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Introduction to Principles of Islamic Jurisprudence and the Objectives of Shariah

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Notes on *Uṣūl al-Fiqh*

(1)

Introduction

It is important when studying a branch of knowledge for the first time to have in mind an overall perception of major issues including its definition, importance, origin and development, and major themes.

Definition:

Uṣūl al-Fiqh is a unique product of Islamic thought. It is one of the sciences designed and created by the genius Muslim mind and has left its impact on the legal and jurisprudential thought of other nations that came in contact with the Muslim world.

Uṣūl al-fiqh is a term that consists of two words. *Uṣūl* is the plural form of *aṣl* which denotes a variety of meanings including root, foundation, rule, basis, and principle. A common meaning these meanings have is that they stand for something upon which something else is based, built or established.

The word *fiqh* is the infinitive form of the verb *faqiha* in the past form and *yafqahu* in the present form. It denotes subtle understanding as used in the Quranic verse that reads, "فما لهؤلاء القوم لا يكادون يفقهون حديثا What is with these people that they can hardly understand any discourse?" [4:78] and in the prophetic ḥadīth " من يرد الله به خيرا يفقه في الدين The one for whom Allah intends good is given subtle understanding in the religion". The word *faqīh* stands for the one who practices and is well-versed in *fiqh* or rather the one who has *fiqh* as an aptitude.

In fact, the word *fiqh* was used in the beginning for knowledge of the *shari`ah* in general including its diverse aspects of belief, ethics, transactions, acts of worship,

etc. The term developed later on as different branches of the *shari`ah* acquired their specific nomenclature and has been confined to *the knowledge of practical shari`ah rulings acquired from the detailed evidences*. The terms of this definition exclude rational, conventional and experimental rules as well as belief and ethical ones.

So the *faqīh* is concerned with examining "detailed evidences" looking for *shari`ah* rulings. When looking for the rules regarding unmarriageable women, for example, he examines the Quranic verse that reads, "Forbidden to you [in marriage, as well,] are your mothers, and your daughters, and your sisters, and your paternal aunts, and your maternal aunts, and the daughters of a brother, and the daughters of a sister …" [4:23] contemplating on its explicit and implicit significances.

Now, it has become easy to understand the term *uṣūl al-fiqh*. It simply means the rules, principles and foundations that underlie the process of comprehending *shari`ah* texts and extracting rulings therefrom. It provides linguistic and rational tools and techniques that are necessary to ensure a sound understanding and interpretation of the texts. For example, one rule dictates that a command in an imperative mood basically denotes a binding obligation. Thus, the *faqīh* applies this rule to relevant imperatives in the texts of the Quran and the Sunnah as in the Quranic verse "O you who believe! Fulfill all contracts" [5:1] Still in the presence of certain circumstantial evidences the imperative may denote only giving a permission as in the Quranic verse that reads "وإذا حللتم فاصطادوا But when you lawfully end [the state of pilgrim sanctity], then you may [resume] hunting game." [5:2]

Unlike *fiqh*, *uṣūl al-fiqh* is concerned with the holistic rules that help the *faqīh* deduce and extract rulings and to approach *shari`ah* evidences from an overall perspective. For example, the Sunnah, in *uṣūl al-fiqh*, is studied as the second major

source of *shari`ah* rulings and thus discussions are held concerning its authority, classifications, how to verify the authenticity of a prophetic narration, etc.

Why do we study *uṣūl al-fiqh*?

The rules, principles and techniques studied in this science are necessary and indispensible for the seekers of *shari`ah* knowledge. In fact, the areas of study in *uṣūl al-fiqh* intersect with nearly all other branches of *shari`ah* knowledge and thus mastering this science facilities research in all these areas. *Uṣūl al-fiqh* is indispensible for the preparation of qualified *muftis* (jurisconsults) who shoulder a great responsibility in giving legal advice to Muslims. In addition, the practice of *ijtihād,* to which the *ummah* is in a dire need, heavily rely on mastering *uṣūl al-fiqh*

Uṣūl al-fiqh is as necessary for *fiqh* as logic for philosophy and grammar for speech. A discipline of knowledge provides criteria, rules and methodology for another.

The rise and development of *Uṣūl al-fiqh*

During his lifetime, Prophet Muhammad (peace be upon him) was the ultimate reference for his Companions. After his demise the *ṣaḥābah* (his Companions) had to face the challenges of their time and thus started to practice *ijtihād*. They enjoyed the privilege of being native Arabs who received the Quran, knew the reasons and circumstances of legislation, studied the *shari`ah* under the direct guidance of the Messenger of Allah, and conceived the spirit and objectives of the *shari`ah* from his practical application. Thus they practiced *ijtihād* to the best of their abilities employing linguistic techniques as well as legal and jurisprudential rules they learned from the Quran and the Prophetic traditions. For example, with regard to the *`iddah* (waiting period) of a pregnant widow, we read two seemingly different Quranic injunctions. In one verse we read, " والذين يتوفون منكم ويذرون أزواجا يتربصن بأنفسهن أربعة أشهر وعشرا As for those among you who die and leave wives [behind,

your widows] shall keep themselves in wait for four months and ten [days].” [2:234] In another verse we read, “وأولات الأحمال أجلهن أن يضعن حملهن As for those who are pregnant, their stated term is whenever they deliver what they carry.” [65:4] Now, should a pregnant widow observe four months and ten days or her waiting period ends once she delivers her baby? This gave rise to differences of opinion even among the Companions of the Prophet. Some of them viewed that she should observe the longest period in her case while others maintained that the verse in *surat al-Ṭalāq* was revealed after the verse in *surat al-Baqarah* and thus overrules its signification. Both opinions are based on jurisprudential approaches and methodology. Thus, the rules and methodology of deduction and interpretation were already in practice. The *ṣaḥābah* passed their knowledge and methodology to the second generation, known as the *tabi`ūn*, who also practiced *ijtihād* and employed the same techniques. Students of knowledge started to record and write down scholars’ justifications and reasons for their opinions and interpretations. Scholars started to draw attention to some linguistic and jurisprudential maxims and principles and gradually the rules of jurisprudence began to take shape.

Some Ḥanifite scholars claimed that Imam Abu Yūsuf, the famous disciple of Imam Abu Ḥanīfah, left some writings on *uṣūl al-fiqh*. But this claim cannot be verified since it lacks historical evidence. The Imamites also claimed that Imam Abu Ja`far and his son Muhammad dictated some jurisprudential rules to their disciples. Still this claim is similar to the previous one. Therefore, it is historically known that the first to write exclusively on the principles of jurisprudence was Imam al-Shāfi`i in his masterpiece *al-Risālah*, though he also discussed issues related to *uṣūl al-fiqh* in his other books and treatises. His main intention was to defend the *shari`ah* against deviant interpretations by providing proper criteria and methodology for which he convincingly argued and laid strong foundations.

Al-Risālah gained favor with Muslim jurists and scholars who showed their interest in it at a variety of levels. Then writings on *uṣūl al-fiqh* started to develop; particularly after Greek logic has found its way to Islamic thought. A class of Muslim theologians, known the *mutakallimūn,* adopted a more theoretical approach focusing on the provision of abstract rules and principles without much attention to the existing practical applications and examples. Legal examples were used only for clarification, according to this approach. This rational perspective went to extreme when theological issues and even philosophical questions found their way to *uṣūli* discussions and writings.

On the other hand, there was another approach, assumed mainly by the Hanifites, who focused more on the deduction of rules from the practical examples and legal opinions adopted by their legal school. The principles and rules here were concluded by surveying legal opinions through the process of *istiqrā'* (inductive reasoning) as opposed to the *mutakallimūn* methodology that provided rules and criteria to judge legal opinions accordingly.

Since both approaches have significance in the formation of jurisprudential scholarship, a third approach has been adopted by late *uṣūli* authorship combining and harmonizing the privileges of both methodologies. Many of the late *uṣūli* writings of different legal schools have preferred this approach.

Famous *uṣūli* books based on the *mutakallimīn* approach:

-*Al-Burḥān fī Uṣūl al-Fiqh*, by al-Juwaynī

-*Al-Mustaṣfā* by al-Ghazālī

-*Al-Iḥkām fī Uṣūl al-Aḥkām* by al-Āmidī

-*Al-Maḥṣūl* by al-Razī

Famous *uṣūli* books based on the Ḥanifites approach:

-*Al-Fuṣūl fī al-Uṣūl* by al-Jaṣṣāṣ

-*Taqwīm al-Adillah* by al-Dabusī

-*Kashf al-Asrār* by al-Bukhārī

Famous *uṣūli* books based on the third approach:

-*Badī` al-Niẓām* by al-Sā`ātī

-*Jam` al-Jawāmi`* by al-Subkī

-*Al-Taḥrīr*, by Ibn al-Humām

A unique methodology was followed by Imam al-Shāṭibī who brilliantly discussed *uṣūli* issues from the perspective of *maqāṣid al-sharī`ah* (*sharī`ah* objectives). Nevertheless, this approach did not receive much attention until recent times when discussions on *maqāṣid al-sharī`ah* resurfaced and gained momentum.

Major Areas of Discussion in *uṣūl al-fiqh*

Ghazali skillfully gathered the scattered branches of the science of *uṣūl al-fiqh* under four major subjects that constitute the four *aqṭāb* (poles/corners) of this science. He borrowed the metaphor of the harvesting process to the process of extracting *sharīʿah* rulings from their prescribed sources.

As the ultimate goal is to know how to extract *sharīʿah* rulings from their sources, it becomes necessary to examine the nature of these rulings, the evidences, or sources, from which these rulings are to be extracted, the techniques of such deduction and extraction, and lastly the qualifications required in the person who should undertake the process of extraction. Metaphorically, the ruling is the fruit

(*thamarah*), the evidences are the sources of fruition (*muthmir*), the methods to approach evidences to extract rulings are the techniques of harvesting (*ṭuruq al-istithmār*), and the *mujtahid* (the practitioner of *ijtihad*) is the harvester (*mustathmir*).

(2)

Al-Ḥukm al-Shar`ī* (*Sharī`ah Ruling)

Technically, *al-ḥukum al-Shar`ī* refers to the Lawgiver's address as related to the conduct of the *mukallaf* (legally responsible person) which consists of a demand, an option or an enactment. The Lawgiver in Islamic context refers to Allah, Exalted be He, for lawgiving is one of His exclusive rights as well be discussed later. The divine address or communication has reached human beings through His Prophet Muhammad (peace be upon him) in the form of revelation that manifested itself in the Quran and the Sunnah. As will be clarified later, all other evidential sources of shari`ah rulings ultimately refer to divine revelation and serve as indicatives of the divine intent. Moreover, the divine communication under discussion is concerned with the conduct of the *mukallaf* which excludes belief and ethical issues as well as the narratives of the nations of old.

A "demand (or *iqtiḍā*)*"*" in the definition refers to the dos and don'ts; that is, what to be done and what to be avoided. An "option, or *takhiīr*" gives room and liberty for the *mukallaf* to do or not to do. The *ḥukm* in this case is called *mubāḥ*. An "enactment (or *waḍ`*)" is a different category that refers to Lawgiver's enactment of something to serve as a *sabab* (cause) or a *sharṭ* (condition) of obtaining something else or as a *māni`* (hindrance) against obtaining it.

Examples of a demand to do include the Quranic verses "يا أيها الذين آمنو أوفوا بالعقود O you who believe! Fulfill all contracts" [5:1], and "يا أيها الذين امنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه O you who believe! When you contract a loan between each other for a stated term, then write it down." [2:282] Examples of a demand to avoid include the Quranic verses "ولا تقربوا الزنا And you shall not ever approach illicit sexual intercourse" [17:32] and "ولا تقتلوا النفس التي حرم الله إلا بالحق And you shall not ever kill

any [human] soul that Allah has prohibited, except by what is [lawful and] right" [17:33]

Sometimes the imperative mood indicates *ibāḥah* (permissibility) as in the Quranic verse that reads, "فإذا قضيت الصلاة فانتشروا في الأرض But when the Prayer is concluded, then [you may freely] spread throughout the land and seek out the bounty of Allah"[62:10] This thus is a valid example for *takhiīr.*

Zinā (fornication) is *sabab* for the application of its *ḥadd* (prescribed penalty) as enacted in the Quranic verse that reads "الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة As to she who fornicates and he who fornicates, whip each one of them a hundred lashes" [24:2] and so is the theft crime for its prescribe penalty. *Wuḍū'* (ritual ablution) is a *sharṭ* (condition) for the validity of the Prayer as indicated by the Quranic verse that reads "...يأيها الذين آمنوا إذا قمتم إلى الصلاة فاغسلوا وجوهكم O you who believe! When you rise for the Prayer, wash your faces…" [5:6] Homicide is an example of hindrances enacted by the Shari`ah as it hinders the murderer from inheriting the person he/she killed as the Messenger of Allah said, "The murderer shall not inherit".

Ḥukm shar'i is divided into the two main varieties of *al-ḥukm al-taklīfī* (defining law) and *al-ḥukm al-waḍ`ī* (declaratory law). The former consists of a demand or an option, whereas the latter consists of an enactment only. `Defining Law' is a fitting description of *al-ḥukm al-taklīfī*, as it mainly defines the extent of man's liberty of action. *Al-ḥukm al-waḍ`ī* is translated as 'declaratory law', since this type of *ḥukm* mainly declares the legal relationship between the cause (*sabab*) and its effect (*musabbab*) or between the condition (*sharṭ*) and its object (*mashrūṭ*).

Ḥukm taklīfī falls within the capability of the *mukallaf* since one is demanded to comply with it. On the other hand, *ḥukm waḍ`ī* can be something within one's capacity such as fornication and theft as causes for their prescribed penalties; and

can also be something beyond human ability such as the apparent movement of the sun that determines the times of daily prayers and the appearance of the crescent as a cause for fasting Ramadan.

Ḥukm talkīfī is divided into five categories: If the demand to do something is definite with emphasis on doing it or with a warning against neglecting it, this is called *wājib* (obligatory); otherwise, it is called *mandūb* (recommendable). On the other hand, if the demand not to do something is definite with emphasis on not doing it or with a warning against doing it, this is called *ḥarām* (prohibited); otherwise, it is *makrūh* (undesirable). If something is declared permissible or a permission is given to do something, this is called *mubāḥ* (permissible).

Obviously, a demand to do something necessitates bringing it into existence, whereas a demand not to do it necessitates keeping it nonexistent.

Now, we discuss these categories in detail:

Wājib refers to what the Lawgiver has demanded the *mukallaf* to do in such a definite and emphatic manner that entails reward for compliance and punishment for noncompliance. This is known from the language used to express such a demand. Imperative forms are direct expressions of a command. Threatening of punishment, in this world and/or in the hereafter, for neglecting the demand also indicates its obligatoriness.

According to the majority of scholars, the two terms *wājib* and *farḍ* denote the same legal meaning and can be used interchangeably. The Ḥanifites, however, distinguish between the two terms based on the decisiveness of the underlying evidence. If the command is established by a *qaṭ`ī* (definitely indicative) expression in the Quran or the *mutawātir* Sunnah, they call it *farḍ*; but if established by a *ẓannī* (speculatively indicative) evidence, they call it *wājib*. The Ḥanifites also maintain that the

punishment for neglecting *wājib* is lesser than for neglecting *farḍ*. Moreover, denying *farḍ* takes the person out of the fold of Islam, whereas denying *wājib*, though a grave sin, does not have such a serious consequence.

Wājib can be classified based on different considerations.

If *wājib* must be observed within a specified time-limit, it is called *wājib muqayyad*. Obligatory daily Prayers and fasting in Ramadan are examples of this type. However, if *wājib* is free from such a limitation, it is *wājib muṭlaq*. Paying *kaffārah* (an expiation), for example, can be done anytime during one's life.

If *wājib muqayyad* is done within the prescribed time-limit, this is called *adā'* (prompt performance). If, however, it is done after the lapse of the prescribed time, this is called *qaḍā'* (belated performance); whereas if it is done for a second time within the prescribed time, this is called *i`ādah* (repetition).

Wājib can also be divided into *wājib muḥaddad* (quantified *wājib*) and *wājib ghayr muḥaddad* (unquantified *wājib*) depending on whether a certain quantity has been prescribed by the Lawgiver for its fulfillment. Thus, *zakāh*, *ṣalāh* and *ḥadd* penalties are examples of *wāib muḥaddad*, whereas the length of standing, bowing and prostration, *mahr* (dower) and obligatory *nafaqah* (spending) are examples for the latter. As a result, the quantitative aspect of *wājib ghayr muḥaddad* is flexible and left to human discretion to determine based on different factors, traditions, circumstances, etc.

As a consequence, if the quantified *wājib* is not discharged as determined, it constitutes a liability on the person (*dhimmah*) of the individual, as in the case of unpaid *zakah* or an unpaid debt. On the other hand, failure to discharge a *wajib ghayr muḥaddad* does not result in a personal liability.

Moreover, *wājib* is also divided into *wājib `aynī* (personal obligation) and *wājib kifā'ī* (collective obligation). The former refers to obligations to be discharged by every individual per se and cannot be fulfilled on his behalf, such as *ṣalāh* and fasting. The latter, however, consists of obligations the fulfillment of which is required from the Muslim community as a whole to the extent that if one or some individuals discharge such an obligation, the rest of the community is absolved. *Jihād* and *ḥisbah* (promotion of good and prevention of evil) are examples of such collective obligations. If there is only one person qualified to fulfill the collective obligation, it becomes a personal obligation upon him.

Mandūb refers to what the Lawgiver has demanded the *mukallaf* to do in such an unbinding manner that a reward is promised for compliance but no punishment ensues for noncompliance. An example of this is the demand to write down a loan contract in the Quranic verse "يا أيها الذين أمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه O you who believe! When you contract a loan between each other for a stated term, then write it down." [2:282] The imperative form here does not indicate an obligation because the next verse says "فإن أمن بعضكم بعضا فليؤد الذي اؤتمن أمانته But if you trust one another, then let him who is entrusted deliver his trust" [2:283] The same applies to the demand "فكاتبوهم إن علمتم فيهم خيرا Moreover, if those whom your hands rightfully possess desire a deed [of emancipation], then write it for them, if you come to know goodness in them." [24:33]

For the majority of scholars, such terms as *sunnah*, *nāfilah*, and *mustaḥab* are synonymous to *mandūb*. In addition, there are different degrees of *mandūb* demands. Some of them are strongly recommended such as the *watr* Prayer; others are only desirable such as praying four *rak`ah*s before *`Aṣr* Prayer. There are also recommendable etiquettes and virtuous acts such as the prophetic directions concerning the etiquettes of eating, drinking, applying perfume, gatherings, etc.

Lastly it is important to note that a Muslim may not neglect all *mandūb* acts as this denotes aversion to and disregard of the prophetic guidance.

Ḥarām is that which the Lawgiver has demanded to avoid and refrain from in such a definite and emphatic manner that entails reward for compliance and punishment for noncompliance. This is indicated by a prohibitive mood that can be expressed in a variety of forms. "لا تفعل do not do" is the most famous prohibitive form. Certain verbs denote prohibition in the imperative mood such as *dharr* (refrain from), *ijtanib* (avoid), and *utruk* (give up). In the Quran we read, " فاجتنبوا الرجس من الأوثان واجتنبوا قول الزور So shun the abomination of idol-[worship]. Moreover, shun speaking any false word" [22:30] A threat for the commission of an act is also indicative of prohibition as in the Quranic verses, " والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء فاجلدوهم ثمانين جلدة As to those who accuse chaste women [of illicit sexual intercourse] who then do not produce four eyewitnesses [to the very act], whip them eighty lashes" [24:4] and "إن الذين يأكلون أموال اليتامى ظلما إنما يأكلون في بطونهم نارا Indeed, those who consume the wealth of the orphan unjustly are only consuming fire into their bellies. For they shall roast in a flaming fire" [4:10]

The Hanafites, agree with the majority in calling this kind as *ḥarām* only if the forbiddance is established by a definitive proof. However, if it is founded on speculative evidence, they call it *makrūh taḥrīmī*, but not *haram*. The former resembles the latter in that the commission of both is punishable. But they differ from one another insofar as the denial of the *harām* casts the denier out of the fold of Islam, which is not the case with regard to *makrūh taḥrīmī.*

Ḥarām can be divided into *ḥarām li dhātihi* (that which is forbidden for its own sake) and *ḥarām li ghayrihi* (that which is forbidden because of something else). *Shirk* (associating partners with Allah), *Zinā,* murder, and theft are examples of *ḥarām li*

dhātihi due to their inherent enormity. Concluding a sale contract after calling for Friday Prayer and *taḥlīl* marriage (marriage with the intention of rendering the wife lawful for her ex-husband after divorce) are examples for *ḥarām li ghayrih* since sale contract and marriage are lawful in principle but the accompanying extraneous factors in both cases render them unlawful and forbidden.

Ḥarām li-dhātih may become permissible only in cases of *ḍarūrah* (necessity). Thus, uttering a word of *kufr* (infidelity) and drinking wine, for example, are only permitted to save one's life. *Ḥarām li-ghayrih*, on the other hand, may become permissible not only in cases of necessity but also to alleviate a hardship. Therefore, a physician may examine the private parts of a patient even when the illness does not constitute a threat to life.

Makrūh is that which the Lawgiver has demanded the *mukallaf* to avoid and refrain from in such an unbinding manner that a reward is promised for compliance but no punishment ensues for noncompliance. This can be known by means of *qarā'in* (contextual or circumstantial evidences) that alleviate the prohibitory tone from absolute forbiddance to undesirability of the act. Obviously, the commission of *makrūh* does not entail punishment or sinfulness.

According to the Ḥanifites, this kind is called *makrūh tanzīhī* as opposed to *makrūh taḥrīmī* mentioned above.

Mubāḥ is that concerning which the Lawgiver has given the option for the *mukallaf* to do or not to do insomuch that neither reward nor punishment ensues for either its commission or its negligence. There is a variety of ways to express such permissibility. One of these ways is an open declaration of permissibility as in the Quranic verse that reads, "اليوم أحل لكم الطيبات وطعام الذين أوتوا الكتاب حل لكم This day: made lawful for you are all wholesome things. Thus the food of those who have been

given the Scripture is lawful for you." [5:5] Another way is to negate sinfulness and liability as in the Quranic verse that reads, "ولا جناح عليكم في ما عرضتم به من خطبة النساء Moreover, there shall be no blame on you [believers] wherein you allude to a marriage proposal regarding [such] women [in waiting]." [2:235] An imperative mood may also indicate permissibility in the presence of *qarā'in* as in the Quranic verse "وإذا حللتم فاصطادوا But when you lawfully end [the state of pilgrim sanctity], then you may [resume] hunting game." [5:2]

It is noteworthy that certain *mubāh* acts may not be neglected altogether. Eating, for example, is basically permissible, but it is forbidden to abstain from eating until one dies. Similarly it is permissible for the husband to have intimate relation with his wife whenever he wants, but it is forbidden for him to refrain from sexual relation with her altogether since this causes harm to her. In this case, she may raise the issue to the Muslim judge to ask for divorce.

(3)

***Al-Ḥukm al-Waḍ`ī* (declaratory law)**

It can be defined as the Lawgiver's address as related to the conducts of the *mukallafīn* which enacts something into a *sabab,* a *sharṭ* or a *māni`*. Hence, these three constitute the divisions or types of *ḥukm waḍ`ī.*

Sabab: Literally *sabab* indicates something that leads to something else as we can understand from the Quranic verse that reads, " وآتيناه من كل شيء سببا Moreover, We endowed him with [magnificent means to attain] a way to [nearly] all things [he endeavored]" [18:84] Technically it stands for what the Lawgiver has identified as the indicator of a *ḥukm shar`ī* in such a way that its presence necessitates the presence of the *hukm* and its absence means that the *hukm* is also absent. So, it is a cause and effect relationship. For example, fornication and theft are causes for their respective *ḥadd* penalty and seeing the crescent of the month of Ramadan is a cause for the obligation of fasting. From these examples, we can divide causes into those that fall within the capacity of the *mukallaf* , such as fornication and theft and those that are beyond human capacity such as the appearance of the Ramadan crescent. Subsumed under the former category are contracts, whether created by unilateral or mutual will, that serve as causes for their consequential effects. In fact, there are various forms of causes that have been enacted by the Lawgiver.

The word *`illah* is used by some *uṣūl* jurists as synonymous with *sabah*. Still others maintain that if human reason can perceive the relation between the cause and effect, the cause here can be called as *sabab* and also as *`illah*. However, if human reason cannot perceive such a relationship, such as the relationship between seeing the Ramadan crescent and the obligation of fasting, then this cause is called *sabab* but cannot be called *`illah*. In other words, *sabab* is more general than *`illah* since the

latter is only used for rational causes whereas the former can be used for both rational causes and causes that cannot be rationalized.

***Sharṭ* (condition)** is an evident and constant attribute or quality whose absence necessitates the absence of *ḥukm* but whose presence does not automatically bring about its object (*mashrūṭ*) and it does not constitute an integral part of its entity. *Wuḍū'*, for example, is a condition for the validity of *ṣalāh* and its absence necessitates the invalidity of *ṣalāh*; still its presence does not necessitating performing *ṣalāh*. Another example is the presence of witnesses for a marriage contact. The same applies to all conditions enacted by the sharī`ah.

The definition of *sharṭ* obviously distinguishes it from the *sabab*, though the former normally complement the latter. Moreover, a condition, as stated above, does not constitute an integral part of the *mashrūt* (the object for which it is a condition) and this differentiates *a sharṭ* from a *rukn* (pillar/constituent) which constitutes an integral part without which an object cannot come into existence. If the condition is laid down by the Lawgiver, it is referred to as *sharṭ shar`ī,* and if it is stipulated by a *mukallaf*, it is referred to as *sharṭ ja`lī* (improvised condition). *Wuḍū'*, as a condition for *ṣalāh*, is an example of the former and the conditions made by parties of a sale contract serve as an example for the latter.

***Māni`*** (hindrance) is something whose presence either nullifies the *ḥukm* or the cause of the *ḥukm*. In both cases the presence of a *māni`* necessitates the absence of the *ḥukm.* Obviously we have two kinds *māni`*: one that affects the *sabab*; that is, its presence entails the nullification of the *sabab* and consequently the absence of the *ḥukm* and one that affects the *ḥukm*; that is, its presence entails the absences of the *ḥukm* itself in spite of the presence of the causes and the fulfillment of the conditions. For example, in spite of being a legal heir, one who kills his relative does not deserve

a share of his inheritance. Being a relative to the killed person is a cause to inherit him but being his murderer serves as a hindrance that nullifies that cause and deprives the killer of any share in the inheritance. This is an example of the first kind. An example of the second is paternity, which hinders retaliation: if a father kills his son, he is not liable to retaliation although he may be punished otherwise. Paternity thus hinders retaliation, according to the majority of scholars.

It is noteworthy that it is not permissible to intentionally create a *māni`* in order to avoid a *shari`ah* ruling. This would thus be subsumed under the category of forbidden *ḥiyal* (subterfuges). An example of this is to get oneself indebted in order to avoid the obligation of *zakāh*.

Rukhṣah (concessionary law) and _`Azīmah_ (strict law):

In *uṣūl al-fiqh* terminology, *rukhṣah* and *`azīmah* are used as two opposite terms. *`Azīmah* refers to the law as intended by the Lawgiver in the first place regardless of any circumstances that may affect the *mukallaf* while applying or complying with the law. In this sense, *`azīmah* is the law in its original and normal state. On the other hand, *rukhṣah* is considered in conjunction with attenuating circumstances. It thus constitutes an exception to the *`azīmah*. In other words, in normal circumstances, the *mukallaf* has to comply with the normal and original laws of the *shari`ah*, whereas in cases of abnormal circumstances license and concession may be granted insofar that the *mukallaf* can be absolved of an obligation or given a license to do what is, otherwise, prohibited.

Kinds of _rukhṣah_:

- Permitting a prohibited act on grounds of necessity, such as eating the flesh of a carcass or uttering a word of disbelief under coercion to save one’s life.

-Absolving the *mukallaf* of a *wajib* when conformity to that *wajib* causes hardship, such as the concession given to the traveler not to observe the fasting of Ramadan and to the one who is unable to stand to pray while sitting down.
-Validating transactional contracts which would normally be disallowed. For example, *salam* (advance sale) and *istiṣnā`* (order for the manufacture of goods) are all anomalous, since the object of contract therein is nonexistent at the time of contract, but they have been exceptionally permitted, according to a group of jurists, in order to accommodate the public need for such transactions.

All kinds of *rukhaṣ* (sing. *rukhṣah*) constitute exceptions that render permissible that which is normally impermissible. However, sometimes observing the *rukhṣah* is mandatory as in the case of eating the flesh of a carcass to save one's life. If one loses his life due to abstaining from observing such *rukhṣah,* he becomes sinful. Still, in some other cases, observing the *`azīmah* is more preferable than observing the *rukhṣah* as in the case of uttering the word of disbelief under coercion; particularly, if abstaining from uttering it vexes the disbelievers.

Ṣaḥiḥ (valid) and *Bāṭil* (void)

From the *shari`ah* perspective, validity of the acts of the *mukallaf* are determined by their fulfillment of *shari`ah* requirements. A valid act of worship or transaction is the one that entails its legal consequence in the sense that if it is an act of worship, the *mukallaf* is not required to do it again and if it is a transaction, the legal effects of the contract ensues. Thus, when we describe, for example, the fasting of a *mukallaf* as *ṣaḥīḥ,* this means that he has fulfilled the obligation and does not have to make it up. Likewise, when we describe a sale contract as *ṣaḥīḥ* this means that the purchaser is entitled to receive the commodity and the seller is entitled to receive

the price. The opposite of *ṣaḥīḥ* is *bāṭil* (void) which is a description given to the act of the *mukallaf*, whether an act of worship or a transaction, when it is in disconformity with *shari`ah* requirements; that is, when it is lacking a *rukn* (pillar) or *sharṭ* or its legal consequences are hindered by a *māni`*. *Fāsid* (corrupt) is a term used by the majority of scholars as synonymous with *bāṭil* to denote the same legal meaning. The Ḥanifites agree with the majority in terms of using *fāsid* and *bāṭil* in the same sense with regard to acts of worship as they are either valid or void and invalid and there is no intermediate category in between. However, with regard to transactions, they use *fāsid* as an intermediate category between *ṣaḥīḥ* and *bāṭil*. When the deficiency in a contract affects an essential requirement (*rukn*), the contract is null and void and fulfills no legal purpose. If, however, the deficiency in a contract only affects a condition, the contract is *fāsid* but not void, which means that, although deficient in some respects, it is still a contract and produces some of its legal consequences, but not all. Thus a *fāsid* contract of sale entitles the purchaser to own the object of sale when he takes possession thereof, but does not entitle the purchaser to the usufruct (*intifā`*).

The Ḥanifites define *fāsid* as something which is essentially lawful (*mashru`*) but is deficient in respect of an attribute (*waṣf*) as opposed to *bāṭil* which is unlawful (*ghayr mashru'*) on account of its deficiency in terms of both essence (*aṣl*) and attribute. The Hanafi approach to *fasid* is also grounded on the idea that the deficiency which affects the attribute, but not the essence of a transaction, can often be removed and rectified.

(4)

***Al-Ḥākim* (the Lawgiver), *al-Maḥkūm fīh* (the subject-matter of *ḥukm*) and *al-Maḥkūm `alayh* (the legal agent who is the subject of the divine law)**

Al-Ḥākim: In Islam, the only Lawgiver is Allah. No one has the right to enact and prescribe laws except Him. This is basically a belief issue that is firmly established by Quranic verses. Allah says what means " إن الحكم إلا لله Judgment belongs to none but Allah" [12:40] In three verses in surat al-Mā'idah the Quran declares " ومن لم يحكم بما أنزل الله فأولئك هم الكافرون And whoever does not rule by what Allah has sent down- then such as these are the disbelievers" [5:44], " ومن لم يحكم بما أنزل الله فأولئك هم الظالمون But whoever does not rule by what Allah has sent down- then such as these are the wrongdoers" [5:45] and "ومن لم يحكم بما أنزل الله فأولئك هم الفاسقون For whoever does not rule by what Allah has sent down- then such as these are the ungodly" [5:47] We read also in the Quran "أم لهم شركاء شرعوا لهم من الدين مالم يأذن به الله Or is it that they have associate-gods who have laid down for them [tenets] of religion, for which Allah has not given permission?" [42:21] Allah is the creator and is also the Lawgiver.

Therefore, Muslim scholars are in agreement that, with regard to legislation and Lawgiving, the role of human reasoning is confined to understanding, deduction, inference and application within the parameter of divine guidance and revelation. It does not have absolute authority to enact laws in its own right or else human will would be rival to divine will. In other words, Muslims scholars endeavor only to discover the intent of the Lawgiver using the linguistic and rational tools as presented in the science of *uṣūl al-fiqh*. Revelation to human mind is as indispensible as light to human eye.

***Al-Maḥkūm fīh* (the subject-matter of *ḥukm*)**

The Lawgiver's address is concerned with the acts and conduct of the *mukallaf* which constitute the subject matter of *ḥukm shar`ī*. The conduct which the individual is required to do, or avoid doing, has to fulfill the following conditions:

- It has to be known to the *mukallaf* so that he may be able to obey and comply. One has to have clear conception and understanding in this regard. Prophet Muhammad (peace be upon him) undertook to the responsibility of conveying and explaining *shari`ah* rulings as the Quran proclaims "وأنزلنا إليك الذكر لتبين للناس ما نزل إليهم" Thus to you We have sent down the [Quran as a final] Reminder, so that you may make clear to all people what has come down to them." [16:44] Muslim scholars have shouldered the responsibility after him. A Muslim also needs to identify him/herself with *shari`ah* rules to the best of one's ability. In principle, in a Muslim country, *shari`ah* laws and rulings are supposed to be available and thus easily accessible. Of course, not all *shari`ah* rulings are known to all Muslims. There are *aḥkām* that are known to all, others that are gradually propagated by scholars and preachers, and others that are known only to erudite scholars. Therefore, ignorance of such well-known *shari`ah* rulings as the obligation of *ṣalāh* and the prohibition of theft and fornication, is not an acceptable excuse in Muslim countries. However, some of the *aḥkām* that are well-known in Muslim countries could be less known in non-Muslim countries; particularly for newly converted Muslims.

-It has to be within the capability of the *mukallaf*. No law may demand something which is beyond the capacity of the individual, such as fasting for ten consecutive days without eating or drinking at all. The principle here is clearly declared by the Quran that "لا يكلف الله نفسًا إلا وسعها" Allah does not obligate a living soul beyond the limits of his capacity." [2:256]

As for the acts of the heart, there are certain acts that are obligatory and even constitute the foundations of faith, such as the basics of Islamic belief that have to be firmly ingrained into one's heart. Still there are other acts of the heart that are beyond human control, such as to love one child or one wife more than the others. One will not be held accountable for such feelings and emotions as long as they are not translated into acts of favoritism and unfair treatment. Therefore, one is demanded to observe just treatment but is not demanded to change such feelings.

Hardship in *shari`ah* tasks

The Quran commends striving and overcoming hardships and trials for the sake of Allah. Allah (Exalted be He) said in the Quran what means, " والذين جاهدوا فينا لنهدينهم سبلنا [as to] those who strive for Us [alone, against every evil], We shall, most surely, guide them upon Our pathways [to salvation]" [29:69] and "ومن جاهد فإنما يجاهد لنفسه Thus whoever strives [in the path of Allah] strives only for [the benefit] of his own soul." [29:6] Undoubtedly, there is a sort of bearable hardship involved in *shari`ah* obligations, such as the hardship involved in *Ḥajj*-pilgrimage and fasting Ramadan in the long days of the summer. Nevertheless, this kind of normal hardship is reasonable and bearable and, thus, cannot be a valid excuse for the unfulfillment of obligations or the commission of prohibited acts.

There is, however, another kind of unusual hardships which may constitute a cause for *rukhṣah*, such as the hardship of travelling which is a cause for certain *shari`ah* licenses and so is the case with certain kinds of sickness. The *shari`ah* does not approve getting oneself deliberately involved into unnecessary hardship and suffering. The Messenger of Allah (peace be upon him) saw a man standing under the sun while fasting. When he inquired, people told him that this man had vowed

not to sit or take a shade until he finishes his fasting. The Messenger of Allah said, "Tell him to sit down, take a shade and complete his fasting."

Al-Maḥkūm `alayh

This refers to the *mukallaf* who has to be able to understand the Lawgiver's address in order to be able to comply. This also necessitates his being sane. As there are different degrees of sanity and there is no way to determine the minimum degree, the Lawgiver has set reaching maturity as an indicator of the minimum degree of sanity that renders a person responsible both in this world and in the Hereafter. Thus, the *mukallaf* is the one who has reached the age of maturity while being sane. An insane person, hence, is not subject to *shari`ah* address and so is a child. *Shari`ah* rules that pertain to their wealth or ensue as consequences of their misconducts belong to the category of *ḥukm waḍ`ī*, not *ḥukm taklīfī*. The details will be given below when discussing the legal capacity.

But before that we need to answer a question about how can the non-Arabs be addressed by the *shari`ah* rulings while the message of the Islam is in Arabic and they cannot understand it? The answer is that the divine message had to be sent down in a certain language anyway and it is the responsibility of its recipients to convey it to other nations in their languages. This is what happened when the Messenger of Allah (peace be upon him) sent messages to the kings and emperors of his time and these messages were translated to their languages.

Al-Ahliyyah (legal capacity)

Ahliyyah is principally divided into two types: capacity to receive or inhere rights and obligations, referred to as *ahliyyat al-wujūb*, and capacity for the active exercise of rights and obligations, which is referred to as *ahliyyat al-adā'*.

Ahliyyat al-wujūb pertains to a certain attribute that qualifies man to receive rights and obligations known as *al-dhimmah*, which is close to "legal personality". This attribute is vested with every human being from the time of being a fetus in the womb until the time of death. *Ahliyyat al-Adā',* however, is founded on the capacity of the mind to understand and to discern. Since intelligence and discernment are hidden qualities, the law associated personal responsibility with the attainment of the age of maturity, which is something that can be established by factual evidence.

Both *ahliyyat al-wujūb* and *ahliyyat al-adā'* can be either deficient or complete. Accordingly, scholars have divided man's lifetime into four stages:

-From the time of being a fetus until the time of delivery: during this stage *ahliyyat al-wujūb* develops in a deficient way, which enables the fetus to receive rights, such as a share in inheritance or a legal will, but not obligations. *Ahliyyat al-adā'*, however, has no existence at this stage.

-From the time of delivery until reaching the age of discernment (seven years, according to the majority of scholars): in this stage *ahliyyat al-wujūb* becomes complete; still *ahliyyat al-adā'* remains nonexistent.

-From the age of discernment until the age of maturity: Now *ahliyyat al-adā'* starts to develop in a deficient way, which makes the discerning child's acts of worship valid and acceptable. Such a child can also conclude transactions that are utterly to his benefit, such as accepting gifts and donations. Acts and transactions that are open to both loss and benefit are valid only if approved by the child's guardian.

-After maturity, *ahliyyat al-adā'* becomes as complete as *ahliyyat al-wujūb*. Thus, every person who has acquired this ability is presumed to possess it unless there is evidence to show that he or she is deficient in intellect or insane.

(5)

***Al-Adillah al-Shari`ah* (Proofs of *Shari`ah*)**

The Arabic word *dalīl* (pl. *Adillah*) means proof, indication, or evidence. Technically, *dalīl* is an indication in the *shari`ah* sources from which a practical *shari`ah* ruling (*ḥukm*) is deduced. *Al-Adillah al-Shari`ah* (*shari`ah* proofs) in the science of *uṣūl al-fiqh* refer to the sources of *shari`ah* laws.

Some of these sources have gained the consensus of Muslim scholars; namely, Quran and Sunnah. *Ijma'* (consensus) and *qiyā* (analogical reasoning), however, have gained the agreement of the majority of scholars as sources of shari`ah laws. These four sources are widely known as *al-adillah al-muttafq `alayhā* (the agreed upon proofs/sources) There are still other sources over which Muslim scholars had different opinions such as *istiḥsān, maṣlaḥah mursalah*, and *`urf*, as will be discussed and explained later on.

Shari`ah* proofs can be divided into *adillah naqliyyah* (transmitted proofs) and *adillah `aqliyyah (rational proofs). The former refers to such proofs that are only known by way of transmission and human intellect has no role in the establishment of their authority, though most of them can be rationally justified. These are the Quran, the Sunnah, *ijmā'*, the legal opinion of the Companion, and *shar` man qablanā* (laws revealed before the advent of Islam). The latter, however, are the proofs that need rational justification for their authority, although they are dependent on the transmitted proofs in many ways. These include *istiḥsān, qiyās, maṣaḥah mursalah*, and *`urf*. This unmistakably exhibits the value of *`aql* (intellect) in the *shari`ah* and how harmoniously it works together with the revealed guidance.

Finally it is noteworthy that all *shari`ah* proofs/sources ultimately refer to the Quran and serve as explanatory to it.

The Quran

The Arabic word Qur'an literally means reading or recitation. For Muslims, it refers to the book that contains the speech of Allah revealed to Prophet Muhammad in Arabic and transmitted to us by continuous testimony, or *tawātur*. Muslims believe that it is so inimitable in wording, composition, and meaning that it cannot be accurately translated.

The Quran is divinely protected as stated in the Quran "إنا نحن نزلنا الذكر وإنا له لحافظون Indeed, it is We who have sent down the Reminder [to humanity of the way of Allah]. And, indeed, We shall [forever] preserve it." [15:9] Allah, exalted is He, challenged both the jinn-kind and mankind to bring forth the like of it " قل لئن اجتمعت الإنس والجن على أن يأتوا بمثل هذا القرآن لا يأتون بمثله Say: If all the people and all the jinn were to come together to bring about the like of this Quran, never would they bring about the like of it- even if they were staunch backers of one another." [17:88]

Scholars are in agreement that the entire text of the Qur'an is *mutawātir*; that is, its authenticity is proven by universally accepted testimony. It has been preserved both in memory and in written records throughout the generations of Muslims. Thus, nothing less that *tawātur* is accepted to establish the authenticity of the variant readings of the Qur'an.

The inimitability (*I'jāz*) of the Qur'ān is manifested in the following points, though is be confined to them:

a) The Language and Style of the Qur'ān
b) The Predictions of the Qur'ān
c) The stories of the Qur'ān
d) The beliefs and laws of the Qur'ān
e) The scientific facts of the Qur'ān

f) The effect the Qur'ān has on its listeners
g) The lack of contradictions in the Qur'ān
h) The ease by which the Qur'ān is memorized

The Quran has two approaches in the revelation of *aḥkām*: either to provide the detailed rulings and laws or to present the general rules leaving the details to the *ummah*. Examples of the former are the rules of inheritance, divorce, women's waiting period, the prohibition of *zinā* and theft and the permissibility of sale. Examples of the latter include the command to observe *shurā* (consultation), fulfill covenants, and cooperate with each other in matters of virtuousness and not to cooperate in matters of sinfulness and aggression. There are also Quranic verses that have laid down several legal maxims such as "وما جعل عليكم في الدين من حرج nor has He placed on you any [undue] strain in [your] religion" [22:78], " يريد الله بكم اليسر ولا يريد بكم العسر Allah intends for you ease, and does not intend for you hardship" [2:185] and "فمن اضطر في مخمصة غير متجانف لإثم فإن الله غفور رحيم But whoever is compelled by starvation [to eat of forbidden foods] without inclining to sin, then, indeed, Allah is all-forgiving, mercy-giving" [5:3]

The Qur'an often indicates the purpose, reason, objective, benefit, reward and advantage of its injunctions. The Qur'an addresses the conscience of the individual to persuade and convince him of the divine guidance with an allusion to the benefit that may be procured by the observance of its commands or the harm that will be avoided by complying with its prohibitions. This is a feature of the Qur'anic legislation which is closely associated with the process of ratiocination (*ta'līl*) and provides the *mujtahid* with a basis on which to conduct further enquiry into *ta'līl*.

The Sunnah

The Arabic word *sunnah* implies normative practice or an established course of conduct as we read in the Quran "سنة الله في الذين خلوا من قبل ولن تجد لسنة الله تبديلا [Such has been] the way of Allah with those who have gone before. And never will you find, in the [established] way of Allah, any alteration." [33:62]

The word *sunnah* is used by the *fuqaha'* (jurists) in the field of *`ibādāt* (acts of worship) as opposite to *wājib* to denote supererogatory acts of worship. It is also used as opposite to *bid`ah* (heretic innovation). The *muḥaddithūn* (scholars of hadith) use it for all that can be attributed to Prophet Muhammad, be it sayings, acts, tacit approvals or physical or moral qualities. The *uṣūli* scholars exclude physical and moral qualities and focus only on prophetic sayings, acts and tacit approvals because they are mainly concerned with the legislative aspect of his life.

Authority of the Sunnah: The Sunnah has been subject of various attacks throughout Islamic history launched by heretics and deviant sects. Recently orientalists and secularists have revived almost the same allegations and misconceptions casting doubts on its authority and veracity.

The Quran explicitly attests to the authority of the Sunnah as a source of legislation:

- The Quran describes Prophet Muhammad (peace be upon him) saying " وما ينطق عن الهوى إن هو إلا وحي يوحى Nor does he speak out of whim. It is none other than a [divine] revelation being revealed [to him]" [53:3-4]

-Clarification of the Quran is the responsibility of the Messenger of Allah as stated by the Quran "وأنزلنا إليك الذكر لتبين للناس ما نزل اليهم We have sent down the [Quran as a final] Reminder, so that you may make clear to all people what has come down to them." [16:44]

-The Quran is full of verses that command Muslims to obey the Messenger of Allah and follow his example. “ لقد كان لكم في رسول الله أسوة حسنةYet, very truly, in the Messenger of Allah there is an excellent model for you.” [33:21]

- There are warnings against disobeying his commands “ وما كان لمؤمن ولا مؤمنة إذا قضى الله ورسوله أمرا أن يكون لهم الخيرة من أمرهم ومن يعص الله ورسوله فقد ضل ضلالا مبينا Thus it is not ever [befitting] for a believing man or a believing woman, when Allah and His Messenger have decreed a matter, to have for themselves a [contrary] choice in their affairs. For whoever disobeys Allah and His Messenger has truly strayed into clear misguidance.” [33:36]

Classification of the Sunnah

The Sunnah can be divided into three types: *qawlī* (verbal), *fi`lī* (actual) and *taqrīrī* (tacitly approved).

Verbal Sunnah refers to all prophetic words and statements. There are thousands of examples for this type such as the Prophetic statements “ إن الدين يسرThe religion [of Islam] is easy”, “المسلم من سلم المسلمون من لسانه ويده The [true] Muslim is the one who Muslims are in safe from his [evil] tongue and hands”,”من رأى منكم منكرا فليغيره whoever sees *mukar* (anything disapproved by the *shari`ah*) let him change it.” Of course, as a human being, Prophet Muhammad (peace be upon him) uttered so many sayings for different purposes including mundane ones as in the case of his advice to some farmers to inoculate palm-trees, which proved to be an incorrect procedure. Scholars of *fiqh* and *uṣūl*, however, are mainly concerned with the legislative side of the prophetic sayings.

Actual Sunnah refers to the prophetic acts, deeds, and practices such as when performing *ṣalāh*, *hajj* rituals and fasting and collecting *zakāh*. These acts are reported by his Companions.

In general, we can classify prophetic acts into the following categories:

-Acts done by the Prophet (peace be upon him) as a man and a human being. These are non-legal and do not constitute a part of the *shari`ah*; nevertheless, Abdullah ibn `Umar was keen to trace and follow the example of the Prophet even in such matters out of his love for him. This category includes also such acts that are based on human experience such as fight tactics in the battles during his lifetime. We may here recall the incident where al-Ḥubāb ibn al-Mundhir gave advice regarding the strategic location of the Muslim army, which gained favor with the Prophet (peace be upon him).

-Acts exclusively legislated for Prophet Muhammad (peace be upon him). Examples of these include fasting consecutive days without breaking fasting, marrying more than four wives together, and the prohibition of marrying his wives after his death. These also do not have legislative aspects with regard to Muslims.

-Acts and practices that clarify Quranic injunctions such as his clarification of how to pray, how to perform *ḥajj* and how to apply theft penalty. This can be known either through the Prophet himself telling that he did that as a clarification of a Quranic injunction or though *qarā'n* (circumstantial evidences). An example of the former is his saying "صلوا كما رأيتموني أصلي Pray as you see me praying" and of the latter is his application of the theft penalty identifying the part of the hand to be amputated. Acts under this category are obligatory upon Muslims to follow if they clarify a Quranic obligation or recommendable if they clarify a recommendable one.

-Acts that do not belong to any of the above categories and indicate the purpose of seeking nearness to Allah therewith, such as observing supererogatory prayers or fasting. Such acts are recommendable for Muslims to observe and follow. If they do not indicate the purpose of seeking nearness to Allah therewith, they are basically permissible.

Tacitly approved Sunnah: This type refers to Prophet Muhammad's silence and refrainment from disapproving an act that was done in his presence or, if not in his

presence, he came to know about. This silence is taken to be a tacit approval that proves the validity and permissibility of such an act because he would never remain silent if it were impermissible. A famous example of this type is the case of his silence when *al-ḍabb* (a desert lizard) was eaten in his presence.

(6)

Based on the number of its narrators, the Sunnah can be classified into *mutawātir* and *āḥād*, according to the majority of scholars. The Ḥanifites, however, add a third type and called it *mashhūr* (well-known).

-***Mutawātir* report**: literally, the word *mutawātir* denotes something that is continuously recurrent. Technically, it stands for a report transmitted by an indefinite number of people in such a way as to preclude the possibility of their agreement to perpetuate a lie. Such a possibility becomes inconceivable owing to their large number, diversity of residence, and reliability. This type of reports yields certainty. Thus, a *mutawātir* report must fulfill the following conditions:

- The number of reporters must be large enough to preclude their collusion in propagating falsehood. There is difference of opinion, however, over the minimum number required here, but all opinions lack convincing evidence. Thus, as stated by a number of scholars, the least number required for *tawātur* is unknown to us. Yet once certainty is attained, we come to know that the required number has been fulfilled.
- Such a number of reporters must be found in every generation of transmitters.
- The reporters must base their report on sense perception. If, therefore, a large number of people report that the universe is created, their report would not be *mutawātir* since this report is based on rational deduction.

Once these conditions are fulfilled, we come to know that the report is certainly attributed to the Prophet (peace be upon him). If all the reports are identical on the exact wording of the Hadith, this is called *mutawātir bi al-lafẓ* (verbal *mutawātir*), which is rarely found. An example for this kind is the hadith which reads, “Whoever lies about me deliberately must prepare himself for a place in Hell-fire.” However, if the reports of a large number of narrators have different wordings but have one

common meaning, this is called *mutawātir bi al-ma'nā* (conceptual *mutawātir*). Examples of this kind are numerous. The verbal and actual *Sunnah* which explains the manner of performing the obligatory prayers, the rituals of *hajj*, fasting, the quantities of *zakah*, and the implementation of *ḥudūd*, etc., all constitute conceptual *Mutawātir*.

***Mashhūr* (well-known) report**: according to the Ḥanifites, this term refers to such reports that were transmitted by a small number of companions but later on it has become well-known and transmitted by a large number of transmitters. An example of this kind is the hadith that reads, "Acts are only considered based on the intention." The Ḥanifites consider this kind as more cogent than the *āḥād* reports and less cogent than the *mutawātir* reports. For the majority of scholars, however, *mashhūr* reports are subsumed under solitary reports.

***Āḥād* (solitary) reports:** Apart from the Ḥanifites who singled out the term *mashhur* for the above concept, *āḥād* reports stand for such narrations that lack the conditions of *tawātur*¸ according to the majority of scholars, and thus engender *ẓann* (speculative knowledge). In fact, this type constitutes the major corpus of prophetic reports.

From early time in Islamic history, deviant sects cast doubt on the authority of solitary reports and their doubts have been echoed up to these days by the criticizers of the Sunnah. Scholars argued that the Quran itself attests to the validity of depending on solitary reports. Allah (exalted be He) said " فلولا نفر من كل فرقة منهم طائفة ليتفقهوا في الدين ولينذروا قومهم إذا رجعوا إليهمYet never should the believers march out to [fight] all at once. Why should there not be- from every division of them that marches out [to battle]- a company [that stays behind] to become learned in religion, so that they may admonish their people [about faith] when they return to them." [9:122] The Arabic word "طائفة (here translated as a company)" can be used to mean

one person or to mean a group of persons. This means that whoever learns Islamic teachings and admonishes others should be listened to as an authority to learn from. This is what the Prophet (peace be upon him) did during his lifetime when he sent individuals from among his companions, as teachers and judges, to convey the message of Islam to other towns and tribes. He also sent them to collect zakah. Moreover, the messages he sent to the kings and emperors of his time were carried and conveyed by individuals. The religious reports transmitted by the companions in all such cases are subsumed under the category of solitary reports.

The rejecters of *āḥād* reports argued that they yield speculation and thus cannot be trusted. However, this is a weak argument because authentic solitary reports yield *ẓann ghālib* (weighty presumption), which the *shari`ah* commands Muslims to follow. A lay Muslim person is required to seek fatwa from a trustworthy Muslim jurist and follow his guidance in religious issues, though this jurist is an individual person. A testimony given by two just persons constitutes enough evidence for a Muslim judge to issue a judicial decision accordingly. In addition, acceptance of solitary reports gained the consensus of the Prophet's Companions as reported in so many cases. They used to consult with each other and inquire about any prophetic guidance concerning the matter at hand. In many times only one or two would report a relevant prophetic tradition and the rest of the attendees would accept the report and act accordingly. Based on solitary reports, Abu Bakr gave the grandmother a share of inheritance, `Umar gave the wife a share in her husband's blood money and took *jizyah* (capital tax levied on non-Muslim citizens) from the Magians- to give just a few examples.

Scholars of *ahlu al-Sunnah,* including the four famous schools of *fiqh*, agree on the authority of *āḥād* reports as a source of Islamic legislation. However, there is difference of opinion among them concerning certain details. As a result, there are two approaches toward solitary reports.

According to the first approach, any hadith transmitted via an authentic and uninterrupted chain of trustworthy narrators should be accepted and acted upon unconditionally as a part of the *shari`ah*. This approach is mainly adopted by the Ḥanbalites, the Shafi`ites and the Ẓahirites.

The second approach, however, does not deem the authenticity of the chain of narrators enough to accept and act upon the hadith and therefore adds more conditions that serve as precautionary measures. Imam Abu Ḥanifah and Imam Malik maintain this perspective. Imam Malik stipulated that the ḥadith should not be in disagreement with the practices of the People of Medina. To Imam Malik, the practice of the People of Medina is more authoritative than a solitary report because Medina was the abode of the Prophet and his companions and thus the practices of its people must have been established on prophetic traditions handed down through the generations. Thus such established practices cannot be overruled by solitary reports.

Imam Abu Ḥanifah also maintained that a solitary report should not be accepted if the narrator's action contradicts his narration. This is why he did not accept the report of Abu Hurayran that reads, “When a dog licks a dish, wash it seven times, one of which must be with clean earth”, because Abu Hurayrah himself used to wash the dish three times only. Abu Ḥanifah also requires that the subject matter of *āḥād* report should not be such that would necessitate the knowledge of a vast number of people. For this reason he rejected the hadith that reads, “Anyone who touches his sexual organ must take a fresh ablution” arguing that had this Hadith been authentic, it would have become an established practice among all Muslims, which is not the case.

The majority of scholars, however, does not approve these additional conditions and are concerned only with the authenticity of the report.

Discontinued reports:

In principle, if a chain of narrators is interrupted anywhere, the report is to be rejected. But a number of Muslim jurists had a special stance toward what is technically known as *mursal* ḥadith. *Mursal* is defined as a *ḥadith* transmitted by someone who has not met with the prophet and yet quotes him directly. This transmitter may be from the second generation (*tabi`īn*) or the third one (*tābi`i al-tabi`īn*). This means that there is at least one, if not more, missing narrator. Apart from the *ṣaḥābah*, all other narrators have to be checked for their trustworthiness. Imam Shafi'ī does not accept *mursal* ḥaidīth unless it is reported by a famous *tābi`ī* who is known to have met with a number of the Companions and not to have reported weak and doubtful hadiths, such as Said ibn al-Musayyab, al-Zuhrī, and, al-Ḥasan al-Baṣrī. Al-Shafi`ī further stipulated that such a *mursal* be supported by another more reliable ḥadith with a continuous chain of transmitter, in harmony with a precedent of a Companions, or approved by a number of the Muslim scholars. Imam Ahmad gives such a *mursal* priority over *qiyās* when there is no other relevant narration with continuously connected chain of narrators.

Imam Abu Hanifah and Imam Malik are less strict in this regard and accept *a mursal* hadith which is transmitted by *tabi`ī al-tab`īn* if the transmitter is upright and trustworthy. Their point of view is that when an upright scholar believes in the reliability of a report, he tends to link it directly to the Prophet. The *mursal* narrations transmitted by Muhammad ibn al-Ḥasan al-Shaybānī are examples of such *mursals*.

(7)

Ijmā'

Ijmā' is the verbal noun of the Arabic word *ajma`a*, which means to determine. An example for this meaning is found in the Prophetic hadith " لا صيام لمن لم يجمع الصيام من الليل There is no [valid] fasting for him who has not intended to fast at night." *Ajma`a* also means to agree upon something and is usually followed by the preposition "على upon/on" as in the example أجمع القوم على الأمر *ajma` al- qawm `ala al-amr* (the people agreed on the matter).

Technically, it is the unanimous agreement of the *mujtahidīn* (practitioners of *ijtihād*) among the Muslim community of any period after the demise of the Prophet Muhammad on any *shari`ah* matter. Analyzing the definition we realize that the opinions of those who have not reached the rank of *ijtihad* are not considered in such a consensus. Moreover, all *mujtahidīn* must raise no disagreement for *ijmā`* to be concluded. If only one expresses a different opinion, no consensus can be claimed, though a number of jurists would take the agreement of the vast majority as a consensus discarding the disagreement expressed by a minority. However, the majority is not always right. In many a place in the Quran, the majority is mentioned in negative contexts being on the side of ignorance and disbelief. Thus, the truth can be at the side of the one who disagrees. In addition, if the *mujtahidūn* of one city or country, no matter how sacred or venerable it may be, reach an agreement, this is not *ijmā`* until all the *mujtahidūn* in other countries agree with them. Imam Malik, hence, received criticism for considering the practical consensus of the people of Medina. Of course, the subject of consensus has to be a *shari`ah* ruling to the exclusion of non-legal issues. Moreover, *ijmā`* had no place during the lifetime of Prophet Muhammad (peace be upon him).

**The authority of *ijmā`***: The value of *ijmā`* is that once it is reached, it cannot be repealed or overruled. This helps now in the face of secular attempts to make radical changes in *shari`ah* rules to cope with modernism.

We have three main positions towards the authority of *ijmā*:

-The majority of Muslim jurists approve the authority of *ijmā`* as a source of Islamic rulings.

-The Ẓahirites uphold that the *ijmā`* of the Companions is the only authoritative *ijmā`* since they were known and their agreement was conceivable.

-A group led by the Kharijites and al-Naẓẓām disapprove the authority of *ijmā`* arguing that its occurrence is not conceivable.

In support of their position, the majority of scholars quoted the Quranic verse that reads, " ومن يشاقق الرسول من بعد ما تبين له الهدى ويتبع غير سبيل المؤمنين نوله ما تولى ونصله جهنم وساءت مصيرا But whoever rebels against the Messenger after the [revealed] guidance has become clear to him, and follows other than the way of the believers, We shall turn him over to that which he [himself] has turned. And We shall roast him in Hell- and what an evil destination it is!" [4:115] Scholars argue that the Quranic phrase "and follows other than the way of the believers" means: and follows other than the way agreed upon by the believers; that is, their consensus. Prophet Muhammad (peace be upon him) is reported to have said, "My [Muslim] nation never agrees unanimously on [a matter of] misguidance." There are other prophetic reports that attest to the same meaning. Although most of their chains are not authentic, their totality attests to the purport of the above ḥadith.

The rejecters of *ijmā`* mainly argue that the occurrence of *ijmā`* as defined above is quite inconceivable. It is very difficult to know every *mujtahid* in person across the Muslim world. Even if we come to know them, how can we collect all of their opinions? Moreover, *ijmā`* must have a *mustanad* (referential basis). If this basis is *qaṭ`ī, ijmā`* will make no sense. If it is *ẓannī,* then how can a large number of people

agree upon one opinion regarding a speculative issue despite of their different personalities, backgrounds, and cognitive abilities? This is rationally farfetched, according to them.

The proponents of *ijmā`* counter-argue that these are mere doubts that cannot prevent the possibility of its occurrence. In fact, *ijmā`* has been reached by the Companions of the Prophet in many cases and since it occurred, even one time, no one can claim the impossibility of its reoccurrence. Examples of cases of *ijmā`* reached by the Companions include their agreement on the following:

-A grandmother is entitled to one sixth of the inheritance.

-The validity of marriage without prior agreement on the dowry.

- Brothers and sisters from the father side are entitled to the same share of inheritance as full brothers and sisters.

-The son prevents the son of the son from inheritance.

Moreover, if the basis of *ijmā`* is *qaṭ`ī, ijmā`* will make it more cogent and the *ḥukm* thus will have two supportive evidences instead of one. If the basis of *ijmā`* is *ẓannī*, *ijmā`* will lift it up to the level of decisiveness.

Besides, those who deemed it rationally farfetched to reach *ijmā`* founded their argument on the situation in the world at that time. It is true that the conclusion of *ijmā`* was difficult in the previous ages and this is why there are cases of reported *ijmā`* that proved untrue after careful examination. Still this does not necessitate the impossibility of its occurrence. Taking the modern technology into account, reaching *ijmā`* has become easier than before. In fact, there are calls and cries inside the scholarly community to activate the idea of *ijmā`* taking advantage of this technology.

Kinds of the *ijmā`*:

There are two kinds of *ijmā`*: *ijmā` ṣarīḥ* (explicit) and *ijmā` sukūtī* (tacit).

-explicit *ijmā`* refers to such a consensus where every *mujtahid* expresses his opinion and all opinions come to an agreement. This *ijmā`* constitutes a decisive and binding authority that cannot be repealed or overruled.

-Tacit *ijmā`* refers to such a consensus whereby some of the *mujtahidūn* of a particular age give an expressed opinion concerning an incident while the rest remain silent. The majority of jurists, who approve this kind of *ijmā`*, take this silence as indicative of their tacit agreement; otherwise, they would have expressed their disagreement. There are other jurists, however, who do not approve this kind of *ijmā`* arguing that we cannot take scholars' silence as indicative of their agreement. There are so many reasons, they further argue, that may cause a person to remain silent. Fear of a tyrant authority, thinking that others have expressed their disagreement and thus he does not need to express it, and feeling embarrassed of showing disagreement with certain scholars are among such possible reasons. Still, these are rational possibilities that can hardly occur all at once for all the scholars who remain silent. These may be thinkable with regard to a group of scholars in one country, but this cannot be the case with all scholars across the Muslim world. Besides, it does not behoove of Muslim scholars to conceal the truth for fear of tyrants.

Still there is a third approach in this context led by a number of jurists who took a middle way between the above two doctrines. According to this approach, this type of *ijmā`* does not constitute such a decisive, authoritative *ijmā`* as the first one. Still it constitutes a *ḥujjah ẓanniyyah* (presumptive authority) and is valid as a weighty factor to give preponderance to an opinion that entertains such *ijmā`*. Being a presumptive authority means that, unlike the first type, it can be repealed and overruled. This third approach thus has taken both arguments into account and stood in between, which gained favor with a number of later scholars.

**The basis of *ijmā`***: *Ijmā`*, according to the majority of scholars, must be founded either on a textual authority or on *ijtihād*. It can never be based on whimsical opinions that have no foundation in the *shari`ah* rules.

The Quran and the Sunnah constitute the main textual authority for *ijmā`*. The prohibition of marrying one's granddaughters is not mentioned explicitly in the Quran but *ijmā`* has been reached on such a prohibition based on the Quranic verse that prohibits marrying daughters. *Ijmā`* on giving a grandmother one sixth of the inheritance is based on a solitary prophetic report as mentioned above.

Dawūd al-Ẓahirī and al-Ṭabari maintain that *qiyās* cannot be a basis for *ijmā`* because it is based on analogical reasoning and it is unfeasible that all minds reach at the same conclusion. The majority of jurists, however, accept *qiyās* as a basis for *ijmā`* because it is based on a textual authority and even accept *ijtihad*, in general, as a basis of *ijmā`* so long as it is based on an acceptable source of *shari`ah* laws such as *maṣlaḥah mursalah*. The collection of the Quran was based on *maṣlaḥah mursalah* and so was the *adhān* suggested by `Uthman to draw people's attention to Friday Prayer before the imam's ascension on pulpit and both gained the consensus of the Companions.

***Qiyas* (Analogical reasoning)**

Literally, *qiyās* means measuring the length, weight, or quality of something. The Arabic expression, *qāsa al-thawb bi'l-dhirā`* means: The cloth was measured by the yardstick. *Qiyās* also denotes comparison, with a view to suggesting equality or similarity between two things. Thus, the Arabic sentence *Zayd lā yuqās ilā `Amr* means: Zayd cannot be compared with `Amr.

Technically, *qiyās* is the extension of a *shari'ah* ruling (*ḥukm*) from an original case (*aṣl*) to a new case (*far`*), because the latter has the same effective cause (*`illah*) as the former. The Quran, for example, forbade drinking wine because of

its intoxicating effect. Thus, whenever we have a beverage that has the same intoxicating effect as the wine we extend the rule of prohibition to it.

(8)

Authority of *qiyās*: The majority of Muslim jurists approve the authority of *qiyās* arguing that the Quran addresses human mind demanding it in numerous ways to reflect, contemplate, and take lessons. Stories of old nations are related and parables are set for minds to ponder on since same premises produce same conclusions. A direct Quranic injunction dictates, "فاعتبروا يا أولي الأبصار So derive a lesson, O you who have eyes to see!" [59:2] In other Quranic verses the Quran provokes reasoning, "أكفاركم خير من أولائكم أم لكم براءة في الزبر Are you disbelievers better than those [Allah destroyed before you]? Or is that you have immunity [against punishment inscribed] in the divine Writs?" [54:43] " أفلم يسيروا في الأرض فينظروا كيف كان عاقبة الذي من قبلهم دمر الله عليهم وللكافرين أمثالها Have they not, then, journeyed through the earth to see how [devastating] was the end of those [who belied God's messages] before them? Allh utterly demolished them. And for the disbelievers there is ever the like of it [looming]." [47:10] " أفنجعل المسلمين كالمجرمين مالكم كيف تحكمون Shall We, then, regard those who are Muslims, in willing submission to Allah [alone], as [equal to] the defiant unbelievers?" [68:35] Obviously, the verses tell the reader that the shari`ah brings similar things together and sets different things apart and that one should not expect different results if the premises are similar.

The Prophet Muhammad (peace be upon him) himself used analogical reasoning in a number of cases. On day Umar ibn al-Khaṭṭāb came to him feeling worried as he committed what he thought to be an enormous mistake. When the Messenger of Allah (peace be upon him) inquired about what happened, `Umar told him that he kissed his wife while fasting. Then the Messenger of Allah (peace be upon him) said, "What if you gargled your mouth with water?" `Umar said, "There is nothing wrong with that." He replied, "So what?" The Messenger of Allah (peace be upon

him) drew analogy between kissing and gargling mouth with water to show that the former is as permissible as the latter.

In another case, a man came to the Messenger of Allah telling him that his mother had made a vow to perform *ḥajj* but died before fulfilling it. The man asked if he had to fulfill it on her behalf. The Messenger of Allah (peace be upon him) said, "What if she had had a debt to be paid, would you have paid it?" The man said, "Yes" Then the Messenger of Allah (peace be upon him said, "The debt owed to Allah is worthier of being paid."

The Companions of the Messenger of Allah also employed such analogical approach. Umar in his famous epistle to his judge Abu Mūsā al-Ash`arī gave precious advice about the conduct and methodology that a judge should follow. In a part of this epistle he said, "Employ [deep] understanding regarding whatever of the Quran and the Sunnah has reached you. Then drew analogy between things and identify similar cases. Then deliberate on that which is more beloved to Allah and closer to the truth."

The proponents of *qiyās* also argued that the shari`ah rulings can be classified into two main categories: rulings that can be rationalized and rulings that cannot be rationalized. The latter category is confined to such ritual acts of worship as the number of *rakāt* (prayer units) and rounds of circumambulation around the *Ka`bah* in addition to the *muqaddarāt* (quantified injunctions) such as the penance of breaking oath, the penalty of fornication, shares of inheritance, etc. Apart from this narrow area of non-rationalized laws, most of the shari`ah laws are rational.

The opponents of *qiyās*, mainly led by the Ẓahirites, quoted such Quranic verses as "يا أيها الذين ءامنوا لا تقدموا بين يدي الله ورسوله O you who believe! Do not advance yourselves [in any affair] contrary to [the decree of] Allah and His Messenger." [49:1] They claimed that using *qiyās* falls under the prohibition mentioned in this verse because if the shari`ah is silent about an issue, no one may advance himself

before the decree of Allah and His Messenger. But this is not true, because *qiyās* is based on the rationale and effective causes of shari`ah laws, which are indicated, explicitly or implicitly, in shari`ah texts.

They also quoted the Quranic verse that reads, "ونزلنا عليك الكتاب تبيانا لكل شيء For We have sent down to you the [Quran as a revealed] Book, to make all things clear" [16:89] arguing that the Quran has clarified all laws, which is not true as well.

In addition, they quoted a number of the Companions condemning *ra'y* (personal opinion). Umar said, "Beware of the people of *ra'y*. These are the enemies of the Sunnah. They could not memorize *aḥādīth* and hence they spoke out of their own *ra'y*. Thus, they went astray and led others astray." Ali also said, "Had the religious [matters] been based on mere *ra'y*, the lower part of the *khuff* would have been worthier of being wiped over than the upper part." They argued that such statements criticize the use of *ra'y* and *qiyās* is nothing but a kind of *ra'y*. Still the *ra'y* censured in such statements is the one that is whimsical and goes contrary to *sharī`ah* proofs. As for the opinions that are formed after due contemplation and comprehension of *shari`ah* texts and proofs, these do not belong to this category and are actually commendable.

Finally, it is noteworthy that *qiyās* is a rational instrument to deduct and discover unmentioned *shari`ah* rulings just as the linguistic tools used for the same purpose. Both tools aim to understand the purpose and intent of the Lawgiver to comply with, not to enact laws in isolation of the divine guidance.

Types of *qiyās*:

There are three types of *qiyās*:

1) If the *`illah* is more evident in the new case than in the original case, this called *qiyās al-awlā* (analogy of the superior). For example, in *surat al-Isrā* the Quran prohibits saying *uff* (fie) to one's parents "فلا تقل لهما أف ولا تنهرهما then you shall not say to either of them [even so much as]: Fie!" [17:23]

Thus if someone inquires about the ruling of beating them, it can safely be said that its prohibition is more obvious than the verbal abuse mentioned in the Quranic verse. It can be said that the Quran prohibited the lowest level of abuse to indicate the enormity of higher levels.

2) If the *`illah* is equally effective in both the new and the original cases, this is called *qiyās al-musāwī* (analogy of equals). For example, the Quran declares the prohibition of unjust consumption of the orphan's wealth, since it is a kind of injustice and aggression, "Indeed, those who consume the wealth of the orphan unjustly are only consuming fire into their bellies." [4:10] Analogically, any form of unjust aggression against the orphan's wealth is equally prohibited.
3) If the *`illah* is more evident in the original case than the new one, this is called *qiyās al-adnā* (analogy of the inferior). For example, the rules of *ribā*, prohibit the exchange of wheat unless the two amounts are equal and delivery is immediate. By analogy this rule is extendable to apples, since both wheat and apples share the same *`illah* of being edible and measurable, according to a number of jurists. But the *`illah* of this *qiyas* is weaker with regard to apples.

Pillars of *qiyās* and their conditions:

As indicated in the very definition of *qiyās,* there are four pillars involved in this process: The original case (*aṣl*), the shari'ah ruling (*ḥukm*), the new case (*far`*),and the effective cause (*`illah*).

-The *aṣl*: The original case has to be established by the main sources of the Quran, the Sunnah, or the *ijmā`*. A *far`* (new case) may not constitute an *aṣl* for another new case. Extending this line of taking new cases as *aṣl* for other new cases would lead to a completely different case than the original one.

- The *ḥukm*: This has to be a practical shari`ah ruling. *Qiyās* is not applicable in the area of *`aqīdah* (matters of faith). Moreover, it has to be rational in the sense that human intellect is capable of perceiving the reason behind its enactment. Thus rulings that belong to the areas of *`ibādāt* (devotional matters) and *muqaddarāt* are not valid for the application of *qiyās*. The *ḥukm* must be operative, in the sense that it has not been abrogated. In addition, it must not be confined to an exceptional case. Sharī`ah rulings exclusive to the Prophet Muhammad (peace be upon him) are not extendable by analogy.

-The *far`*: 1)The new case must not be covered by a textual evidence or *ijma`*, for if it is found in either of these sources, there will be no need for *qiyās*. 2) The effective cause must be as applicable to the new case as to the original case. Failing to fulfill this condition indicates a significant discrepancy between the two cases, which renders *qiyās* invalid.

- The *`illah*: This is the most important requirement in the process of *qiyās*. It has to fulfill the following conditions:1) It has to be an evident, constant attribute (*waṣf ẓāhir munḍabiṭ*). If it is something hidden, such as intention or goodwill, it won't be ascertainable and thus cannot constitute the *`illah* for *qiyās*. Likewise, it has to be constant in the sense of being applicable to all cases without being affected by differences of persons, times, places and circumstances. 2) It has also to be a proper attribute that bears a reasonable relationship to the ruling and achieves the objective of the Lawgiver by bringing benefit to people or protecting them against harm. Therefore, the smell and color of the wine, for example, are not proper attributes for its prohibition. 3) Finally, it has to be *muta`addiyah* (transferable); that is, it can be transferred to other cases. If the *`illah* is confined to the original case, *qiyās* will not be applicable. Travelling, for example, is the *`illah* for

shortening the four-*rak`ah* Prayers and is confined to this ruling. No matter what level of hardship one may suffer, this cannot be a reason to shorten the Prayers.

(9)

***Al-'Istḥsān* (Juristic Preference)**

Literally *istiḥsān* is the verbal noun of *istaḥsana,* which means to deem something good or preferable. In its juristic sense, *istiḥsān* is a method of making exception to avoid any rigidity or unfairness that might result from the literal enforcement of the law. Technically, it refers to a principle that authorizes departure from an established precedent in favor of a different ruling for a strong reason that requires such departure. In other words, it is to give an issue a ruling different from that of its counterparts due to the consideration of a more cogent factor. The essence of *istiḥsān* is to make an exception from a constant rule due to an accidental reason that makes such exception closer to the spirit of the *shari`ah* than the strict application of that rule. Thus, in such cases, *istiḥsān* is more cogent than *qiyās* ; and hence, usually *istiḥsān* is used in particular cases as an exception from a universal rule whose application in some particular cases leads to the contrary of *shari`ah* objectives. The reason that requires such exception is technically called *wajh al-istiḥsān*.

For example, a person put under interdiction for his foolish financial transactions should be prevented from all financial transactions to save his wealth since he is not qualified to manage his financial affairs. This should include his donations as well. The Ḥanifites, however, allowed such a person, based on *istiḥsān*, to make a will of donation because such a will brings benefit to others as well as a reward to the donor. Besides, in Islamic law, a will of donation is confined to one third of one's wealth unless the heirs allow for more.

The Ḥanifites are the main upholders of *istiḥsān* and their books are replete with rulings based on its application. Abu Ḥanifah was known for heavily relying on this principle to the extent of astonishing his disciples. On the other hand, al-Shafi`ī is famous for his rejection of *istiḥsān* considering it a kind of employing whimsical opinion and self-desire in the *shari`ah*. He is also reported to have said: Whoever employs his preference actually enacts laws. However, the meaning rejected by al-Shafi`ī is not the one accepted by the majority of scholars, because there is a unanimous agreement on the rejection of whimsical opinion in the *shari`ah*. Moreover, al-Shafi`ī himself is reported to have used juristic preference and the very word '*astaḥsin* (present tense of *istaḥsana*) in a number of cases. For example, he preferred to give three days for a person to claim his right of *shuf`ah* (preemption) and to give 30 dirhams to a divorced woman as a *mut`ah* (gift of consolation). Some of the Shafi`ite jurists claimed that al-Shafi`ī used the word in its literal meaning. Still the contexts it was used in bear no much difference from the technical usage intended by the Ḥanifites and those who agree with them. In fact, nearly all scholars from different schools employ the essence of *istiḥsān* in a way or another and thus *istiḥsān* as defined above should not be a point of juristic dispute. Hence, the disagreement over *istiḥsān* is actually a verbal one.

Kinds of *istiḥsān*:

As mentioned in the definition of *istiḥsān,* there must be a strong reason or factor that requires such a shift and departure from the main principle, and this reason constitutes the authority of *istiḥsān*. Based on the type of this authority, *istiḥsān* has the following kinds:

- *Istiḥsān* that is based on textual evidence from the Quran or the Sunnah. To support their view, the Ḥanifites quoted exceptions made by the Lawgiver as evidence for departure from the main principle due to a strong reason. *Khiyār al-*

sharṭ (conditional option in a sale), for example, as established by the Sunnah, gives the right for one or both parties of a sale contract to suspend the sale agreement for a stated period of time. According to the Ḥanifites, this is an exception to the principle that a sale contract becomes binding once both parties express their consent in the form of *'ījāb* (offer) and *qabūl* (acceptance). *Salam* (advance sale)[1] is another example as an exception from selling nonexistent commodities and this exception is also established by the Sunnah. The Messenger of Allah (peace and blessings be upon him) said, "Whoever pays in advance the price of a thing to be delivered later should pay it for a specified measure at specified weight for a specified period".

- *Istiḥsān* that is based on *ijmā'*: For example, scholars accepted the practice of paying one price for entering public bathrooms, though people use different amounts of water. This acceptance gained scholars' unanimous agreement and is regarded as an exception from the standard principle.

- *Istiḥsān* that is based on *`urf*: According to the Ḥanifites, only real estate is valid for making *waqf* (endowment). Thus, movable properties, such as books and utensils may not be donated as *waqf*. However, under the pressure of people's customary practice, late Ḥanifite jurists made an exception to their rule and allowed donating movable properties as *waqf*.

- *Istiḥsān* that is based on necessity: For example, insignificant amounts of *najāsah* (ritually impure substances) have been declared pardonable as an exception from the general rule of removing traces of *najāsah*. This exception is based on the necessity of using things that may have such insignificant traces of *najāsah* and the difficulty of completely removing them. Another example is considering the water of wells in the desert ritually pure, though these wells are exposed to kinds of

[1] The advance sale of an article to be delivered at a fixed date.

najāsah from their visiting animals. But people's necessity to use this water has caused jurists to consider it ritually pure.

- *Istiḥsān* that is based on *maṣlaḥah*: For example, the general rule is that a trustee is not responsible for any loss or damage happens to the property in his custody unless it can be attributed to his personal fault or negligence. Jurists, however, changed their view and have held the trustee to be responsible for such losses, unless the loss is caused by a calamity. This *istihsan* is based on public interest.
- *Istiḥsān* that is based on hidden *qiyās* as opposed to evident *qiyās*: Examples include considering the water remaining from the drinking of carnivorous birds ritually pure, though evident *qiyās* would judge it to be ritually impure, considering it analogous to the water remaining from carnivorous beasts.

Maṣlaḥah (Public Interest)

Literally, *maṣlaḥah* means benefit, interest, and advantage. The employment of *maṣlaḥah* technically stands for attaining benefits and keeping away detriments and harms in fulfillment of and in agreement with the objectives of the *shari`ah*. This last phrase "in agreement with the objectives of the *shari`ah*" is a modification that distinguishes *maṣlaḥah* intended here from the general meaning of the word.

Thus, interests can be divided, from the perspective of the Lawgiver, into three categories:

- Interests considered and approved by the Lawgiver as indicated by particular textual proofs and, thus, rulings and procedures can be built on them. Scholars have unanimously agreed that the shari`ah came to preserve and protect five essentials; namely, faith, life, intellect, lineage, and wealth.

- Interests disapproved and denounced by the Lawgiver, because they are not real interests, though they may appear to be so. Examples of these false interests include increasing wealth through usury, giving equal shares of inheritance to male and female hairs in all cases, allowing for apostasy, allowing for euthanasia (mercy killing), etc.

- Interests concerning which there is no particular textual evidence that attests neither to their consideration nor to their negligence and disregard and thus are called *maṣlaḥah mursalah.* Scholars have disagreed over the validity of depending on this kind of *maṣlaḥah* in the process of legislation.

In general, the majority of scholars accept the essence of *maṣlaḥah* as a basis for lawmaking. The majority of Ḥanifites and Shafi`ites, however, have reservations against it. The Shafi`ites are known for their rejection of *maṣlaḥah*, whereas the Ḥanifites, are more tolerant in this regard because they employ the principle of *istḥsān* (juristic preference) which sometimes intersects with *maṣlaḥah.* The Malikites and the Hanbilites, on the other hand, establish rulings on *maṣlaḥah* without subsuming it under *qiyās,* and without looking for an *asl* for the process of *qiyās*. Therefore, they are more famous for employing *maṣlaḥah mursalah.*

In support of employing *maṣlaḥah,* narrations were reported that the *ṣaḥabah* took *maṣlaḥah* into account in their juristic opinions, judgments, decisions, and procedures. Examples include the collection of the Quran by Abu Bakr and then by Uthmān, Abu Bakr's appointment of Umar as his successor, Umar's judgment that the wife of a missing person should be considered divorced after the elapse of a certain number of years, in addition to other examples we mentioned before.

In order to alleviate the fears of the other party that this may open the door for playing with *shari`ah* rules and for building legislations on fanciful considerations, they set the following conditions: a) the interest has to be in agreement with the

objectives of the *shari`ah*, not eccentric to its philosophy; b) and it has to be real, not fanciful. Experts are needed here along with *shari`ah* scholars to decide this point, which is very critical. Common people may give preference to a personal interest over a public one, or consider an immediate benefit but do not regard its evil or detrimental consequences. They may overlook a major harm in favor of a minor benefit. Human thought is affected by personal, local, occasional, and material considerations; therefore, *maṣlaḥah* has to undergo proper and fair assessment.

Qarāfī, a Malikite jurist, asserts, "If you survey legal schools (*madhāhib*), you will find them (jurists') when practicing *qiyās* and making association or disassociation between two cases, they do not seek a witness for the legal consideration of the meaning by which they associate or disassociate. They, rather, feel contented with absolute *munāsabah* (proper relationship) and this is the [essence of] *maṣlaḥah mursalah*. Thus, it is considered in all legal schools." He also adds commenting on the examples he gave for the Companions' acting upon *maṣlaḥah mursalah*, "Even Imam al-Ḥaramayn in his book named "*Ghayyāthī*" authorized and gave fatwas from which even Malikites are so distant. He dared to adopt them for absolute *maṣlaḥah*. Likewise did Ghazālī in *Shifā al-Ghalīl*; though both of them were so harsh in blaming us with regard to *maṣlaḥah mursalah.*

The following are also examples of laws and rulings on the principle of *maṣlaḥah mursalah* as approved by jurists:

- Levying taxes on rich people when there is shortage in the state resources in order to fulfill a public need or to protect the state.
- Beating an accused person who is known for stealing others' properties to confess his crime.

- Accepting testimony from children against other children in the accidents that take place when they are together.
- Traffic rules and laws, laws that organize lands and public places, administrative laws, etc.
- The right of the state to confiscate a personal property for the sake of a public interest, as in confiscating lands to build a bridge or make a highway road, etc.

(10)

***Sadd al-Dharā'i`* (Blocking the Means to Evil)**

Sadd means to block. *Dharāi`* is the plural form of *dharī`ah* which denotes a way or means that leads to something, good or bad, permissible or impermissible, legitimate or illegitimate.

D*harāi`* can be classified into four kinds:

1. *Dharāi`* that basically lead to something permissible but may also lead to some evil consequences; yet their advantages outweigh their disadvantages, such as looking at a woman one intends to marry and giving sincere advice to an unjust ruler. This kind of *dharāi`* is approved by the *shari`ah*. They are either permissible, recommendable, or obligatory owing to the degree of their consequent benefit.
2. *Dharāi`* that basically lead to something permissible and are never intended to lead to evil consequences, but they often lead to them and the consequent evil outweighs the consequent benefit, such as cursing the gods of the disbelievers before them (prohibited in the Quran 6:108) and selling weapons at times of civil turmoil and mischief.

3. *Dharāi`* that basically lead to something permissible but can be employed to lead to unlawful consequences such as marrying a woman divorced thrice with the intention of making her lawful to her first husband and a sale contract that involves *ribā* transaction, though the contract may seem apparently valid. Intention here plays a significant role in deciding the intended consequence since the matter may appear outwardly in agreement with shari`ah requirements.

This last kind of *dharāi`* has been subject to juristic disagreement. The Malikites and Ḥanbalites incline to block this kind of *dharāi`* whereas the Shafi`ites and Ẓahirites give more consideration to the formality than to the hidden intent arguing that the shari`ah does not task us to search for people's intentions. The former party, however, counterargues that the shari`ah does not overlook intentions. It principally aims at regulating and controlling people's intentions to be in agreement with its principles, objectives, and guiding rules. Despite the significance of formalities, they should not be taken as a cover for illegal intentions. It is unbecoming of the wise shari`ah to prohibit something and facilitates the means to it. If good intention does not justify a permissible conduct, when it will likely lead to evil consequences, then ill-intention cannot justify it. Muslims were forbidden to say "*rā`inā* (consider us)" to the Prophet (peace be upon him) because the Jews used to twist the pronunciation of this word to abuse him. The shari`ah forbids a Muslim to attempt buying or selling anything if another Muslim has already made a sale agreement concerning it. There are so many other examples that can be given in this regard.

Finally, it is noteworthy that scholars who regard this principle need to pay attention to another close principle which is the principle of *raf` al-ḥaraj* (removing hardship and strain), for excessive use of *sadd al-dharāi`* may cause unbearable hardship and strain for people.

`Urf (Custom)

The term *`urf* literally stands for custom, habit, tradition, and convention. Technically, *`urf* denotes such customs and traditions that have become widely accepted by people provided that they bear no contradiction to the norms and teachings of the *shari`ah*. The technical meaning of the term apparently bears no much difference from the literal one. *`Ādah* is a close word that literally denotes quite the same meaning, according to a large number of scholars. Some other scholars draw distinction between the two terms and consider *`ādah* more general because it can be used for personal habits, while *`urf* is not usually used in this sense. Moreover, the word *`ādah* can denote natural occurrences that people have nothing to do with, such as the age of reaching maturity, which differs from hot countries to cold ones. Anyway, both words are used for nearly the same meaning by most of the jurists and thus we find them stating " العادة محكمة والعرف معتبر" *`Ādah* is to be referred to, and *`urf* is to be taken into consideration".

The majority of scholars take *`urf* into consideration as long as it does not contradict the teachings of the *shari`ah* because when people develop an established custom or tradition, this usually indicates that it achieves some interest for them and is suitable for their conditions.

Classifications of *`Urf*

`Urf has various classifications based on various considerations:

First, *`urf* can be classified into general and specific: general *`urf* is that which is widely practiced and accepted among the community, such as using the word ولد *walad* for a male child, though it basically means a child, male or female, as used in the Quran; sitting in cafés without time limit, and deferring the payment of the dowry (*mahr*). Specific *`urf*, however, is that which is known and practiced among a

specific group of people, such as a town or a tribe. This also includes such jargons and clothes that are used by people of a particular profession, craft, etc.

Second, *`urf* can also be divided into verbal and practical: verbal *`urf* is a conventional agreement to use a word in a particular sense, as in the example of the word *walad* mentioned above, and the word *dābbah* دابةwhich basically indicates all animals that tread on earth, but is commonly used for four-footed animals such as cows and horses.

Practical *`urf* stands for conventional practices that people have agreed to follow in their life and transactions such as their dietary customs, feasts, manners of transactions, etc.

Third, *`urf* can further be divided into valid and invalid: Invalid *`urf* is that which turns lawful what is Islamically unlawful, or turns unlawful what is Islamically lawful. So, dealing in *ribā* transactions, consuming intoxicants, uncovering parts of the body that have to be covered, listening to prohibited music, and the like customs are invalid customary practices and must be changed. Such customs cannot be taken into consideration by the *shari`ah*.

Valid *`urf* is that which does not contradict the *shari`ah*, such as the conventions of giving gifts by the groom to his bride before the wedding and dividing the dowry into two parts: one paid in advance, and the other becomes due on divorce or on the death of the husband.

Proofs for the consideration of *`urf* in the *shari`ah*

Here are examples for the consideration of *`urf* in *shari`ah* texts:

-Allah SWT said, "وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ" And [incumbent] upon the child's father is [supplying] their provision and their clothing, in accordance with what is [commonly] acceptable" [2:233] and said, "وَلِلْمُطَلَّقَاتِ مَتَاعٌ بِالْمَعْرُوفِ"And let

there [also] be [reasonable] provision for divorced women, in accordance with what is [commonly] acceptable." [2:241] Prophet Muhammad ﷺsaid to Hind bint `Utbah when she asked about the amount she could take from her husband's wealth for the expenses of her household, " خذي ما يكفيك وولدك بالمعروفTake reasonably what is sufficient for you and your children, in accordance with what is [commonly] acceptable." The word *ma`rūf* (what is commonly acceptable) in these texts refers to *`urf;* that is, the common practice. Scholars take *`urf* into consideration in many cases and refer to it when there is no specific text concerning the case at hand.

Conditions of acting upon *`urf*

1. It may not contradict explicit textual evidences. Traditions like women's walking in the street without proper *ḥijāb*, mixed education, usurious transactions with traditional banks, and celebrating the birthdays of saints belong to invalid *`urf* that needs to be changed.
2. It has to be commonly and constantly, not rarely, used.
3. *`Urf* used to interpret and explain contracts and agreements has to be preceding, not subsequent to, them.
4. In contracts, there must be no explicit statement that contradicts the common *`urf*, or else such an explicit statement should be given priority.

(11)

The Companion's Legal Statement

Literally, the word *ṣaḥābī* is derived from *ṣuḥbah* (companionship) to refer to such a companion who usually has spent an amount of time with his companion.

Nevertheless, the *muḥaddithūn* (hadith scholars) define the *ṣaḥābī* as anyone who met the Messenger of Allah, even for a moment, while believing in him and died as a believer. *Uṣūlī* scholars, still, confine the discussion here to such a Companion who spent a considerable amount of time with Prophet Muhammad (peace be upon him) such as the rightly guided Caliphs, Ibn `Abbas, Abu Hurayfah , etc.

The *ṣaḥābah* practiced *itjtihād* during the lifetime of Prophet Muhammad (peace be upon him), which he approved in some cases and corrected in some others. After his demise, the *ṣaḥābah* were the reference for the *ummah* and their legal statements and fatwas were recorded for juristic reference. Now, the question is whether such fatwas and legal statements are authoritative and binding.

Scholars have classified legal statements of the *ṣaḥābah* into the following:

-Statements regarding matters that cannot be based on personal opinions. Such statements have the same status as the statements attributed to the Prophet (peace be upon him.) himself, provided that the Companion is not known for taking knowledge from *isrā'īliyyāt* (reports of the People of the Scripture). An example of this division is Ibn Mas`ūd's statement that the least period of menstruation is three days.

-Statements concerning issues that are open to personal opinion. Now, if the Companion's opinion went spread, became known to other Companions, and none of them expressed disagreement, this would then be taken as a silent consensus, which is a legal proof for the majority of jurists as discussed above. In fact, this is the strongest form of silent consensus.

-However, if some of the Companions expressed their disagreement with his opinion, one may not act upon either of their opinions without first examining their evidences, balancing between them and coming up with the weighty opinion.

- If the Companion's opinion did not go spread, some jurists said that it still has an authority and ought to be followed because the *ṣaḥābī* had better understanding of the shari`ah than next generations. Others said that it has no authority because the

ṣaḥābī is not infallible and may have fallen in error. This latter view sounds more cogent.

Revealed Laws Preceding the Islamic *Sharī`ah*

To understand the point of discussion here we need to divide such laws into the following classifications:

- Laws that are found only in their sacred books and are not found in the Quran or the Sunnah. Such laws are beyond our discussion here since we cannot depend on their own sources as we have doubts regarding their veracity. The Prophet Muhammad (peace be upon him) said, "Do not believe the people of the Scripture and do not disbelieve them." In fact, some of these laws can never be of divine origin.
- Laws mentioned in the Quran or the Sunnah accompanied by contextual or extra-textual evidence that they are part of the Islamic shari`ah. For example, we read in the Quran "كتب عليكم الصيام كما كتب على الذين من قبلكم O you who believe! Fasting is prescribed for you as it has been prescribed for those before you." [2:183]
- Laws mentioned in the Quran or the Sunnah accompanied by contextual or extra-textual evidence that they are not part of the Islamic shari`ah; that is, they have been abrogated by the shari`ah. For example, in *surat* al-An`ām we read " وعلى الذين هادوا حرمنا كل ذي ظفر ومن البقر والغنم حرمنا عليهم شحومهما إلا ما حملت ظهورهما أو الحوايا أو ما اختلط بعظم ذلك جزيناهم ببغيهم وإنا لصادقونAnd as to those of Jewry, We forbade every animal with [undivided] hoof. And from cows and sheep, We forbade them their fat, excepting what their backs carry, or the [animals'] entrails, or what is joined with bone. That [is how] We recompensed them for their offenses. And, indeed, We are ever truthful" [6:146] The preceding verse reads, " قل لا أجد فيما أوحي إلي محرما على طاعم يطعمه

إلا أن يكون ميتة أو دما مسفوحا أو لحم خنزير فإنه رجز أو فسقا أهل لغير به فمن اضطر غير باغ ولا عاد فإن ربك غفور رحيم Say [to them, O Muhammad]: I do not find in what has been revealed to me anything prohibited [of] the food one eats- except if it be carrion or outpoured blood or the flesh of swine- for, indeed, this is defilement- or an ungodly [offering] invoked thereby to other than Allah", which means that such things that were prohibited for the Jews are not prohibited for Muslims. Another example can be found in the prophetic declaration "And the spoils of war became permissible for me, though they were not permissible for anyone before." This and the former divisions are beyond the point of discussion here as well.

- Laws mentioned in the Quran or the Sunnah without clarification of whether they are part of the shari`ah or not. An example provided here is the Quranic verse that reads, " وكتبنا عليهم فيها أن النفس بالنفس والعين بالعين والأنف بالأنف والأذن بالأذن والسن بالسن والجروح قصاص Now, in it We prescribed for them: A life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and retribution for wounds." [5:45] The Ḥanifites and Malikites hold the view that such laws are part of the shari`ah considering the Lawgiver's silence in this regard as a tacit endorsement. The Shafi`ites, on the other hand, maintain that these laws cannot be part of the shari`ah unless explicitly endorsed as such.

  In fact, as some contemporary scholars observed, this seems to be a verbal dispute. For all laws of the preceding nations mentioned in the Quran or the Sunnah are accompanied by contextual or extra-textual evidence that clarifies whether such laws are enforceable in the shari`ah or not, which means that this division is more theoretical than actual. The law of *qiṣāṣ* (retaliation) in the verse quoted above, for example, is unanimously a part of the shari`ah as clearly indicated by other evidences. The Quran dictates, " كتب عليكم القصاص في

القتلى O you who believe! [Equivalence in] retribution is prescribed for you regarding [all] those who are murdered." [2:178] Prophet Muhammad (peace be upon him) also issued a number of judicial judgments based on this law. The rightly guided caliphs acted on the same law, which also gained jurists unanimous agreement.

***Istiṣḥāb* (Presumption of Continuity)**

Literally, *istiṣḥāb* is derived from the trilateral verb *ṣaḥiba*, which means to accompany or to be in the company of, to denote the continuity of companionship. Technically, *istiṣḥāb* stands for a rational proof that can be employed in the absence of other indications; specifically, those facts, or rules of law and reason, whose existence or non-existence had been proven in the past, and which are presumed to remain so for lack of evidence to establish any change. In other words, it means to keep the case in the present as it was in the past deeming that the latter accompanies the former. Thus, whatever has been proved to be existent remains so in our assumption until the opposite is proven and whatever has been proved to be nonexistent remains so in our assumption until the opposite is proven.

Since they denied any rational approach, the *Ẓ*ahirites relied heavily on *istiṣḥāb* whenever they failed to find a *shari`ah* ruling in the Quran or the Sunnah.

Jurists have classified *istiṣḥāb* into the following types:

- *Istiṣḥāb al-`adam al-aṣlī* (presumption of original absence), which means that a fact or rule of law that had not existed in the past is presumed to be non-existent until the contrary is proved. Thus, if A, who is a trading partner to B, claims that he has made no profit, the presumption of absence will be in support of A's claim unless B can prove the opposite.

- *Istiṣḥāb al-wujūd al-aṣlī* (presumption of original presence), which means that a fact or rule of law that had existed in the past is presumed to be existent until the contrary is proved. Thus, if A is known to be indebted to B, A is presumed as such until it is proved that he has paid the debt or was acquitted of it.

-Presuming the continuation of the original permissibility of things. Allah (Exalted be He) showed His favor on humankind saying "هو الذي خلق لكم ما في الأرض جميعا He is the One who created for you all that is in the earth." [2:29] He also said, " وسخر لكم ما في السماوات وما في الأرض جميعا منه And He has subjugated for you all that is in the heavens and all that is in the earth- all of it from Him." [45:13] This means that anything created by Allah and is not prohibited in the shari`ah is basically permissible.

Jurists are in agreement on the validity, in principle, of the above three types of *istiṣḥāb,* although they have differed in their detailed applications.

-Presuming the continuity of the *waṣf shar`ī* (legal attribute) until the contrary is proven. *Ṭahārah* (ritual purity) and *najāsah* (ritual impurity), for example, are two *shar`ī* attributes. One who has performed *wuḍū'* becomes ritually pure and remains so until he breaks his *wuḍū'*. Doubts that may attack such a person regarding his ritual purity should be discarded. For the Ḥanifites and Malikites, this type *istiṣḥāb* is used in its defensive capacity (*li al-daf`*) only; that is, to ward off any cause of loss or liability; whereas the Shafi`ites and Ḥanbalites use it in both its defensive and affirmative capacities (*li al-daf` wa al-Ithbāt*); that is, to bring about benefit and interest as well. The impact of this difference of opinion is clearly manifested in the case of the *mafqūd* (missing person). As long as there is no evidence to prove otherwise, a missing person is deemed alive and thus his properties may not be inherited by others. However, is a missing person entitled to inherit from others?

The Ḥanifites and Malikites answer this question in negative whereas the Shafi`ites and Ḥanbalites answer it in affirmative.

Finally, here are a number of juristic maxims that are based on the essence of *istiṣḥāb*:

1. *Al-yaqīn la yazūl bi'l-shakk* Certainty may not be disproved by doubt.
2. In principle, things should be deemed in the present as they were in the past.
3. *Al bara'ah al aṣliyyah (*The original freedom from liability). In principle, any person is free from liability until the contrary is proven. Therefore, when A, for example, claims that B owes him a sum of money, he is requested to provide evidence for his claim because B is principally free from such liability.

(12)

The Methods of Extracting Shari`ah laws

The discussions below constitute the essence of *uṣūl al-fiqh* since they basically lay the foundation for the extraction of shari`ah rules and laws. These discussions are mainly related to linguistic issues. As the Qurʾan is an Arabic Book and the verbal teachings of the Prophet are also in Arabic, Islam has a special relation with this language.

Imam Shāfiʿī asserts that every Muslim has to learn the Arab tongue to the utmost of his capacity in order to be able to profess that there is no true god but Allah and that Muhammad is His servant and Messenger, to recite the Book of Allah, and to utter the obligatory *takbīr* (pronouncing *Allahu akbar* (Allah is greatest)), *tasbīḥ* (pronouncing *subḥana Allah* (glorified is Allah)), *tashahhud* (a special formula recited in the last part of Prayer) etc., with which one is commanded [to pronounce].

To obtain a sound and proper interpretation of a text there is a need to examine its various textual indications, for extracting meanings from the composition of a speech depends on identifying its indications. Every text imparts its meanings through letters, sings, and allusions; or by means of logical implication without which the significations of the text would be incomplete. A scholar concerned with the interpretation of a given text has the responsibility of uncovering all its possible meanings and of employing every method of interpretation that is linguistically acceptable. A failure to uncover any of these meanings undoubtedly means that the text cannot be properly implemented.

The word *dalālāt* (pl. of *dalālah* (indication)) stands for the various meanings conveyed by an expression. A single expression may indicate different meanings in different ways.

The two major schools that have shaped this science; namely, the Mutakallimūn- usually represented by the Shafiʿites- and the Hanifites, have adopted two approaches in dealing with the discussions of *dalālāt*. This gave rise to diversity of terminologies used by each group, as each group had a special approach and perspective; and this undoubtedly has had its obvious impact on the field of the practical application of extracting rulings.

However, the Hanifites managed to give a well-structured skeleton for the major categorization of these issues. According to them, words in relation to the meanings they convey can be divided on the basis of four considerations: First, with regard to the basic formation of a word to indicate a meaning; second, with regard to the usage of the word in the meaning it was originally formed to signify or in another one; third, with regard to the clarity or ambiguity of such usage; and fourth, with regard to how the word indicates such a meaning or the ways to understand the meaning conveyed by the word.

Analyzing the first consideration, the word is either formed to indicate one meaning or more than one meaning. Thus, the indication is either specific or general. Under this consideration, jurists deal with the nature, types, and applications of general and specific expressions. They also tackle the discussions related to homonyms, imperatives, and prohibitions as well as absolute and qualified expressions within the same scope.

Khāṣṣ is a term used for a word that signifies a specific, single meaning. The word رجل (man), for example, signifies one meaning with one entity. Words for such meanings as جهل (ignorance) and قناعة (contentment) are specific. Names of numbers belong to the same category.

Khāṣṣ has a definitive indication and is free from ambiguity. Thus, "three days" in the Quranic verse that reads "فمن لم يجد فصيام ثلاثة أيام But if one [of you] does not find [such means], then fast three days [instead]" [5:89] is definitive and bears no other meaning. So is the case with "forty sheep" in the prophetic hadith "In every forty sheep one sheep [is due for Zakah]."

ʿĀmm is a word which applies to many things, not limited in number, and includes everything to which it is applicable. سماوات (Heavens), رجال (men), نساء (women), and مؤمنين (believers) are examples for *āmm*. There are many forms used by the Arabs to indicate such generality and comprehensiveness. Among these forms are:

1) Emphatic words that indicate comprehensiveness, such as *kull, jamīʿ, ajmaʿūn, aktaʿūn* (every/all, altogether, entirely, completely) as in the Quranic verse that reads, "كل امرئ بما كسب رهين Every person is himself in pledge for what he has earned)." [52:21]
2) Indefinite words when they come in a negative or prohibitive context as in the Quranic verse that reads "ولا تصل على أحد منهم مات أبدا Therefore, do not ever pray over any one of them who dies" [9:84]
3) The singular noun prefixed by "*al"* that is not meant to render the word definite as in the Qurʾanic verses "إن الإنسان لفي خسر Indeed man is in loss" [103:2] and "والسارق والسارقة As for the male thief the female thief." [5:38]
4) Definite plural nouns whether prefixed by the definite article *al* or in a genitive construction. An example of the former is the Quranic verse that reads, "وأحسنوا إن الله يحب المحسنين Indeed, Allah loves those who excel in [doing] good."[2:195] and of the latter is the Quranic verse that reads, "حرمت عليكم أمهاتكم Forbidden to you [in marriage, as well,] are your mothers" [4:23]

Evidences that specify *ʿumūm*

The indication of a general term can be confined by its user to some of the elements or individuals it applies to. This thus reveals the user's real intention. The recipient of this address, however, cannot know his intention unless through indicative evidence. Therefore, jurists have been concerned with this process, technically called *takhṣīṣ* (specification), in their search for the intention of the Lawgiver.

***Al-mukhāṣṣiṣāt al-munfaṣilah* (detached specifying evidences)**

The most famous of these *mukhāṣṣiṣāt* are:

-**The evidence of reason** as in the Qurʾanic injunction " ولله على الناس حج البيت من استطاع إليه سبيلا Ḥajj-pilgrimage to the [sacred] House is owed to Allah, as an obligation upon all people" [3:97], for reason dictates that such an obligation is not laid on children or insane people.

-**An independent speech.** For example, the Quran prohibits the consumption of carrion in general stating "حرمت عليكم الميتة Forbidden to you is [the consumption of] carrion." [5:3] Yet, the Prophet Muhammad (peace be upon him) was asked about the water of the sea and he said, "هو الطهور ماؤه الحل ميتته It is water is pure and its carrion is lawful", excluding thus the carrion of sea animals.

***Al-mukhāṣṣiṣāt al-muttaṣilah* (attached specifying evidences)**

The most famous of these *mukhāṣṣiṣāt* are:

-***Al-istithnā'*** **(exception)** as in the Quranic verse that reads, " من كفر بالله من بعد إيمانه إلا من أكره وقلبه مطمئن بالإيمان [Doomed is] one who [openly] disbelieves in Allah, after [professing] his faith- except for one who has been compelled [to renounce his belief], while his heart remains at peace with faith." [16:106]

-***Al-ṣifah*** **(qualifying attribute or quality)** as in the Quranic verse that reads, وربائبكم اللآتي في حجوركم من نسائكم الآتي دخلتم بهن" and your step-daughters who are in your [foster] care from your wives with whom you have consummated [marriage]", for the step-daughter is qualified by being "from your wives with whom you have consummated [marriage]." Thus, daughters of wives with whom husbands have not consummated the marriage are lawful to them.

- ***Al-sharṭ*** (condition) as in the Quranic verse that reads, " ولكم نصف ماترك أزواجكم إن لم يكن لهن ولد And [as] to you [men], there [goes] one-half of what your wives leave [behind], if they do not have children." [4:12]

- *Al-**ghāyah*** (extent); that is, the extent of duration and/or application of a general proposition. An example for this is the Quranic verse that reads, " يا أيها الذين آمنوا إذا قمتم إلى الصلاة فاغسلوا وجهوهكم وأيديكم إلى المرافق O you who believe! When you rise for the Prayer, wash your faces, and your hands to the elbows." [5:6] The part above the elbow does not have to be washed.

Al-mushtarakah **(homonym)** is the word that applies to different things whose essences and realities have nothing in common at all, such as the word *al-ʿayn,* which applies to eye, scale, well, gold, and sun, and the word *al-mushtarī,* which applies to both the purchaser and Jupiter. A *mushtarak* term could even indicate two contradictory things such as the word *jalal*, which describes that which is significant and that which is insignificant, and the word *qurʾ,* which is used for the period of menses and the period of being clean from menses.

A *mushtarak* word or expression has to be interpreted according to one of its possible meanings. Contextual or extra-textual evidences may indicate the intended meaning. There are rules as well to give one meaning preference over the others. For

example, in cases of doubt the literal meaning of an expression should be given preference over the metaphorical one. Also, the *shar`ī* meaning should be given preference to the literal one.

The Absolute (*Muṭlaq*) and the Qualified (*Muqayyad*)

Technically, *muṭlaq* is a word that indicates a meaning that is absolute in its genre. In other words, it is such a word that indicates an unspecific individual without any modification. *Muqayyad* is the opposite term and thus can be defined as a word that indicates a meaning that is absolute in its genre but with some modifications.

For example, the word رقبة "bondservant" in the Quranic verse " والذين يظاهرون من نسائهم ثم يعودون لما قالوا فتحرير رقبة من قبل أن يتماسا Thus those who do so [sinfully] estrange themselves from their wives, who then retract what they have said, they must free a bondservant before they [and their wives] touch each other [in intimacy]" is absolute and thus any bondservant, male or female, Muslim or non-Muslim, can be freed. On the other hand, the same word is mentioned in the Quranic verse that reads, "ومن قتل مؤمنا خطأ فتحرير رقبة مؤمنةThus, whoever kills a believer by mistake, then [the atonement] shall be the freeing of a believing human being [from bondage]" but with a modification of being "believing". Thus, a *muṭlaq* remains absolute in its application unless there is a limitation to qualify it.

***Amr* (Imperative Mood) and *Nahy* (Prohibitive Mood)**

Amr is a verbal demand to do something issued from a position of superiority over one who is inferior. The dominant form denoting this demand is *if`al* (do) as in the Quranic injunction "أقم الصلاة لدلوك الشمس Be ever steadfast in [observing] the Prayer at the declining of the sun" [17:78] and also *litaf`al/liyaf`al* (the present tense form prefixed with the imperative article *lām*) as in the Quranic

injunction "فمن شهد منكم الشهر فليصمه So whoever among you bears witness to the month shall then fast it." [2:185] Sometimes a declarative statement may indicate a command as suggested by the Quranic verse "والوالدات يرضعن أولادهن كاملين Furthermore, mothers shall nurse their children two full years." [2:233]

According to the majority of scholars, a command by itself, when unaccompanied by any clue or circumstantial evidence denoting otherwise, indicates obligation. However, in the presence of circumstantial evidences it may impart a variety of meanings including, for example, a recommendation as in the Quranic verse " والذين يبتغون الكتاب مما ملكت أيمانكم فكاتبوهم إن علمتم فيهم خيرا Moreover, if those whom your hands rightfully possess desire a deed [of emancipation], then write it for them, if you come to know goodness in them" [24:33], permissibility as in the Quranic verse "But when you lawfully end [the state of pilgrim sanctity], then you may [resume] hunting game "وإذا حللتم فاصطادوا [5:2], a supplication as in the Quranic verse "My Lord! Forgive me and my parents" رب اغفر لي ولوالدي [71:28], or a threat as in the Quranic verse that reads, "اعملوا ما شئتم إنه بما تعملون بصير Do whatever you so will [in life]! For, indeed, He is all-seeing of all that you do." [41:40]

Amr Preceded By Forbiddance

Sometimes the form *ifʿal,* which according to the majority of jurists indicates obligation comes after a preceding forbiddance. For example, Almighty Allah says, "وإذا حللتم فاصطادوا (But when you lawfully end [the state of pilgrim sanctity], then you may hunt game)" [5:2] The imperative فاصطادوا is preceded by a forbiddance mentioned in the Qur'anic verse that reads "غير محلي الصيد وأنتم حرم Provided you do not make lawful [the hunting of] game while you are in the state of pilgrim sanctity." [5:1] So, does this anteceding forbiddance affect the indication of *amr*?

Jurisprudents have different positions concerning this case:

a)*Amr* in this case indicates permissibility. The proponents of this position argue that by surveying *sharīʿah* texts in which *amr* comes after forbiddance, we have found that the general norm of the usage indicates permissibility. So, this has become a predominant customary usage that serves as circumstantial evidence to turn the indication of *amr* from obligation into permissibility.

b)*Amr* in this case indicates obligation. The proponents of this view argue that *amr* basically indicates obligation, and its coming after a forbiddance is not such a valid circumstantial evidence that could turn it away from its original indication.

c)*Amr* in this case removes the preceding forbiddance and thus the issue restores the ruling it had before the forbiddance. The proponents of this position argue that the forbiddance had lifted the previous ruling of the issue, and so removing the forbiddance by an imperative restores the old ruling and returns the issue to the ruling it had before. This last opinion has gained favor with late scholars.

***Nahy* (Prohibitive Mood)**

Nahy is a word or words which demand the avoidance of doing something addressed from a position of superiority to one who is inferior. The dominant form denoting prohibition is the present tense preceded by the prohibitive article *lā* to form *lā taf`al* (do not do) as in the Quranic verse " ولا تقتلوا أولادكم خشية إملاقAnd you shall not ever kill your children for fear of indigence." [17:31] A prohibition may also be expressed in a declarative statement as in the Quranic verse " حرمت عليكم أمهاتكمForbidden to you [in marriage, as well,] are your mothers." [4:23] It may also be indicated by a command that requires avoidance of something as in the

Quranic verse "وذروا ظاهر الإثم وباطنه Moreover, forsake [all] manifest sin, [O humankind]- and its hidden [practice, as well]. " [6:120]

According to the majority of scholars, the prohibitive mood by itself, when unaccompanied by any clue or circumstantial evidence denoting otherwise, indicates *taḥrīm* (forbiddance/unlawfulness). Still in the presence of circumstantial evidence it may indicate a variety of meanings including, for example: *karāhiyah* (reprehension) as in the Quranic verse "لا تحرموا طيبات ما أحل الله لكم You shall not prohibit the wholesome things that Allah has made lawful for you" [5:87], *irshād* (guidance) as in the Quranic verse "لا تسألوا عن أشياء إن تبد لكم تسؤكم Do not ask about things, which if disclosed to you will distress you [with further obligation]" [٥:١٠١], and *du`ā'* (supplication) as in the Quranic verse " ربنا لا تزغ قلوبنا بعد إذ هديتناOur Lord! Let not our hearts swerve after You have guided us." [3:8]

(13)

With regard to the usage of words and whether a word is used in its primary, secondary, literal, technical or customary sense, jurists divide such usage into *haqīqī* (literal) and *majāzī* (figurative). The Hanifites consider here the clarity of the

intention in both divisions. If it is clear, they call it *ṣarīḥ* (plain) and if it is not, they call it *kināyah* (metonymic).

The usage is called *ḥaqīqī* when a word is used in its literal sense keeping its original or primary meaning and is called *majāzi* when it is used in its metaphorical sense to indicate a secondary meaning. Moreover, *ḥaqīqī* usage is subdivided into *lughawī* (linguistic), *`urfī* (customary) and *shar`ī* (juridical). The linguistic meaning is that which is taken from the dictionary as it refers to the meaning for which the word was first coined. Words like *samā*, *jabal* and *asad*, for example, stand literally for sky, mountain, and lion respectively. The customary *ḥaqīqī* usage refers to the meaning established by the common usage of people such as the word *dābbah* which is originally used to mean everything that treads on earth, but the customary usage confines it to four-legged animals. The juridical *ḥaqīqī* usage refers to the meanings that the Lawgiver has given to some words such as the words *īmān* (faith), *kufr* (disbelief), and *ṣalāh* (Prayer).

Majāz is the metaphorical or figurative usage of words that is based on a relationship between the primary meaning and the secondary one. The word *asad*, for example, literally means lion, still if we describe a brave man as *asad*, we thus use the word metaphorically.

The principle here is to interpret words and expressions in their *ḥaqīqī* meanings unless there are clues or circumstantial evidences that the *majāzī* meaning is intended. Moreover, *ḥaqīqī* meaning is to be given preference when it comes into conflict with *majāzi* one.

Both the *ḥaqīqī* and *majāzī* are divided into *ṣarīḥ* (plain) and *kināyah* (metonymic). The word or expression is *ṣarīḥ* when it clearly reveals the intended

meaning. It is *kināyah,* however, if the intended meaning is not clearly expressed to the extent that we need either to consider circumstantial evidences to identify it or to ask the speaker himself about his intention. For example, if a husband says to his wife "أنت طالق (you are divorced)", this expression is explicit enough to make the divorce immediately effective. But if he angrily says to her "الحقي بأهلك Go to your family", we need to ask him about his intention whether he intended to divorce her or he just wanted her to go to her family. Hence, this expression is *kināyah* for divorce.

With regard to the degree of clarity or ambiguity of the text, the Hanafites classify the clear text, according to the degree of clarity, into *ẓāhir* (apparent), *naṣṣ* (explicit), *mufassar* (unequivocal), and *muḥkam* (perspicuous).

The indication is *ẓāhir* (apparent), if it is independently clear enough though it is not the primary intent of the context. For example, the Quranic statement that reads, "وما أتاكم الرسول فخذوه وما نهاكم عنه فانتهوا Thus whatever the Messenger brings you, then you shall take it. And whatever he has forbidden you, you shall desist from it"[59:7] is part of a verse that deals with the division of spoils. Still this part of the verse has the apparent meaning of the necessity of obeying the Messenger of Allah (peace be upon him) and is widely used to assert this meaning, though this general meaning is not the primary intent of the context.

The *naṣṣ* (explicit) indication, however, is the primary intent of the context. The Quranic statement "وأحل الله البيع وحرم الربا while Allah has made selling lawful and has prohibited usury", for example, is explicit in distinguishing between selling and usury since it comes in the context of refuting the claim of deeming selling equal to usury; whereas the *ẓāhir* (apparent) meaning is the lawfulness of selling and the prohibition of usury.

The explicit (*naṣṣ*) indication is more cogent than the apparent (*ẓāhir*) one and is thus given preference when they come into conflict. Yet, both of them are open to other interpretations.

The indication is *mufassar* (unequivocal), if it is clearer than *naṣṣ* and is not open to another interpretation, though it accepts abrogation. The Quranic injunction "فاجلدوهم ثمانين جلدة" in the verse that reads " والذين يرمون المحصنت ثم لم يأتوا بأربعة شهداء فاجلدوهم ثمانين جلدة As to those who accuse chaste women [of illicit sexual intercourse] who then do not produce four eyewitnesses [to the very act], whip them eighty lashes" [24:4] is *mufassar* because it is not open for any other interpretation.

A *muḥkam* (perspicuous) indication is neither open to another interpretation nor is liable to abrogation. For example, the prohibition of marrying Prophet Muhammad's wives after his death as declared Quranic statement " وما كان لكم أن تؤذوا رسول الله ولا أن تنكحوا أزواجه من بعده أبدا. It is not for you [believers] to offend the Messenger of Allah. Moreover, never are you to marry his wives after him" [33:53] is *muḥkam* since it is not open for any other interpretation.

The Mutakallimūn have a different approach to clear expressions as they divide them into just two: *ẓāhir* and *naṣṣ*. *Naṣṣ* is that which has only one meaning and is not open to any other interpretation, whereas *ẓāhir* is that which is open to other interpretations because it has more than one meaning, though one meaning is preponderantly apparent

On the other hand, if the text is unclear, this unclearness is not always at the same level. This is why the Hanafites divide unclear texts into four categories that stand opposite to the above four categories of clear expressions. These are *khafī* (obscure), *mushkil* (problematic), *mujmal* (ambivalent), and *mutashābih* (intricate).

If the text indication is clear but its inclusion of or application to some particular cases is obscure, it is called *khafī*. For example, the Prophet Muhammad (peace be upon him) said, "The killer is not entitled to inheritance." The meaning of "the killer" is unambiguous if taken to mean the murderer. But whether this rule applies to the one who kills by mistake is an obscure issue. A *khafī* expression needs thorough investigation to determine its applicability to particular cases.

If the ambiguity refers to the expression itself, then if it can be realized by reasoning, it is called *mushkil*. *Mushtarakah* words are clear examples of this category. Words like *`ayn* and *qur'*, as mentioned above, have a variety of meanings and thus it is problematic to decide the intended meaning. Still it can be decided through reasoning and *ijtihād* taking contextual and extra-textual evidences into consideration.

If the meaning cannot be realized by reasoning and can be realized only through an authoritative transmission, it is called *mujmal*. In this case, the word or expression itself seems ambivalent and there is no way to determine the meaning unless a clarification is given by the speaker himself. The Quranic injunctions to perform *ṣalāh* and *ḥajj* are examples of this category, for the only way to clarify how to perform them was through the statements and practices of Prophet Muhammad (peace be upon him).

Lastly, if it cannot be realized at all, this is called *mutashābih*. *Mutashābih* has no room in the area of *sharīʿah* rulings that people have to obey and comply with, it deserves no much room in the science of *uṣūl al-fiqh*, for there is no example for a *sharīʿah* ruling that can be described as *mutashābih* in this sense

The Mutakallimūn, however, classify unclear texts into just two types: *mujmal* and *mutashābih. Mujmal,* according to this approach, encompasses the four categories provided by the Hanafites. As for the *mutashābih,* some of them use it as a term synonymous with *mujmal*, while others give it a wider meaning.

With regard to how the word imparts the meaning, the Hanafite jurists identify four types of textual indications: *ʿibārat al-naṣṣ* (the explicit meaning), *ishārat al-naṣṣ* (the alluded meaning), *dalālat al-naṣṣ* (the inferred meaning), and *iqtiḍāʾ al-naṣṣ* (the required meaning). They have arrived at this categorization by distinguishing four levels of meaning conveyed by a given text.

ʿIbārat al-naṣṣ refers to the explicit meaning, whether primary or secondary, that is based on the actual words and phrases of the text. This is the dominant and most authoritative meaning that takes priority over other levels of meaning that might be detectable in the text. The Quranic verse that reads, " وإن خفتم ألا تقسطوا في اليتامى فانكحوا ما طاب لكم من النساء مثنى وثلاث ورباع Thus if you [men] fear that in [marrying] orphaned females you may not act with justice, then marry [other] women that seem good to you- [up to] two, or three, or four" [4:3] impart a number of primary and secondary meanings such as the permissibility of marriage, limiting the number of wives to four, confining oneself to one wife when fearing injustice. All these meanings are indicated by the very words of the verse. *ʿIbārat al-naṣṣ* is always given priority over other subsidiary meanings of the text.

Ishārat al-naṣṣ is a rationally concomitant meaning indicated by the signs and allusions a text contains, not by its very words, and hence needs contemplation to be detected and inferred. For example, jurists inferred that a husband and a wife may start their fasting day while in the state of *janābah* (ritual defilement) from the Quranic verse that reads, " أحل لكم ليلة الصيام الرفث إلى نسائكم هن لباس لكم وأنتم لباس لهن علم

الله أنكم كنتم تختانون أنفسكم فتاب عليكم وعفا عنكم فالآن باشروهن وابتغوا ما كتب الله لكم وكلوا واشربوا حتى يتبين لكم الخيط الأبيض من الخيط الأسود من الفجرPermitted for you [believers] on the night of the fast is intimate approach to your wives. They are a garment for you. And you are a garment for them. Allah knows that [before granting this permission,] you used to betray yourselves. Thus He has granted you repentance [for what is past] and pardoned you. So now you may lie with them and seek whatever [offspring] Allah has decreed for you. Moreover, you may [now] eat and drink until the white thread of dawn becomes clear to you, [as distinguished] from the black thread [of night].” Obviously, the very words of the text say nothing about the inferred ruling. However, it can be rationally inferred that since the spouse are allowed to have intimate relationship at night it is likely to happen that the dawn time may come while they have not taken the ritual bath yet.

A legal text may also convey a meaning that may not have been indicated by words or signs and is yet a complementary meaning which is warranted by the analogical purport of the text. This is known as *dalālat al-naṣṣ*, or the inferred meaning, which is one degree below the alluded meaning by virtue of the fact that it is essentially extraneous to the text. This meaning is determined by the identification of the *`illah* (effective cause) which is common between the explicit meaning and the inferred one. The Mutakallimūn call this indication *dalālat a-Muwāfaqah* (homonymous meaning), which actually refers to *qiyās al-awlā* (analogy of the superior) *qiyās al-musāwī* (analogy of equals) as discussed above.

Iqtiḍāʾ al-naṣṣ, or the required meaning, is a logical and necessary meaning without which the text would remain incomplete and would fail to fully achieve its desired purpose. For example, the Quranic verse that reads, “ حرمت عليكم أمهاتكم” would literally be translated as “Forbidden to you is your mothers.” But there is, of course, a missing meaning required by the context to sound logical; for what is

forbidden is not mothers themselves, but to marry them. So, the text after adding the required meaning would be حرم عليكم نكاح أمهاتكم (Forbidden to you in marriage are your mothers).

The second approach to this consideration is that of the Mutakallimūn. This approach suggests that textual indications are divided into two major varieties of *dalālat al-manṭūq* (pronounced meaning) and *dalālat al-mafhūm* (implied meaning). The pronounced meaning is derived from the obvious text and it is divided into two types: *ṣarīḥ* (explicit) and *ghayr al- ṣarīḥ* (non-explicit). *Ṣarīḥ* comprehends the explicit meaning (*ʿibārat al-naṣṣ*) mentioned by the Hanafites. *Ghayr al-ṣarīḥ* is divided into three types: the required meaning (*dalālat al-iqtiḍāʾ*), gestured meaning (*dalālat al-imāʾ*), and the alluded meaning (*dalālat al-ishārah*). From this division it appears that *ghayr al-ṣarīḥ* includes two types of the indications mentioned by the Hanafites: the alluded meaning and the required meaning.

Dalālat al-mafhūm is an implied meaning that is not indicated in the text but is arrived at by way of inference. This is to a large extent concurrent with what the Hanafites have termed *dalālat al-naṣṣ*. But the Mutakallimūn subdivide this indication into two types: *mafhūm al-muwāfaqah* (harmonious meaning) and *mafhūm al-mukhālafah* (divergent meaning). The former, as referred to above, is an implicit meaning on which the text may be silent but nevertheless in harmony with its pronounced meaning. This harmonious meaning may be equivalent to the pronounced meaning, or may be superior to it.

As for *mafhūm al-mukhālafah,* or the meaning that diverges from the text, its consideration has been a controversial issue. Those who uphold this indication

define it as an indication that establishes an unpronounced ruling that is opposite to the pronounced one due to the negation of one of the modifications considered in the pronounced ruling. In other words, when some modification, negative or positive, is used specifically to shape a ruling, this indicates that when such a modification is missing or negated, it is implicitly understood that this ruling changes to the opposite. This indication is also called *dalīl al-khiṭāb.*

Comparison between the two approaches shows the following:

1.Textual indications are four, according to the Hanafites, while they are five according to the Mutakallimūn, as the latter uphold *mafhūm al-mukhālafah* (divergent meaning), whereas the former do not recognize it.

2. Both the Hanafites and the Mutakallimūn agree on *dalālat al-iqtiḍāʾ* (the required meaning) and *dalālat al-Ishārah* (the alluded meaning).

3.*Dalālat al-naṣṣ* (the inferred meaning), as termed by the Hanafites, is the same as *mafhūm al-muwāfaqah* (the harmonious meaning), as termed by the Mutakallimūn. Even some of the Hanafites called it also *mafhūm al-muwāfaqah.*

Thus, though each approach adopted a different perspective to the issue of textual indications, they eventually converge at a common ground. This is why it could easily be observed that the difference between the two approaches is more formal than real. With the exception of *mafhūm al-mukhālafah* (the divergent meaning), it seems that the two approaches, though they have somewhat different classification and terminologies, agree on the major four textual indications.

(14)

Ijtihād

The trilateral root from which the word *ijtihād* is derived is j-h-d, which in its essence denotes strenuousness and effort. Technically, *ijtihād* can be defined as the exhaustion of one's effort and the exertion of full capacity in realizing either *sharī`ah* rulings or their application.

While scholars of Islamic jurisprudence may disagree about the echelon to which *ijtihād* is properly to be assigned in the *sharī`ah* system, none will dispute its prime significance as a method of deducing legal rulings for issues not directly addressed by a specific legislative text. *Ijtihād* is a rational instrument by which revelation, as expressed in the Qur'ān and the Sunnah, may be extended to new issues and applied to them. Thus it may be viewed as a system that perpetuates the implementation of the spirit of Allah's revealed law, thereby reviving the human being's awareness of rights and obligations—a system enacted by the Prophet (p.b.u.h.) himself during the period of revelation, practiced by him, and taught to his Companions in his lifetime.

Conditions of the *mujtahid* (practitioner of *ijtihād*)

The practitioner of *ijtihād* must possess knowledge of:

-The Book of Allah which it is the main source of *shari`ah* rulings. However, it is not required to memorize the entire Book. It is enough to know the verses to which legal rulings are related. Moreover, it is not required to memorize these verses by heart, but rather to know their places so as to seek the needed verse at the time of need.

- The *ḥadīth*s that relate to *sharī`ah* rulings. Still one does not have to memorize them by heart, but rather to have authoritative references that contain the *ḥadīth*s that relate to *sharī`ah* rulings. Moreover, it is sufficient for him to know the location of each chapter in order to revisit it whenever he needs to issue a fatwa. He needs also to have knowledge about prophetic reports and how to distinguish the authentic from

the unauthentic and the accepted from the rejected. He may `imitate trustworthy scholars of hadith in this regard, if he is not able to verify the authenticity of a given report himself.

- The issues that gained *'ijmā`* so as not to issue a fatwa contrary to *'ijmā`*, just as he has to know the texts so that one should not issue a fatwa contrary to them.

- The science of *uṣūl al-fiqh* which provides the necessary methodology that paves the way for the cultivation of *shari`ah* texts.

- The abrogating texts and the abrogated ones. The *mujtahid* is not required to memorize all cases of abrogation. But in each incident in which he gives a fatwa according to a Quranic verse or a *ḥadīth,* he must know that this *ḥadīth* or that verse is not abrogated.

-Arabic language and grammar in a way that facilitates for him the comprehension of Arabic discourse. He should have such an amount of proficiency that makes the *mujtahid* understand the address of the Arabs and their conventions in usage, to the extent that he becomes able to distinguish between explicit, apparent, and general expressions; literal and figurative meanings; generic and particular moods; clear and equivocal texts, etc.

- The objectives of the *sharī`ah* which serve as an umbrella for the process of *ijtihād,* whether in the understanding, deduction or application of *shari`ah* rulings. Neglecting these objectives during this process will likely result in causing hardship to people and contradicting the spirit of the *shari`ah*.

The *ḥukm* of *Ijtihād*

Exercising *ijtihād* may variably fall under any of the following legal categories:

1- It is a personal obligation in two cases: first, when a qualified person himself faces an incident, he has to exercise *ijtihād* to reach the *sharī`ah* ruling

concerning this incident and he may not consult any other authority, because he himself is able to deduce it; second, when a qualified person is asked about the ruling of an urgent case and there is no other qualified scholar to be consulted to the extent that the *sharī`ah* ruling concerning this incident might be missed if not instantaneously sought.

2- It is a collective obligation if there are a number of qualified *mujtahid*s to investigate the issue under discussion.

3- It is recommendable when the *mujtahid* is asked about an issue that has not happened yet, in which case his exercising *ijtihād* to find out its ruling is only recommended.

4- It is reprehensible if the *mujtahid* wastes his time fruitlessly searching for answers for imaginative, unexpected, unusual questions in order to produce brainteasers.

5- It is prohibited in two cases: first, when one exercises *ijtihād* contrary to an explicit authenticated text; second, when an unqualified person exercises *ijtihād,* because he does not have the tools required for the task. Such a person will be sinful even if he accidently finds the correct ruling.

The domain of *ijtihād*

Not all *sharī`ah* issues fall within the domain of *ijtihād*. Rather some are subject to *ijtihād*, while others are not.

In general, *sharī`ah* rulings that are not liable to *ijtihād* are such ones that are unchangeable over the time, technically called *qaṭ`iyyāt* (decisively evidenced issues); that is, issues established by proofs whose authenticity and indication are beyond dispute. Such *qaṭ`iyyāt* include:

1- Belief issues concerning which there are decisive textual evidences, such as belief in Alah, the messengers, the Last Day, the Holy Scriptures, and the angels.

2- Codes of ethics, such as the goodness of truth telling, virtues, and high moralities and the evilness of their opposites. For good and evil in such ethical issues stand plainly to reason. As a matter of fact, no sound–minded person might question such axioms.

3- *Al-ḍarūriyyāt* (issues known by necessity) that is, issues that have been established in a decisive manner by the *sharī`ah* and have become necessarily known as part of the religion. These include:

- *Al-muqaddarāt,* i.e., legal duties with prescribed quantities, such as the penalty of accusing a chaste person of illicit sexual intercourse, the atonement of breaking one's oath, the portions to be paid as Zakat–charity. Such matters allow for no increase or decrease.
- *Al-yaqīniyyāt,* i.e., legal obligations that are indisputable essentials of the religion, such as the daily Prayers, fasting of Ramadan, Hajj-pilgrimage, as well as the prohibition of murder and fornication.
- *Al-mu'abbadāt,* i.e., particular rulings whose perpetuity is explicitly stated by the *sharī`ah*, such as the prohibition of abusing the Prophet (p.b.u.h.), along with the general principles that the Lawgiver is known to have taken into consideration, such as the principles of lifting strain, the forbiddance of harming others, and the necessity of fulfilling covenants.

Such decisively evidenced issues cannot unanimously be subject to *ijtihād*.

On the other side, *sharī`ah* issues that fall within the domain of *ijtihād* are generally called presumptive rulings (*ẓanniyyāt*). These include:

1– Rulings that are based on textual evidences with presumptive implications. The *mujtahid* has to search for the implied meaning of the evidence and how it is indicated. The evidence could be general or absolute; imperative or prohibitive; indicated by the explicit meaning (*dalālat al-`ibārah*), the alluded meaning (*dalālat al-ishārah*), the implied meaning (*dalālat al-dalālah),* the required meaning (*dalālat al-iqtiḍā')*; or the like considerations that the *mujtahid* takes when investigating a text.

2- Rulings concerning which no particular *shari`ah* text is known. The *mujtahid* has to exert his effort to reach their *sharī`ah* position by way of *qiyās, istiḥsān, istiṣḥāb*, or any other methodology with all scholarly differences regarding the acceptability or unacceptability of a method or the other of such these.

4- Jurisprudential rules that have given rise to many juristic differences, such as whether the signification of *`āmm* (the general meaning) is decisive, as the Ḥanifites view, or presumptive, as the majority of jurists hold, and whether *maſhūm al-mukhālafah* (divergent meaning) has an authority and can be counted on, as the latter has said, or not, as the former has maintained.

5- Some theological issues that do not constitute fundamentals of religion, such as whether the Prophet (p.b.u.h.) saw Allah on the night of his Heavenly Ascension.

Ta`āruḍ* and *Tarjīḥ

Ta`āruḍ is a technical term that refers to contradiction and conflict between two evidences regarding one ruling. Contradiction between legal evidences means that each of the two evidences, having its full authority, nullifies and belies the other, insomuch that they cannot be employed together.

Tarjīḥ is to demonstrate that one of two equivalent evidences is distinguished by a quality that makes it more considerable than the other.

In general, jurists agree that there is no actual conflict between *shari`ah* textual evidences because they emanated from the same source; namely divine revelation. Thus, such contradiction and conflict is not real, but only is in the eyes of the researcher and it ought to be resolved after careful examination. Conflicting evidences have to be compared with each other and the *mujtahid* has to have a set of criteria that enable him either to reconcile the evidences and bring them into harmony or to give preference to the strongest one. *Tarjīḥ* is thus a fundamental precept in the *sharī`ah* that aims at eradicating juristic disagreement.

To remove the apparent contradiction between evidences, the *mujtahid* should first try to reconcile the conflict by any reasonable way of interpretation. For example, the Quranic verse that reads, " كتب عليكم إذا حضر أحدكم الموت إن ترك خيرا الوصية للوالدين والأقربين بالمعروف حقا على المتقين Prescribed for you [believers], when death approaches any one of you who shall leave behind wealth, is that he make a will for [his] parents and nearest relatives, in accordance with what is right" [2:180] suggests the obligation of making a will for one's parents; then the inheritance guiding rules came in other Quranic verses. To reconcile this apparent conflict some jurists suggest that this verse is still applicable to cases where a parent is not eligible for inheritance such as when the parent is a non-Muslim. The later text may also serve as a modification to the earlier one.

If the conflict cannot be reconciled in a reasonable manner and the dates of both texts are knowable, then the one that came later is the abrogating text and the one that came earlier is the abrogated one.

If the dates are not knowable, then the *mujtahid* has to employ the rules of *tarjīḥ* giving one evidence preference over the other. There are so many rules in this regard some of which we referred to before.

Taqlīd

Jurists provided a variety of technical definitions for *taqlīd* that can be summarized into the following two:

First, *taqlīd* is to follow someone else's words or deeds, believing truth to be with him without exploring and pondering on his evidence. Second, *taqlīd* is the acceptance of someone else's opinion without authority or evidence.

However, it can be concluded that the *muqallid* (the imitator) is the one who does not care about knowing the evidence of his *muqallad* (imitated person), yet he adopts his opinion because he trusts him and feels assured that such as a person would not say something without evidence.

Taqlīd thus can be classified into commendable and censurable. *Taqlīd* is commendable for one who is unable to exercise *ijtihād*, because he cannot realize *sharī`ah* rulings himself. Hence, the only way he has is to follow a qualified person who can guide him to the obligations he has to fulfill. But *taqlīd* is censurable and prohibited in three cases:

First, when it involves turning away from what Allah has sent down and neglecting it by following and imitating fathers, elders, teachers, etc.

Second, when the *muqallid* knows that he is following an unqualified person.

Third, when one blindly follows another one even when proofs evidently run counter to the opinion of the *muqallad*. This case is different from the first in that

the *muqallid* here has come to know the contrary proofs while in the first case he imitates before knowing them, even because he has neglected them altogether.

Following fiqh Schools:

Fiqh schools represent different bodies of legal thoughts that adopted diverse methodologies to interpret and apply shari`ah juridical texts. A Muslim may follow one of these schools if he thinks that its methodology is better and closer to the truth than other methodologies. But since the *fiqh* literature of all schools include weak opinions that sometimes contradict *shari`ah* textual evidences, a Muslim has to avoid such weak opinions and follow the correct one. Blind following of legal schools fall under the category of prohibited and censurable *taqlīd*. Moreover, a Muslim has to be open-minded and avoid fanaticism that leads to apprehension and aversion toward other schools.

Maqāṣid al-Sharī‘ah (Shari`ah Objectives)

(1)

Definition

Maqāṣid al-Sharī‘ah is a term composed of two Arabic words: *maqāṣid* and *al-sharī‘ah*. *Maqāṣid* is the plural noun of *maqṣad*. *Maqṣad* is a verbal noun that is derived from the verb *qaṣada.* Both *maqṣad* and *qaṣd* denote straightness of the path, justice, determination, direction, moderation between two extremes. A number of the derivatives of this word is found in the Quran as in following verses: "*وعلى الله قصد السبيل ومنها جائر* Thus it is for Allah to set the straight path [for His seekers]" [16:9] "*واقصد في مشيك* Rather, be of modest bearing in your walk." [31:19] "*لو كان عرضا قريبا وسفرا قاصدا لاتبعوك* Had there been a [worldly] gain near at hand, and a moderate journey, they [who are hypocrites] would, most surely, have followed you." [9:42]

As we shall come to know soon, *maqāṣid al-sharī‘ah,* as an independent branch of knowledge, did not gain much attention in traditional jurisprudential authorship. Therefore, we find no technical definition for this term in classical writings. Even al-Shāṭibī, the founding father of *maqāṣid al-sharī‘ah,* did not provide a technical definition and his words were more explanatory. Contemporary scholars, however, provided various definitions for *maqāṣid al-sharī‘ah,* though they all refer to the same meaning.

Ibn ‘Āshūr's definition: "The meanings and wisdom that the Lawmaker observed in all, or most of, laws and legislations." ‘Alāl al-Fāsī's definition: "The aims and secrets intended by the Lawgiver in every *shari`ah* ruling."

Al-Raysūnī's definition: "The objectives proposed in the *shari`ah* in order to achieve the benefit of people."

The development of *Maqāṣid al-Sharī'ah*

The emergence of *maqāṣid al-sharī'ah* began with the emergence of *sharī'ah* law. *Maqāṣid al-sharī'ah* are found, directly or indirectly, in the texts of the Quran and the traditions of Prophet Muhammad (peace be upon him). The Quran and the Sunnah are replete with wisdom, purpose and intention behind various legislations. After the demise of Prophet Muhammad (peace be upon him), the Companions, who thoroughly fathomed the objectives of the *sharī'ah*, followed the same suit. For example, Ibn Mas'ud said, "Beware of overstrictness and overthought. Stick to the old tradition." This statement goes in accordance with the texts of the Quran and the Sunnah which promote ease and removal of hardship. Fighting the apostates, collection of the Quran, resumption of congregational *tarāwīḥ* prayer, suspending the theft penalty in the famine year are other examples of their consideration of *sharī'ah* objectives.

The same spirit passed to the next generations up to the time of the founding fathers of the fiqh schools. Principles of *istiṣlāh*, *istiḥsān*, *qiyās*, *'urf*, and *sadd al-dharā'i'*, which were developed by these imams, are principally founded on *sharī'ah* objectives as will be discussed soon. Scholars and jurists started gradually to touch upon issues related to the secrets, purposes and objectives of *sharī'ah* rulings and laws as we see in the works of al-Baqillānī (died 403 H.) in his book *al-Taqrīb wa al-Irshād*, al-Juwaynī (died 478 H) in his book *al-Burhān* where he first discussed *al-kulliyāt al-khams* (the five universals), al-Ghazālī (died 505 H) in his book *Shifā' al-Ghalīl* and *al-Mustaṣfá*, al-Rāzī (died 606 H) in his book *al-Maḥṣūl*, al-Āmidī (died 631 H) in his book *al-Iḥkām fī Uṣūl al-Aḥkām*, and many more. Al-'Izz ibn 'Abd al-Salām (died 660 AH) made a huge contribution in his book *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām* which contains detailed discussions

on the concepts of *maṣlaḥah* (benefit) and *mafsadah* (harm). Both Ibn Taymiyyah (died 728) and Ibn al-Qayyim (died 751 H) paid much attention in their various works to the practical consideration and application of *maqāṣid al-sharī'ah*. Later one came al-Shāṭibī (died 790 AH) who wrote his master piece *al-Muwāfaqāt fī Uṣūl al-Sharī'ah* in which he dedicated, for the first time, a large part for detailed discussions on *maqāṣid al-sharī'ah*.

Maqāṣid al-sharī'ah, then, was neglected for a long time until scholars and jurists of contemporary era started to revive discussions concerning its significance under the pressure of the swaying cultural invasion. Distinguished among contemporary scholars is al-Ṭāhir ibn 'Ashūr whose book *maqāṣid al-sharī'ah al-Islāmīyah* can be considered second in importance to *al-Muwāfaqāt*. Among other famous writers on *maqāṣid al-sharī'ah* are those whose definitions were mentioned above.

Significance of *maqāṣid al-sharī'ah*

Knowledge of *maqāṣid al-sharī'ah* is indispensable for all those who are interested in *sharī'ah* knowledge and Islamic thought.

-For a scholar and a jurist, *maqāṣid al-sharī'ah* helps developing an in-depth comprehension of *sharī'ah* overarching philosophy that underlies its rules and laws. It is substantially significant for reaching a balanced view when there is a conflict of interests, for proper assessment of seemingly contradictory evidences and for appropriate employment of the techniques of inference and deduction. It also paves the way for the process of *ijtihād* for unprecedented incidents.

A jurist needs *maqāṣid al-sharī'ah* when giving fatwa in a particular case and when applying laws to actual incidents. Umar suspended the application of theft penalty in the year of famine, did not give a share of *zakah* to those whose

hearts are to be reconciled, and did not distribute the conquered lands of Iraq among the soldiers as was practiced by the Prophet Muhammad (peace be upon him) himself because he considered the future Muslim generations.

Moreover, *maqāṣid al-sharī'ah* is important for Muslim preachers as it enables them explain and exhibit the beauty and wisdom of *sharī'ah* rules and laws for both Muslims and non-Muslims. It endears Islam to non-Muslims and enhances faith in the hearts of Muslims. Many non-Muslims have reverted to Islam after comparing the objectives of Islamic laws with the philosophy of man-made laws. Understanding the wisdom behind the laws makes compliance to them much easier- even lovable. In addition, *maqāṣid al-sharī'ah* enables Muslim preachers to defend shari`ah against unwarranted secular attacks that brand it as being the cause of violence and backwardness of Muslims.

How *maqāṣid al-sharī'ah* relates to *sharī'ah* sources

The Quran is the first source and ultimate reference of *maqāṣid al-sharī'ah*. As indicated above, the Quran habitually alludes to the wisdom and purposes of laws. Regarding *ṣalāh*, the Quran says "*وأقم الصلاة إن الصلاة تنهى عن الفحشاء والمنكر* Moreover, [duly] establish the Prayer. Indeed, the Prayer guards [one] against immorality and evil" [29:45] and about fasting " *كتب عليكم الصيام كما كتب على الذين من قبلكم لعلكم تتقون* Fasting is prescribed for you as it has been prescribed for those [who have believed] before you, so that you may be God-fearing" [2:183] and about zakah "*خذ من أموالهم صدقة تطهرهم وتزكيهم بها* Take from their wealth a charitable offering to cleanse them and purify them thereby." [9:103] About social dispute we read, "*إنما المؤمنون إخوة فأصلحوا بين أخويكم* Indeed, all the believers are brethren. Thus set aright [relations] between your brothers." [49:10] An example of the wisdom behind a prohibitory law is the Quranic verse " *إنما الخمر والميسر والأنصاب والأزلام رجس*

من عمل الشيطان فاجتنبوه لعلكم تفلحون. إنما يريد الشيطان أن يوقع بينكم العداوة والبغضاء في الخمر فهل أنتم منتهون والميسر ويصدكم عن ذكر الله وعن الصلاة O you who believe! Indeed intoxicants, and gambling, and idol altars, and divining arrows are but defilement from the works of Satan. So shun them, so that you may be successful. Indeed, Satan only desires to instill between you enmity and [bitter] hatred through intoxicants and gambling, and to turn you away from the remembrance of Allah and from the Prayer. Will you not, then, desist?" [5:90-92]

Prophet Muhammad (peace be upon him) used to draw attention to many of the underlying secrets, rationale and wisdom behind *sharī'ah* rulings and laws. For example, he emphasized the easiness of the *sharī'ah* in both words and acts. He said, "Indeed the religion [of Islam] is easy." He refrained from doing things that might cause hardship to people. He said, "Were it not that my nation would suffer hardship, I would command them to use *siwak* before every prayer". He also refrained from observing *tawarīḥ* in a congregation after he had led such a congregational prayer for three nights and upon his companion's inquiry he said, "I [did that] lest it might become obligatory upon you." When he was asked about hajj whether it would be a yearly obligation he said, "If I would say 'yes', it would be a [yearly] obligation, and you would not be able [to fulfill it]."

If *ijmā`* is based on a textual reference, then *maqāṣid al-sharī'ah* is obviously observed as explained above. If it is based on *ijtihād,* it has to be achieving some religious or worldly interest and thus *ijmā`* is always concomitant with *maqāṣid al-sharī'ah.*

Qiyās aims to analogically align new incidents with original cases in terms of a *sharī'ah* ruling since they share a common *`illah* (effective cause). The *`illah*

is a quality that is suitable to be the basis of the ruling since it brings benefit or wards off harm, which is the essence of *maqāṣid al-sharī'ah*.

The essence of *istiṣlāḥ*, as a source of *sharī'ah* rulings, is to seek benefit and interest and avoid harm and loss. Even those jurists who theoretically rejected *maṣlaḥah* (interest) as a basis for enacting laws, employed it practically in their writings and fatwas and thus its authoritative consideration has gained jurists explicit and implicit agreement. Undoubtedly, the consideration of *maṣlaḥah* goes in harmony with *maqāṣid al-sharī'ah*.

The principle of *istiḥsān* (juristic preference), with its various types as studied in *uṣūl al-fiqh*, is essentially based on the consideration of *maqāṣid al-sharī'ah*. It involves exceptions and exemptions from general laws and rules that are largely employed when strict observing of the law or analogy leads to the opposite of the Lawgiver's intent. The achievement of benefit and interest and avoidance of harm and loss underlie the observance of this principle and thus it fulfils the goal of *maqāṣid al-sharī'ah*.

Similarly, *sadd al-dharā'i`* (blocking the means to evil) is another principle of legislation adopted by a variety of *fiqh* schools to maintain *maqāṣid al-sharī'ah*. When basically lawful and permissible means lead, under certain circumstances, to evil results and consequences they must be blocked and disallowed; or else the *sharī'ah* would be accused of contradicting its objectives.

Moreover, jurists have approved the consideration of *`urf* (custom) when it does not contradict *sharī'ah* laws. Customs and traditions, verbal or practical, are usually developed to facilitate people's transactions and achieve their interests, which intersects with the objectives of the *sharī'ah*. Thus, jurists have laid certain

conditions to make sure that the observance of *`urf* does not conflict with *maqāṣid al-sharī‘ah*.

(2)

How to identify *maqāṣid al-sharī‘ah*

In general, the major objective of the *sharī‘ah* is to show people the path to their success in this world and in the Hereafter. The Quran explicitly states " فإما يأتينك مني هدى فمن اتبع هداي فلا يضل ولا يشقى ومن أعرض عن ذكري فإن له معيشة ضنكا ونحشره يوم القيامة أعمي But if there comes to you, [O humanity,] guidance from Me, then whoever follows My guidance shall not go astray [in the world] and shall not suffer misery [in the Hereafter]. But whoever turns away from My remembrance, for him, indeed, there shall be a stringent life. And We shall bring him to assembly, on the Day of Resurrection, blind*" [20:123-124]*

In particular, however, the identification of *maqāṣid al-sharī‘ah* is closely related to the rationalization of its laws and rulings. In a limited area of *sharī‘ah* rulings human intellect has no chance to rationalize or infer a particular reason. This area is mainly confined to acts of worship and quantified obligations (known as *muqaddarāt*), such as the number of *rak`āt* (prayer units), the number of rounds around the Ka`bah, the number of lashes for the commission of fornication, etc. The rest of *sharī‘ah* rulings and laws can be rationalized and the wisdom and interest behind their prescription are conceivable.

The Lawgiver's intent behind *sharī‘ah* rulings and laws can be identifying through the following ways:

-**First**: ***sharī'ah*** **texts themselves**: Many of the laws and rulings mentioned in the Quran and the Sunnah are accompanied by explicit or implicit indications of the purposes and objectives for which they were enacted. Various linguistic tools have been employed to express these objectives and this is why it is critically significant to have a good command of Arabic language.

Examples of the explicit indications include:

- The Quranic verse that reads " *من أجل ذلك كتبنا على بني إسرائيل أنه من قتل نفسا بغير نفس أو فساد في الأرض فكأنما قتل الناس جميعا ومن أحياها فكأنما أحيا الناس جميعا* Because of this, We did prescribe for the Children of Israel that whoever kills a person- except [in punishment] for [the killing of another] person, or for the spreading of [dire] corruption in the earth- it shall be [reckoned] as though he has killed all humankind. And whoever saves a life, it shall be [reckoned] as though he has saved the life of all humankind." [5:32] This is a Quranic comment on the story of the two sons of Adam.

-The Quranic verse that reads "*وأقم الصلاة إن الصلاة تنهى عن الفحشاء والمنكر* Moreover, [duly] establish the Prayer. Indeed, the Prayer guards [one] against immorality and evil." [29:45]

-The Quranic verse that reads " *ما أفاء الله على رسوله من أهل القرى فلله وللرسول ولذي القربى واليتامى والمساكين وابن السبيل كي لا يكون دولة بين الأغنياء منكم* Thus whatever spoils Allah has turned over to His Messenger from the [disbelieving] townspeople, it shall be for Allah and for the Messenger [to disburse], and for [his] close relatives, [who are prohibited from charity,] and for the orphans, and for the indigent, and for the wayfarer- so that it does not merely circulate between the wealthy among you." [59:7]

- The Quranic verse " يا أيها الذين آمنوا إنما الخمر والميسر والأنصاب والأزلام رجس من عمل الشيطان فاجتنبوه لعلكم تفلحون إنما يريد الشيطان أن يوقع بينكم العداوة والبغضاء في الخمر والميسر ويصدكم عن ذكر وعن الصلاة O you who believe! Indeed intoxicants, and gambling, and idol altars, and divining arrows are but defilement from the works of Satan. So shun them, so that you may be successful. Indeed, Satan only desires to instill between you enmity and [bitter] hatred through intoxicants and gambling, and to turn you away from the remembrance of Allah and from the Prayer" [5:90-91]

-The Prophetic statement "*إنما جعل الاستئذان من أجل البصر* Seeking permission [to enter others' houses] has been enjoined because of [unlawful] sight."

-The prophetic statement "*إنما نهيتكم عن ادخار لحوم الأضاحي لأجل الدافة* I had forbidden you to store the meat of sacrificial animals because of the visiting [poor] people [who came to Medina last year]."

In implicit indications usually the ruling is mentioned accompanied by a quality that had it not been the *`illah* (effective cause) of this ruling, it would have been redundant to mention it. Examples include:

-The Quranic verse that reads, " *والسارق والسارقة فاقطعوا أيديهما جزاء بما كسبا نكالا من الله* As for the male thief and the female thief [among yourselves], cut off their hands as a recompense for what [evil] they have earned, [and] as a chastisement of deterrence from Allah." [5:38] The context indicates that theft is the *`illah* of that punishment.

-The Quranic verse that reads, " ويسألونك عن المحيض قل هو أذى فاعتزلوا النساء في المحيض ولا تقربوهن حتى يطهرن And they ask you, [O Prophet,] about menstruation. Say: It is a [cause for] harm. So withhold yourselves [from sexual intercourse] with women during menstruation, and do not approach them until they are cleansed."

[2:222] This indicates that having sexual intercourse with one's wife is prohibited during menstruation because it is a cause of harm.

-When a man came to Prophet Muhammad (peace and blessings be upon him) and told him that he had sexual intercourse with his wife during Ramadan daytime he commanded him to emancipate a salve. This indicates that the emancipation of a salve is the atonement for intimate relationship in Ramadan daytime.

-**Second**: *istiqrā'* (Inductive reasoning); that is, to trace particular rulings to come up with a governing universal principle. *Istiqrā'* can be either complete or incomplete; the former yields decisive universals whereas the latter yields presumptive ones. Universal rules and objectives of the *sharī'ah* have been identified by Muslim jurists through such inductive reasoning. For example, easiness of the *sharī'ah* has been established not only by a number *sharī'ah* texts that affirm this intrinsic spirit but also by complete induction of *sharī'ah* laws and rulings. All such laws and rulings are easy to be observed and obeyed and whenever the *mukallaf* (legally responsible person) is faced by difficulty or hardship concessions and licenses are granted to overcome the situation. Justice, mercy and the like universal *sharī'ah* values have also been known as fundamentals of Islamic legislation by way of induction.

-**Third**: ***Ijmā`***: Sometimes jurists identify a certain meaning that is neither expressed in the *sharī'ah* texts nor is known by way of inductive reasoning. Nevertheless, this meaning gains consensus of jurists as being intended or observed by the Lawgiver to achieve a certain purpose. For example, according to the inheritance law, a full brother is given precedence over a paternal brother to the extent that the existence of the former excludes the latter from inheritance. Jurists

unanimously conclude that the reason is that the full brother possesses two ties with the deceased person as compared to the half-brother who possesses only one tie. Observing this *`illah*, jurists give precedence to the full brother over the paternal brother with regard to leading the funeral payer over the deceased brother and the right of guardianship when a brother is placed under interdiction.

Fourth: **The Lawgiver's silence**, which can be divided into two divisions:

1) If there was no need for the issue under discussion during Prophet Muhammad's lifetime or there was a need for it but there existed a preventive factor that inhibited its enactment, then the Lawgiver's silence should be reconsidered and the principle of *maṣlaḥah* should be employed. The collection of the Quran after Prophet Muhammad's death was a matter about which the Lawgiver remained silent; simply because so long as the Prophet Muhammad was alive there was no need to collect the Quran. After his death, however, Muslims became in need of such collection- an interest that gained the approval and consensus of the Prophet's companions. On the other hand, Prophet Muhammad led his companions in *tarāwīḥ* Prayers for three nights and then declared his refrainment. When asked about the reason he said, "I [did that] lest it might become obligatory upon you." In this case, there existed a preventive factor that caused the Prophet to refrain, though there was a need for such congregational payer as an act of worship. Therefore, Umar ibn al-Khaṭṭāb reconsidered the case and commanded Ubay ibn Ka`b to lead people in *tarāwīḥ* prayer since the preventive factor no longer existed. Under this category all unprecedented incidents that aim to achieve people's interests can be subsumed.

2) If there was a need for the issue under discussion and there was no preventive factor, then the Lawgiver's silence regarding it suggests that it is

unauthorized and unlawful. Under this division fall all innovated rituals and acts of worship.

Divisions of *maqāṣid al-Sharī`ah*

There are different divisions of *maqāṣid al-sharī`ah* based on various considerations:

First: *maqāṣid* can be divided into: *maqāṣid al-shāri'* and *maqāṣid al-mukallaf*

-*Maqāṣid al-Shāri'* (objectives of the Lawgiver) refers to the intentions and purposes of the Lawgiver behind *sharī`ah* injunctions. The *sharī`ah*, in general, aims at the success of humankind both in this world and the Hereafter.

-*Maqāṣid al-mukallaf* which refers to the intentions of the legally responsible persons behind their words, acts, and conducts. These intentions have to be in conformity with the objectives of the Lawgiver.

Second: *maqāṣid* can be divided into general, specific and particular.

-*Maqāṣid 'āmmah* (general objectives): These refer to the objectives observed in all, or most of, the *sharī`ah* fields. The five essential objectives, as will be discussed later, and universal objectives, such as easiness and justice fall under this division.

-*Maqāṣid khāṣṣah* (specific objectives), which are the objectives that are related to a specific field or certain fields of the *sharī`ah* that are close to each other. Thus, there have objectives pertaining to family laws, objectives regarding financial transactions, objectives pertaining to criminal laws, objectives of worship rituals, etc. Ibn `Ashūr provided insightful contributions in this area in his book on *maqāṣid al-sharī`ah*.

-*Maqāṣid juz'iyyah* (partial objectives): These are the Lawgiver's objectives behind particular laws and rulings. For example: the objective of having witnesses in marriage is to strengthen the marriage contract and prevent disputes and denial.

Third: *maqāṣid* can be divided into *aṣliyyah* (primary) and *taba`iyyah* (secondary)

-*Maqāṣid aṣliyyah* refers to the primary objectives of *sharī`ah* laws and rulings as intended by the Lawgiver.

-*Maqāṣid taba`iyyah* refers to such secondary objectives that were not intended primarily by the Lawgiver and may satisfy the *mukallaf* 's own purposes. For example, the Lawgiver's primary objective behind the legislation of marriage is to preserve the existence of humankind. Still the *mukallaf* may intend with marriage to satisfy his own desire or to make some financial benefit from marrying a wealthy woman. Similarly, the primary purpose of *ḥajj* pilgrimage is to seek nearness to Allah. Nevertheless, *mukallaf* may, as a secondary objective, engage in trade and make money during this journey as explicitly stated in the Quran " *ليس عليكم جناح أن تبتغوا فضلا من ربكم* It is not a sin for you [during *ḥajj*-Pilgrimage] if you seek [to obtain] bounty from your Lord [through commerce]." [2:198] *Maqāṣid taba`iyyah* can be subdivided into three types: 1) *Maqāṣid taba`iyyah* that enhance the primary objectives. An example of this type is to intend with marriage obeying the prophetic injunction to proliferate the ummah population, which enhances the primary objective of preserving humankind. 2) *Maqāṣid taba`iyyah* that contradict the primary objectives, which are

undoubtedly forbidden. *Taḥlīl* marriage contract[2] is an example of this type. 3) *Maqāṣid taba`iyyah* that does not belong to either of the above to types. Such an objective should be basically permissible unless it contravenes *sharī`ah* rules such as when a man marries a woman to cause a psychological damage to her.

(3)

Fourth: *Maqāṣid al-sharī'ah* can be divided into *ḍarūrīyāt* (necessities), *ḥājīyāt* (needs), and *taḥsīniyāt* (luxuries).

-*Ḍarūrīyāt* (necessities): These are the essential and necessary objectives without which people would suffer loss, corruption and chaos in this world and punishment in the Hereafter. These include the preservation of the five essential interests that gained consensus of Muslim jurists; namely, the preservation of religion, life, intellect, lineage and wealth. Some jurists added "the preservation of honor" to these five arguing that the *sharī`ah* has forbidden damaging others' honor and reputation and set a deterring penalty against accusing others with the commission of illicit sexual intercourse. Other jurists maintain that it belongs to the category of *ḥājiyyāt* (needs) that complement *ḍarūriyyāt*. Some contemporary Muslim scholars and thinkers have tried to add more values to these five. Equity and justice were suggested by sheikh al-Ghazali, freedom by Ibn `Ashūr, and ethics by Ṭāhah Abdul Raḥmān.

[2] The case when a man marries a triply divorced woman with the intention of divorcing her so that she may become lawful for her ex-husband.

It is noteworthy that the preservation of each of these essentials materializes by means of regulations and laws that guarantee its existence and protects it against nonexistence.

The preservation of religion: This is the highest and most essential objective. Allah (Exalted be He) created mankind to worship Him " *وما خلقت الجن والإنس إلا ليعبدون* And [know that] I have not created [either] jinn or human beings [for any other end] but to worship Me [alone]." [51:56] There is only one way to worship Allah, that is, through the true religion of Islam being the religion of all prophets and messengers of Allah as explicitly stated in the Quran. Allah (Exalted is He) says in the Quran what means " إن الدين عند الله الإسلام"Surely the religion in the Providence of Allah is Islam" [3:19] and "ومن يبتغ غير الإسلام دينا فلن يقبل منه وهو في الآخرة من الخاسرينAnd whoever desires other than Islam as religion - never will it be accepted from him, and he, in the Hereafter, will be among the losers." [3:85] To guarantee the existence of this objective the *sharī`ah* has prescribed the tenants of faith and acts of worship that bring people close to their Lord. To protect it against nonexistence it prescribed such laws as the penalty of apostasy, *jihād,* enjoining what is right and forbidding what is wrong.

Preservation of life: man was created and honored by Allah who subjugated all that is in the earth for him and provided him with divine guidance to lead a successful life both in this world and in the Hereafter. The very existence of mankind is a necessity and to guarantee this existence the *sharī`ah* commanded man to preserve his life by eating and drinking wholesome food and drinks and also to wear suitable clothes. To protect life against nonexistence, the *sharī`ah* prohibits all sorts of aggression against life. Thus *qiṣāṣ* (retaliation) was enacted to deter murderers and assaulters.

Preservation of progeny: The proliferation of mankind has been destined to be through the sexual relation between man and woman. But this relation has to be within the legitimate frame of marriage to yield a successful and chaste society as compared to the disastrous consequences of promiscuity. Some jurists classified the preservation of progeny under the category of *ḥājiyyāt* arguing that a person can live without marriage. This argument, however, is valid only when considering every person individually, but is undoubtedly invalid if we consider mankind in general. To guarantee the existence of humankind the *sharī`ah* has encouraged marriage as the only legitimate way to have offspring and even exhorted its followers to increase their children. To protect this necessity against nonexistence the *sharī`ah* has prohibited all sorts of illicit relations between men and women which eventually lead to the destruction and corruption of the society and mankind in general. It also prohibits abortion and infanticide. Moreover, the *sharī`ah* has discouraged divorce which results in psychological, social and financial problems to the family members, particularly children.

Preservation of intellect: Allah has favored man with mind and reasoning ability over all other creatures. The Quran in many places addresses human mind to utilize its capabilities in the proper way calling upon it to ponder, think, reflect, understand and remember. Sanity is a condition for the fulfillment of *sharī`ah* obligations; hence, neither a child nor an insane person is obliged to fulfill *sharī`ah* obligations. To guarantee the existence of this faculty Islam exhorts the development of one's mind through seeking knowledge, which is an Islamic obligation. In the Quran we read, " فاعلم أنه لا إله إلا الله Know well, then, that there is no God but Allah" [47:19] and the Messenger of Allah (peace be upon him) said, "Seeking knowledge is an

obligation." To protect it against nonexistence, the *sharī`ah* has prohibited all sorts of aggression that cause the malfunction/dysfunction of human mind. Thus, all kinds of drugs and intoxicants are categorically forbidden. Parents and Muslim authority are required also to protect young children and youth against ideological invasion.

Preservation of wealth/property: Wealth and property are endeared to man and they are also important for people's transactions. To guarantee its existence, the *sharī`ah* enjoined people to work and gain lawful earnings. The Quran declares, "*هو الذي جعل لكم الأرض ذلولا فامشوا في مناكبها وكلوا من رزقه* He is the One who has made the earth yielding [of all its resources] to you. So walk through its [diverse] regions and eat of His provision" [67:15] and "*فإذا قضيت الصلاة فانتشروا في الأرض وابتغوا من فضل الله* But when the Prayer is concluded, then [you may freely] spread throughout the land and seek out the bounty of Allah." [62:10] To safeguard property against nonexistence, the *sharī`ah* has prohibited all forms of aggression against it and enacted severe punishment for the thieves. Allah (exalted be He) said what means "*والسارق والسارقة فاقطعوا أيديهما جزاء بما كسبا نكالا من الله* As for the male thief and the female thief [among yourselves], cut off their hands as a recompense for what [evil] they have earned, [and] as a chastisement of deterrence from Allah." [5:38] Unlawful earnings and ill-gotten wealth (usurpation, bribery, etc.) have been forbidden. Usury also has been strictly forbidden with deterring warnings due to the devastating damage it causes to the socio-economic aspects.

-*Ḥājiyyāt* (needs) are the requirements needed to relieve and lift difficulty, burden, and hardship. Thus, all *sharī`ah* licenses fall under this category. A juristic maxim dictates: Whenever there is difficulty there is ease. Examples

in the field of rituals of worship include concession for travelers to shorten prayer and break fasting in Ramadan. In the area of financial transactions, examples include the permissibility of loans, allowing *istiṣnā`* contract and *al-salam* sale (the advance payment sale). In the area of family laws examples include the enactment of divorce, *khul`* and *`iddah* (waiting period).

-*Taḥsīnīyāt* (embellishments), which complements both *ḍarūriyyāt* and *ḥājiyyāt*. These embellishments refer ultimately to the adoption of good manners, proper etiquettes, and agreeable traditions along with the avoidance of impurities and ill manners. *Taḥsīniyyāt* can be obligatory, recommendable, or permissible. An example of *taḥīniyyāt* for the preservation of religion is to adorn oneself when going to mosques as in the Quranic verse "يا بني آدم خذوا زينتكم عند كل مسجد O Children of Adam! Don your adorning apparel when setting out for every place of worship" [7:31] and also to remove ritually impure substances when performing prayer.

An example of *taḥīniyyāt* to preserve life is the prohibition to consume impure food or drink and to eat or drink excessively.

An example of *taḥīniyyāt* to preserve intellect is the prohibition to sit at a table where intoxicants are served. Moreover, the Prophet Muhammad (peace be upon him) cursed those who participated in the process of making, transporting and serving wine.

An example of *taḥsīniyyāt* to preserve progeny is the commandment to both spouses to observe kind treatment and to establish family relations on cordiality, mercy and love. Even when parting with each other the Quran commands that this should be in the best and fairest manner " الطلاق مرتان

فإمساك بمعروف أو تسريح بإحسانPronouncement of] divorce is [revocable] two times. [Each time thereafter, wives are] to be retained, in accordance with what is right, or set free with generous kindness.” [2:229]

An example of *taḥīniyyāt* to preserve property is the prohibition to sell unlawful, impure substances.