'. As such means, if they lead to evil, these must be rejected. Authority for Sadd al-Dharai is also found in Sunnah. Prophet (SM) forbade a creditor to take a gift from debtor (as it could lead to taking of interest). He(SM) also forbade killing of hypocrites (as it could lead to dissention within community, also lead to wrongful killing on suspicion).

Despite the aforesaid, the Ulama of Usul are not in agreement over Sadd al-Dharai. Some accept it - some do not accept it. However, Shatibi is of the opinion that most Ulama have accepted it in principle, they differ only in application. Abu Zahra is also of the same opinion. (Ref: Dr. Hashim Kamali; Principles of Islamic Jurisprudence).

Dharai have been divided into the following four types from the point of view of their probability of leading to evil ends:

- a) Means which definitely lead to evil. Such means are totally forbidden.
- b) Means which are most likely to lead to evil and rarely leads to benefit. Examples of this are selling weapons during war time and selling grapes to a wine-maker. Most Ulama have invalidated such means.
- c) Means which frequently lead to evil, but there is no certainty or even dominant probability. Ulama differ widely on the illegality of such means.
- d) Means which rarely lead to evil. Examples are digging well in a place which is not likely to cause harm or speaking a word of truth to a tyrannical ruler. Ulama have ruled in favour of permissibility of these means.

Sadd al-Dharai should not be used too much, particularly in the 3<sup>rd</sup> category stated above. Such use would render the "mubah" (lawful) and the Mandub (recommended) unlawful which can not be accepted.

Ibnul Arabi and Abu Zahra are in favour of moderation in its use. People of extremist tendencies can use sadd al-Dharai to restrict human freedom granted by Allah and the Prophet(SM) which is not good for the Ummah.

### **Value of Shariah Rules (Hukm Sharii)**

Hukm Sharii is the communication from the lawgiver (Allah and the Prophet[SM] on the authority of Allah) concerning the conduct of Mukallaf (on whom law is applicable, that is, a sane and adult person) which may be in the form of a demand or an option or only as an enactment.

When the communication is made in the form of a demand or option, the Hukm is called "Al-Hukm al-taklifi (defining law). If the communication is made in the form of an enactment of a Cause or condition only, it is called al-Hukm al Wadi (declaratory law) [see explanation below ].

Al-Hukm al- taklifi (defining law) may be in the form of Fard, Wajib, Mandub, Mubah, Makruh and Haram. According to majority, Fard and wazib are synonymous. If there is binding demand from the lawgiver to do something, it is wazib. However, the Hanafi's consider the demand Fard when both text and the meaning are definitive (qati) and wazib when either the text or meaning is speculative (Zanni - because liable to interpretation of meaning or investigation of authenticity).

Difference between Fard and Wazib has important consequence. Denial of binding nature of a command established by definitive proof (Fard by Qati evidence) leads to unbelief. However, denial of Wazib (according to Hanafi's) or 2<sup>nd</sup> category of Fard (according to the majority) lead to transgression (Fisq). Wazib (and Fard) has been variously classified into the following :

- a) Wazib ayni (personal obligation of all Mukallaf) and Wazib Kafai (collective obligation, performance of some of the community would suffice).
- b) Wazib Muwaqqat (Wazib contingent on time-limit such as Salah and Siam) and Wazib Mutlaq (absolute wazib which is free from time limit - such as Hajj).
- c) Wazib Muhaddad (quantified Wazib, such as Zakah and Salah) and Wazib Ghair Muhaddad (unquantified Wazib such as charity to poor, paying Mohr to wife).

A consequence of distinction between quantified wazib and unquantified wazib is that quantified wazib becomes a liability on the person who has not paid it in proper time.

Mandub (recommended) denotes a demand not binding on the Mukallaf. Compliance earns spiritual reward but no punishment is inflicted for failure. This is the difference between Wazib and Mandub. Examples of Mandub are creation of charitable endowment (Waqf) giving alms to the poor and attending to sick. Mandub is also called Sunnah, Nafl and Mustahab.

Sunnah (Mandub) has been classified into (a) emphatic sunnah (Sunnah-al Muakkadah (examples are adhan, attending congregational prayer) and (b) Supererogatory Sunnah (Sunnah Ghair al-Muakkadah). Examples are Nafl prayers and non-obligatory charity. Neglect of sunnah al-Muakkadah is blameworthy but not punishable. Neglect of Sunnah Gair al-Muakkadah is neither blameworthy nor punishable. Examples of Mandub in the Quran can be seen in verses 2:282, 24:3.

Haram (also known as Mahzur) is a binding demand of lawgiver to abandon something. The level of proof required to establish prohibition is the same as Fard (as explained by early Hanafi Ulama) and of Wazib (as explained by the majority Ulama of Usul).

The textual evidence for Haram may occur in various forms such as :

- a) It may start with "Hurrimat alaykum" (forbidden to you). [Quran - 5:3].
- b) It may be conveyed in negative terms such as "la taqtulu" (do not kill), "la takulu (do not eat or take). [Quran - 5:90; 2:188].
- c) It may be in the form of a command to avoid (Quran - 5:90, to avoid wine-drinking and gambling).
- d) It may be stated that it is not permissible (La yahilla lakum, Quran - 4:19)
- e) Prohibition may be proved by punishment provided for a conduct (Quran - verses on hadd penalties and also verses mentioning punishment of fire in the hereafter,

Prohibition has also been classified into :

- a) Haram li-dhatih (which is forbidden for its own sake (such as wine, gambling) and
- b) Haram li Ghayrih (which is forbidden for an external reason such as, marrying a woman only to make her legal for another man (tahlil).

Makruh is opposite of Mandub. It is preferable to omit it than to commit it. Committing Makruh is not liable to punishment or moral blame. This is the majority view. Hanafi's divide Makruh into : a) Tanzih and b) Tahrimi. According to Hanafis the commitment of Makruh Tahrimi entails moral blame but not punishment. There are traditions (Hadith) in which the word Kariha or its derivative has occurred. These are the textual basis for Makruh. (Ref: Dr. Hashim

Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, U.K.)

Mubah (also termed halal and Jaiz) is a communication of the lawgiver which gives option to the Mukallaf (The Quran - 5:6; 2:235, 2:173). The Ulama of Usul include "Mubah" under Hukm Shari although including it under al-Hukm al-Taklifi is on the basis of probability as there is basically no liability.

Al-Hukm al-wadi (declaratory law) enacts something as a cause (sabab), a condition (shart) or a hindrance (Mani) to the defining law. An explicit example is the hadith which says "there is no "nikah" without two witnesses. Thus the presence of witnesses has been made a condition of a valid marriage. Another example is the hadith, "there shall be no bequest to an heir" which enacts a hindrance (ma'ni) to bequest (wasiah).

Declaratory law is divided into (a) cause, (b) condition, (c) hindrance, (d) Azimah, and (e) Rukhsah. Azimah is the law as the lawgiver had intended in the first place without any softening for any reason (example : all Ibadah in normal circumstances). A law is a Rukhsah when the law embodies the exception to take care of difficulties (example is granting concession to traveller to break fast).

Rukhsah may occur (a) in the form of permitting a prohibited thing on the ground of necessity, (b) omitting a Wazib when conformity to wazib causes hardship (example is the provision for traveller to shorten salah or not to observe fast during Ramadan and (c) in the form of validating contracts which would normally be disallowed (for example, advance sale [salam] and order for the manufacture of goods [Istisnah], though the goods are non-existent).

There is another kind of Shariah values called Sahih (valid), Fasid (irregular) and Batil (void). The classification is made on the basis of compliance with essential requirements (arkam) and conditions (shurut) of Ahkam. When all these are fulfilled, the act is valid or sahih. If these are not fulfilled, the act is void or Batil.

The Ulama are in agreement that Ibadah can only be sahih or batil. In the matter of transactions also, the majority hold the same view. However, the Hanafis have validated an intermediate category in transactions called Fasid (irregular, not Batil) when there is some deficiency in the Shart (condition). If the deficiency is made up, it becomes Sahih.

The pillars of Hukm Shari are (a) Hakim or lawgiver, (b) Mahkum Fih or subject matter, (c) Mahkum Alayh, i.e. on whom law is applied. The source of all law in Islam is ultimately Allah (6:57; 5:45). Mahkum Fih denotes the acts, obligations of the Mukallaf which may be in the form of Wazib, Mandub or

Mubah. Mahkum Alaih deals with the legal capacity of the individuals who bear the rights and obligations imposed by Shariah.

A person acquires active legal capacity when he attains a certain level of intellectual maturity and competence. Active legal capacity is only partial in case of a child (because of age) and in case of a person in death bed.

Hukm Shari has also been classified into (a) haqq-al-Allah and (b) Haqq-al-Ibad. Haqq-al-Allah or the rights of Allah is so called not because Allah benefits from them but because these are beneficial for the community at large. In other words these are public rights. Worship, Hadud, Uqubah (punishments), Kaffarah, Jihad etc. are within rights of Allah.

## 12. Taarud

### Taa'rud (conflict of evidences)

Taa'rud means conflict. In Usul al Fiqh, Taarud means that two evidence of Shariah are of equal strength and they require opposite of each other. A conflict is thus not expected to occur if the two evidences are of unequal strength, because the stronger evidence will prevail. For this reason, there will be no conflict between a Qati and Zanni proof.

If, however, the opposite is required by 2 Quranic Ayat or by a Quranic Ayat and a Mutawatir Hadith (these two are considered equal in authenticity or by two Ahad Hadith, then, there is a conflict.

Conflict can only arise, if the rulings of the two evidence can not be reconciled, that is the subject matter of one can not be distinguished from the other or the time sequence of them can not be distinguished (that is it can not be ascertained which one is the latter).

A genuine conflict can hardly arise between Qati proofs. All such conflicts are apparent rather than real. Such apparent conflicts can be resolved by (a) reconciliation, (b) by specification or (c) by giving preference of one over the other.

A conflict between Nasus (texts of the Quran and the Sunnah) and Ijma is inconceivable as Ijma can not violate Nass.

A Mujtahid must therefore, try to reconcile the apparent conflict in which case both the evidence will be applicable in different sets of circumstances. If this is not possible, he will try to prefer one over the other, thus at least one evidence will be kept. If this is not possible, then, he would see the time

sequence and apply the principle of abrogation. In this way the later evidence will be retained and the earlier one in time will stand abrogated (however such cases are very few). If this is also not possible, both the evidences will be abandoned.

When two evidence in conflict are Amm (general), one may try to distinguish the subject matter of application (for instance one may be applicable to adult and the other to the minor or one may be applicable to married people and the other to unmarried people.) If one evidence is Amm and the other Khass, the solution is Takhsis al Amm (specification of a part of Amm).

Where preference has to be resorted to, the following rules of preference should be applied :

- a) Clear texts will be preferred over unclear texts
- b) Sarih will be preferred over Kinayah, Haqiqi over Majaji.
- c) Ibarah al Nass will be preferred over Isharah al Nass and so on.
- d) Mutawatir Hadith will be preferred over Mashhur and Mashhur will be preferred over Ahad.
- e) Hadith transmitted by Faqih or leading companions over hadith narrated by others.
- f) Prohibition takes priority over permissibility.

In the case of conflict of two Qiyas, if the two can not be reconciled, one may be given preference

### 13. Ijtihad

Ijtihad has been derived from the root word Jahada. Ijtihad literally means striving or self-exertion. Ijtihad consists of intellectual exertion. Ijtihad is a very broad source of Islamic law and comes after the Quran and the Sunnah.

The Quran and the Sunnah were completed at the time of death of the Prophet (SM). Ijtihad, however, continues and this is the source or methodology which gives Islamic law, its adaptability to new situations and capacity to tackle all new issues and problems. Propriety or justification of Ijtihad is measured by its harmony with the Quran and the Sunnah.

The sources of Islamic law other than the Quran and the Sunnah are essentially manifestations of Ijtihad. When clear rule is available in the text (Nass) of the Quran and the Sunnah, Ijtihad is not applicable. The findings of Ijtihad are essentially Zanni in character. The subject matter of Ijtihad is the practical rules of Shariah not covered by Nasus. Ijtihad is a duty of the scholars. If the issue is urgent, Ijtihad is compulsory on each competent scholar. (Fard al Ayn or Wajib

al Ayn). If the issue is not urgent, it is a collective obligation (Fard al Kafai or Wazib al Kafai).

A scholar is supposed to avoid Taqlid (blind following of another scholar). Taqlid is permissible only for a layman. Ibn Hazm believes Taqlid is not permissible for any one. Shah Wali Ullah says, Taqlid is not permitted for a person who can investigate even some matters (Ref. : Al-Insaf fi Bayan-al-Asbabil Ikhtilaf, by Shah Wali Ullah).

Ijtihad is validated by the Quran and the Sunnah and the practice of the Sahabas. The Quran - 59:2; 9:122; 29:69; 4:59 have been quoted in support of Ijtihad. These Ayats are Zahir in nature ( i.e. clear texts but liable to interpretation).

Several hadith are quoted in support of Ijtihad. Of them, two are very important. First is the hadith in which Muadh bin Jabal replied to the Prophet (SM) that he would resort to Ijtihad, if he does not find a solution in the Quran and the Sunnah and the Prophet (SM) affirmed him (Narrated by Abu Dawood). Second is the Hadith in which the Prophet (SM) said that the Mujtahid will get two rewards if he is correct and one reward if he commits a mistake (Abu Dawood).

Requirements of Ijtihad have been laid down by some scholars. Nothing has been mentioned in this regard in the Quran and the Sunnah. Abul Hussain al Basri, laid down for the first time the qualifications of a Mujtahid in the 5<sup>th</sup> century Hijra which was later accepted by Gazali and Amidi. It is true that Ijtihad is the function of the competent scholars. The following are the requirements :

- a) Good knowledge of Arabic language.
- b) He must be knowledgeable in the Quran and the Sunnah and related subjects.
- c) He must be generally knowledgeable of the Ijtihad carried out by previous scholars.
- d) He must know the Maqasid of Shariah.
- e) He must be an upright person and must be capable of distinguishing between strong and weak evidence.

It may appear that the qualifications are very tough. But it is not really so. These are all attainable in reasonable time by any sincere and competent person. The majority of Ulama hold that if a person is capable of making Ijtihad in one area, he can do Ijtihad in all areas. Procedure of Ijtihad is that the Mujtahid must first look at the Quran and the Sunnah. Only if solution is not found there, he may resort to Ijtihad. Rules of Ijtihad by way of Qiyas, Istihsan, Istislah have been laid down by usul scholars.

The majority hold that Ijtihad is liable to error. The minority hold that each of the several verdicts may be regarded as true on their merit. (Shawkani, Irshad).

Mujtahids have been classified in various ways by some scholars according to their understanding. The basic classification can be as follows :

- a) Major Mujtahids, who made their own rules of Ijtihad and did comprehensive Ijtihad.
- b) Other Mujtahids who in most part followed the rules of Ijtihad of other scholars and who undertook Ijtihad on that basis either fully or partially.

Some scholars were against Ijtihad after the first few centuries. This view has now been rejected. Shawkani said that this view is to be utterly rejected. Iqbal says that "closure of gate to Ijtihad is a pure fiction" Progress of Islamic civilization in future depend on Ijtihad by competent scholars. In future, more and more Ijtihad is likely to be collective. (Reference Dr. Hashim Kamali, Principles of Islamic Jurisprudence; Allamah Iqbal, Reconstruction of Religious Thought in Islam).

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