

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

# ***ISLAMIC JURISPRUDENCE*** (اسلامی فقہ)

*by*  
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# PREFACE

*Bismillahirrahmanirrahim*

Islam is the Religion, the entry to which is open for all mankind till the Day of Judgement, by bearing testimonies:

Ash-hadu 'an la 'ilaha 'illallahu wa 'ash-hadu 'anna Muhammadar Rasulullah.

أشهد أن لا اله الا الله و أشهد أن محمدا رسول الله

[I bear testimony that there is no god save Allah and I bear testimony that Hadrat Muhammad (Peace and blessings of Allah be upon him) is the Messenger of Allah].

The Message brought by the Messenger of Allah (Peace and blessings of Allah be upon him) is the Holy Qur'an. Its practical demonstration and explanation is the Sunnah and for all mankind the excellent model is available in the life conduct of the Messenger of Allah (Peace and blessings of Allah be upon him).

In other words, Islam is a way of life, a straight path, a well-established religion, a social contract based on *La ilaha illallah Muhammadur Rasulullah*.

لَا إِلَهَ إِلَّا اللَّهُ مُحَمَّدٌ رَّسُولُ اللَّهِ

The worship of Allah seeking Pleasure of Allah, the love and sincere obedience of the Messenger of Allah (Peace and blessings of Allah be upon him) as a proof of such love and brotherly behaviour among the believers and service to humanity and the creation of Allah are the objectives.

Muslims believe in the oneness of Allah, and in His Angels, and His Books, and His Messengers. They do not discriminate between any one of His Messengers. The first of them was Hadrat Adam (Peace be upon him) and the Last was Hadrat Muhammad (Peace and blessings of Allah be upon him). In between they were sent many prophets and messengers and the people of their time were bound to obey them and the messages brought by them from time to time. Now there shall come no prophet nor messenger nor any new message.

Pakistan was achieved after the Muslims of the sub-continent united on the slogan: *Pakistan ka mailab kiya, La ilaha illallah Muhammadur Rasulullah*.

It was this slogan which was the soul of all efforts at all levels from top to bottom though words were different . For instance:

Dr. Sir Muhammad Iqbal in his letter addressed to the Quaid-i-Azam Muhammad Ali Jinnah on 28<sup>th</sup> May, 1937, wrote:

*"....The question therefore is: how is it possible to solve the problem of Muslim poverty? And the whole future of the League depends on the League's activity to solve this question. If the League can give no such promise, I am sure the Muslim masses will remain indifferent to it as before. Happily there is a solution in the enforcement of the Law of Islam and its further development in the light of modern ideas. After a long and careful study of Islamic Law, I have come to the conclusion that if this system of Law is properly understood and applied, at last the right to subsistence is secured to everybody. But the enforcement and the development of the Shari'at of Islam is impossible in this country without a free Muslim state or states. This has been my honest conviction for many years and I still believe this to be the only way to solve the problem of bread for Muslims as well as to secure a peaceful India."*<sup>1</sup>

Quaid-i-Azam Muhammad Ali Jinnah, the Founder and the first Governor-General of Pakistan, in his speech, in reply to the Civic Address presented by the Karachi Corporation on August 25, 1947, said:

"It should be our aim not only to remove want and fear of all types, but also to secure liberty, fraternity, and equality as enjoined upon us by Islam."<sup>2</sup>

In his address to Civil, Naval, Military, Airforce officers of the Pakistan Government at Khaliqdina Hall, Karachi on October 11, 1947, the Quaid-i-Azam said:

"The establishment of Pakistan for which we have been striving for the last ten years is, by the grace of God, an established fact today, but the creation of a State of our own was means to an end and not the end in itself. The idea was that we should have a state in which we could live and breathe as free men and which we could develop according to our

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<sup>1</sup> Pirzada, Syed Sharifuddin., (editor) *Quaid's Correspondence*, Rawalpinid: Services Book Club, 1987, pp. 148-9.

<sup>2</sup> Afzal, M. Rafique, (editor) *Quaid-i-Azam Muhammad Ali Jinnah: Speeches and Statements as Governor-General of Pakistan, 1947-48*, Rawalpindi: Services Book Club, 1989, p. 65.

lights and culture and where principles of Islamic social justice could find freeplay.”<sup>3</sup>

Quaid-i-Azam, while speaking at a reception given to him on the birthday of the Holy Prophet (peace and blessings of Allah be upon him) on January 25, 1948, by the Bar Association, Karachi, said that he could not understand a section of the people who deliberately wanted to create mischief and made propaganda that the constitution of Pakistan would not be made on the basis of Shari’at. The Quaid-i-Azam said, “Islamic Principles today are as applicable to life as they were 1300 years ago.”

The Governor-General of Pakistan said that he would like to tell those who are misled—“some are misled by propaganda”—that not only the Muslims but also the non-Muslims have nothing to fear.

“Islam and its idealism have taught democracy. Islam has taught equality, justice and fairplay to everybody. What reason is there for any one to fear democracy, equality, freedom on the highest standard of integrity and on the basis of fairplay and justice for everybody. Quaid-i-Azam Muhammad Ali Jinnah said: “Let us make it (the future constitution of Pakistan). We shall make it and we will show it to the world.”

Of provincialism, the Governor-General of Pakistan said that it was a disease and a curse. He added: “I want the Muslims to get rid of the disease of provincialism. A nation can never make progress unless it marches in one formation. We are all Pakistanis and citizens of the State and we should serve, sacrifice and die for the State so that we may make it the most glorious and sovereign State in the world.”

The Quaid-i-Azam, speaking on this great and historic occasion, said: “I thank you for welcoming me. I have known this Bar Association for a considerable time. Today we have met here in a small body to pay tributes to the great man for not only he has reverence of millions but also commands the respect of all the great men of the world. What tribute can I, a humble man, pay to this great man.”

“The Prophet was a great teacher. He was a great law-giver. He was a great statesman and he was a great sovereign who ruled. No doubt, there are many people who do not quite appreciate when we talk of Islam.

“Islam is not only a set of rituals, traditions and spiritual doctrines, Islam is also a code for every Muslim which regulates his life and his conduct

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<sup>3</sup> Ibid, p. 74.

in even politics and in economics and the like. It is based on the highest principles of honour, integrity, fairplay and justice for all, one God and the equality of one God is one of the fundamental principles of Islam. In Islam there is no difference between man and man. The qualities of equality, liberty and fraternity are the fundamental principles of Islam.

The Governor-General of Pakistan observed that the life of the Prophet was simple according to those times. He was successful in everything that he put his hand to; from as a businessman to as a ruler. He said that the Prophet was the greatest man that the world has ever seen. "Thirteen hundred years ago he laid the foundation of democracy."

In his speech at Sibi Darbar on February 14, 1948, Quaid-i-Azam said:

"In proposing this scheme, I have had one underlying principle in mind, the principle of Muslim democracy. It is my belief that our salvation lies in following the golden rules of conduct set for us by our great Law-Giver, the Prophet of Islam. Let us lay the foundation of our democracy on the basis of truly Islamic ideals and principles. Our Almighty has taught us that 'our decisions in the affairs of the State shall be guided by discussions and consultations.'"<sup>4</sup>

In his broadcast talk to the people of Australia on February 19, 1948, the Quaid-i-Azam said:

"The great majority of us are Muslims. We follow the teachings of the Prophet Muhammad (peace be on him). We are members of the brotherhood of Islam in which all are equal in right, dignity and self-respect. Consequently, we have a special and a very deep sense of unity. But make no mistake. Pakistan is not a theocracy or anything like it. Islam demands from us the tolerance of other creeds and we welcome in closest association with us all those who, of whatever creed, are themselves willing and ready to play their part as true and loyal citizens of Pakistan."<sup>5</sup>

In his broadcast talk on Pakistan to the people of the United States of America in February 1948, the Quaid-i-Azam said:

"The constitution of Pakistan has yet to be framed by the Pakistan Constituent Assembly. I do not know what the ultimate shape of this constitution be. But I am sure that it will be of a democratic type, embodying the essential principles of Islam. Today, they are as applicable in actual life as

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<sup>4</sup> Ibid, p. 142.

<sup>5</sup> Ibid, pp. 149-150.



they were 1300 years ago. Islam and its idealism has taught us democracy. It has taught us equality of men, justice and fairplay to everybody. We are the inheritors of these glorious traditions and are fully alive to our responsibilities and obligations as framers of the future constitution of Pakistan. In any case, Pakistan is not going to be a theocratic State – to be ruled by priests with a divine mission. We have many non-Muslims, Hindus, Christians, and Parsis – but they are all Pakistanis. They will enjoy the same rights and privileges as any other citizens and will play their rightful part in the affairs of Pakistan.”<sup>6</sup>

In his speech in reply to the address presented by the students of the Islamia College, Peshawar on April 12, 1948, the Quaid-i-Azam said:

“I naturally welcome your statement that you do not believe in provincialism. You must learn to distinguish between your love for your province and your love and duty to the State as a whole. Our duty to the State takes us a stage beyond provincialism. It demands a broader sense of vision, and greater sense of patriotism. Our duty to the State often demands that we must be ready to submerge our individual or provincial interests into the common cause for common good. Our duty to the State often demands that we must be ready to submerge our individual or provincial interest into the common cause for common good. Our duty to the State comes first: our duty to our Province, to our district, to our town, and to our village and ourselves comes next. Remember, we are building a State which is going to play its full part in the destinies of the whole Islamic world. We, therefore, need a wider outlook, an outlook which transcends the boundaries of provinces, limited nationalism and racialism. We must develop a sense of patriotism which should galvanise and weld us all into one united and strong nation. This is the only way in which we can achieve our goal, the goal of our struggle, the goal for which millions of Musalmaans have lost their all and laid down their lives.”<sup>7</sup>

In his address at the Presentation of Colours to the 2/15<sup>th</sup> Punjab Machine Gun Regiment, Peshawar on April 15, 1948, the Quaid-i-Azam said:

“Live always true to the ideals to which you have just dedicated yourselves afresh— to the service of Pakistan, and make your contribution to the protection of the weak and to the hallowed memory of your comrades and thus enhance the glory of Islam.”<sup>8</sup>

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<sup>6</sup> Ibid, p. 157.

<sup>7</sup> Ibid, p. 221.

<sup>8</sup> Ibid, p. 236.

In his address to the Tribal Jirga at Government House, Peshawar on April 17, 1948, the Quaid-i-Azam said:

“Whatever I have done, I did as a servant of Islam, and only tried to perform my duty and made every possible contribution within my power to help our nation. It has been my constant endeavour to try to bring about unity among Musalmaans, and I hope that in the great task of reconstruction and building up Great and Glorious Pakistan, that is ahead of us, you realise that solidarity is now more essential than it ever was for achieving Pakistan which by the Grace of God we have already done. I am sure that I shall have your fullest support in this mission. I want every Musalmaan to do his utmost and help me and support me in creating complete solidarity among the Musalmaans, and I am confident that you will not lag behind any other individual or part of Pakistan. We Musalmaans believe in one God, one Book—the Holy Qur’an—and one Prophet. So we must stand united as one nation. You know the old saying that in unity lies strength; united we stand, divided we fall.”<sup>9</sup>

In his speech in reply to the address of welcome presented by the Principal, Staff and the students of the Edwards College, Peshawar on April 18, 1948, the Quaid-i-Azam said:

“Today, I am happy to see better things here. What more can one really expect than to see that this mighty land has now been brought under a rule, which is Islamic, Muslim rule, as a sovereign independent State. Now, we have much more difficult tasks ahead—how to reconstruct, how to build it up and how to revolutionise and remodel the past legacies from which we are suffering, namely, the mentality, the character, and the civil customs of which we have been the victims for a century or more as slave people.”<sup>10</sup>

In his message to the nation on the occasion of the first anniversary of Pakistan on August 14, 1948, the Quaid-i-Azam said:

“Remember, the establishment of Pakistan is a fact of which there is no parallel in the history of the world. It is one of the largest Muslim States in the world, and it is destined to play its magnificent part year after year as we go on, provided we serve Pakistan honestly, earnestly and selflessly.”<sup>11</sup>

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<sup>9</sup> Ibid, pp. 237-8.

<sup>10</sup> Ibid, pp. 240-1.

<sup>11</sup> Ibid, p. 273.

Thirteen days after, on August 27, 1948, in his message to the nation on the occasion of Eid-ul-Fitr, Quaid-i-Azam said:

“Let me therefore, appeal to you—in whatever language you may put, when the essence of my advice is boiled down, it comes to this—that every Musalmaan should serve Pakistan honestly, sincerely, and selflessly.”<sup>12</sup>

The speech of Mr. Liaquat ‘Ali Khan, the first Prime Minister of Pakistan while moving the motion on Aims and Objects on 7<sup>th</sup> March, 1949 in the Constituent Assembly is highly illuminating. A few extracts from it will be found instructive and helpful in properly understanding the objectives of our founding fathers:

“Mr. President”, he said “I beg to move the following Objectives Resolution embodying the main principles on which the Constitution of Pakistan is to be based.

Sir, I consider this to be a most important occasion in the life of this country next in importance only to the achievement of independence, because by achieving independence we only won an opportunity of building up a country and its polity in accordance with our ideals. I would like to remind the Housse that the Father of the Nation, the Quaid-i-Azam, gave expression to his feelings on this matter on many an occasion and his views were endorsed by the Nation in unmistakable terms. Pakistan was founded because the Muslims of Sub-Continent wanted to build up their lives in accordance with the teachings and traditions of Islam. We the people of Pakistan have the courage to believe firmly that all authority should be exrcesed in accordance with the standards laid down by Islam so that it may not be misused. All authority is a sacred trust, entrusted to us by God for the purpose of being exercised in the service of man so that it does not become an agency for tyranny or selfishness... In accordance with the spirit of Islam, the Preamble fully recognises the truth that authority has been delegated to the people and to none else, and that it is for the people to decide who will exercise that authority.

“For this reason it has been made clear in the Resolution that the State shall exercise all its powers and authority through the chosen representatives of the people.

“This is the very essence of democracy, because the people have been recognised as the recipients of all authority and it is in them that the power to wield it has been vested... You would notice, Sir, that the Objectives

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<sup>12</sup> Ibdj, p. 276.

Resolution lays emphasis on the principles of democracy, freedom, equality, tolerance and social justice and further defines them by saying that these principle should be observed in the Constitution as they have been enunciated in Islam —tate is not to play the part of a neutral observer, wherein, the Muslims may be merely free to profess and practise their religion because such an attitude on the part of the State would be the very negation of the ideals which prompted the demand of Pakistan and it is these ideals which should be the cornerstone of the State, which we want to build.... In our desire to build up an Islamic society we have not ignored the rights of the non-Muslims. Indeed it would have been un-Islamic to do so, and we would have been guilty of transgressing the dictates of our religion if we had tried to impinge upon the freedom of the minorities. In no way will they be hindered from professing or protecting their religion or developing their cultures ... Sir, the Resolution envisages a federal form of Government because such is the dictate of geography. It would be idle to think of a unitary form of government, when the two parts of our country are separated by more than a thousand mile --- Mr. President, it has become fashionable to guarantee certain fundamental rights, but I assure you that is not our intention to give these rights with one hand and take them away with the other --- Every one will be equal before the law, but this does not mean that his personal law will not be protected. We believe in the equality of status and justice --- It is our intention to build up an economy on the basic principles of Islam which seeks a better distribution of wealth and the removal of want, poverty and backwardness all that stand in the way of achievement of his fuller stature by man, must be eradicated from Pakistan --- We believe that no shackles can be put on thought, and therefore, we do not intend to hinder any person from the expression of his views. Nor do we intend to deprive any one of his right of forming association for all lawful and moral purposes. In short we want to base our polity upon freedom, progress, and social justice ...”.

The objective resolution, the principles and provisions of which have been made substantive part of constitution was passed by first constituent Assembly of Pakistan on March 7, 1949 and is reproduced below:

*“Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;*

*This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan ;*

*Wherein the State shall exercise its powers and authority through the chosen representatives of the people ;*

*Wherein the principles of democracy, freedom equality tolerance and social justice as enunciated by Islam shall be fully observed;*

*Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah;*

*Wherein adequate provision shall be made for the minorities to profess and practise their religions and develop their cultures;*

*Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;*

*Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;*

*Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;*

*Wherein the independence of the Judiciary shall be fully secured;*

*Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded:*

*So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity.<sup>13</sup>*

Islamic Law is the manifestation of the divine will. It finds its expression in the Holy Qur'an and the Sunnah. The law contained in both these sources is the revealed law and is technically known as the Shari'ah/شریعة.

Shari'ah/شریعة has been defined as follows:

ما شرع الله تعالى لعباده من الاحكام التي جاء بها نبي من الانبياء سواء كانت متعلقة بكيفية عمل و تسمى فرعية و عملية و دون لها علم الفقه او بكيفية الاعتقاد و تسمى اصلية اعتقادية و دون لها علم الكلام

*Ma shara`allahu ta`ala li `ibadi hi minal-`ahkami'llati ja'a bi ha nabiyyun min al-anbiya'i; sawa'an kanat muta`allaqatan bi kayfiyyati `amalin; wa tusamma far`iyyatan wa `amaliyyatan wa duwwana la ha `ilmul-fihi 'au bi kayfiyyati-l-i`tiqadi wa tusamma asliyyatan i`tiqadiyyatan wa duwwana la ha `ilmul-kalami.*

[Shari`ah means the commands given by God to His servants, which have been brought by any of the prophets. It is all the same whether they relate to the manner of action—and this is known as subsidiary and applied law—to which the science of *Fiqh* (فقه) was developed; or they relate to the manner of the belief, and this is known as the essentials and dogmatics for which the science of *kalām* (كلام) (scholastic theology) was developed].<sup>14</sup>

It will be worth mentioning to give the readers a brief introduction of Islamic Jurisprudence as enunciated by Mr. Justice Hamood-ur-Rahman (former Chief Justice of Pakistan) in his article published in *Reflections on Islam*.<sup>15</sup> He writes:

Jurisprudence is the science of laws. It deals with the theories and principles of law, the application of law to men's actions and the classification of legal concepts.

Islamic jurisprudence called '*Ilm-ul-Usul*' (علم الاصول) by Muslim jurists is somewhat different. It is a science of man's rights and duties both spiritual and social. While dealing with the above subjects, it also deals with the sources of law and matters appertaining thereto, the interpretation of the *text of the Holy Qur'an* and *Hadith*, the constitution of *Ijma`* (إجماع) and the analogical extension of laws to cases not falling within the texts of the *Holy Qur'an* and *Hadith* i.e. *Qiyas* (قياس) *Ijtihad* (اجتهاد).

Islam is not only a religion but also a complete code of life. It not only teaches us moral principles but also prescribes rules for

<sup>13</sup> Justice Muhammad Munir, (the former Chief Justice of Pakistan) *Constitution of the Islamic Republic of Pakistan, A commentary on the Constitution of Pakistan*, 1973, PLD Publishers, Lahore, Vol. I, pp. 157-8.

<sup>14</sup> Thanawi, Muhammad A'la, *Kashshaf Istilahat al-Funun*, Calcutta: Asiatic Society of Bengal, 1862, I, 759.

<sup>15</sup> Justice Hamood-ur-Rahman, (the former Chief Justice of Pakistan), *Reflections on Islam*, Lahore: Islamic Book Foundation, 1983, pp. 99-105.

regulating our behaviour, collective as well as individual. The latter is a function which is usually left in other societies to the laws to perform, but since the Islamic system is different the principles source of our laws and our jurisprudence is our *Holy Qur'an*. The laws relating to marriage, divorce, succession, wills, gifts, dedications, charities, contracts, torts, crimes, usury, treatment of slaves, taxation and even governance are to be found therein.

The fundamental principle of Islamic Jurisprudence is that no human agency can make a law which is in conflict with the injunctions of the *Holy Qur'an* nor can any such law permit that which the *Holy Qur'an* prohibits. Legislation is possible only in respect of subjects not dealt with in the *Holy Qur'an* and that too without transgressing the principles therein prescribed.

The next important source of Islamic law is the *Sunnah* or tradition as to the precepts and usages of the Holy Prophet (peace be upon him). These have been compiled after carefully verifying their authenticity and testing the veracity of their relators. These constitute *Hadith* and are followed because no one could have understood the *Holy Qur'an* better and guided his disciples to the proper course of actions than the Holy Prophet himself.

Where there is no direct injunction of the *Holy Qur'an* or precept of the Holy Prophet available, the Muslim jurists seek light from *Ijma`* (إجماع) or the consensus of past eminent jurists but where even this is not applicable in a particular case, it is permissible to resort to *Qiyas* (قياس) or analogical deduction.

It is from these sources that the entire system of Islamic Jurisprudence has been developed by four great jurists after whom the four accepted Schools of Islamic Jurisprudence are named.

The first is the *Hanafi School* founded by *Abu-Hanifa* (701 to 795 A.D.) and his two disciples, *Abu Yusuf* and *Imam Muhammad*. This is the school of law followed by the majority of Muslims in Pakistan and India. The second is the *Maliki School* started by *Malik Ibn-i-Anas* (718 to 795 A.D) having adherents in Northern Africa, Morocco and Spain. The third is the *Shafii School* set up by *Muhammad Ibn Idris al-Shafii*, born in Syria (768 to 827 A.D) and the fourth is the *Hanbali School* established by *Ahmad Ibn-i-Hanbal* born in Baghdad (813 to 833 A.D.).

These are the four Schools of orthodox *Sunni* law but after the martyrdom of the fourth *Caliph Hadrat `Ali* (661 A.D.) a schism

arose which divided the Muslims into two sects (i) *the Shias* and (ii) *the Sunnis*.

The difference however lay in this that the *Shias* did not recognize any tradition that was not derived from the house of *Hadrat `Ali*. The difference between the four *Sunni* school of law, on the other hand, related more to the degree of reliance to be placed on *Ijma`* (إجماع) (*consensus of jurists*) and *Qiyas* (قياس) (*analogical deduction*) than on fundamental principles. While *Abu-Hanifa* relied more on *Ijma`* (إجماع) and *Qiyas* (قياس) and even introduced the *Doctrine of Equity* called *Istehsan*, the others relied more on *Hadith or tradition*. It was to narrow this gap that the disciples of *Abu Hanifa* endeavoured to justify their deductions also on the basis of traditions and it is for this reason that where the disciples of *Abu-Hanifa* agree on any question of law between themselves, their view has to be given preference.

This system of jurisprudence seeks to lay down workable rules for the implementation of the social order introduced by Islam which was to be based on the principles of equality, fraternity, honesty, truth, justice and fair-play. It aims to establish a society in which there is no ruler and no ruled, no patrician or plebian and no extremely rich or extremely poor. *Status in a Muslim society does not depend either on birth or rank or wealth or race or colour of the skin or even accomplishments but only of the degree of one's piety. The most pious is highest in status.* All Muslims are brothers and the Muslim society is a single flock in which each is a shepherd unto the other.

Islamic law has sought to achieve this objective by first eliminating the juridical concepts of human sovereignty and nations. Under the Islamic system sovereignty over the Universe vests in Allah Almighty and the *Ummah* (believers) constitute a single nation. They are divided into tribes, clans for purpose of identification. (XLIX – 137). It is the *Ummah* which is the delegate of God on earth but since it cannot function in all matters as a body it has the power to select functionaries and to entrust them with the powers of governance within the State (*Mulk*) which comes into existence where the *Ummah* achieves dominance.

The concept of government as a trust is an unique invention of Islam and it postulates that governmental functions must be discharged for the benefit of the *Ummah* by the representatives chosen by it in accordance with the principles of justice and



righteousness revealed by God. Indeed the Holy Qur'an declares that

[5:44]

It flows as a natural corollary from this that Government enjoys obedience and loyalty of the faithful as long as it conducts its affairs according to the *Shariah or the fundamental law of Islam*. The

moment it violates those sacred principles it is not to be obeyed, for “a word of justice uttered before an unjust ruler is the greatest of *Jihad*” (vide *Al-Hadith-al-Nabawi*, *Riyad al-Salihin*, Part I, p.405)

The *Caliphate* is in essence a bilateral contract. In consideration for the obedience of the people the *Caliph* undertakes to discharge the duties entrusted to him with justice and righteousness and above all in conformity with the *Shariah*. It is entered into like any other contract by offer (*Ijab*) and acceptance (*Qabul*) but it has a third formality attached to it, namely, homage (*Bay`at*) tendered by individuals. The contract comes to an end if the *Caliph* misconducts himself or becomes physically incapable of conducting the affairs of the State.

Next, in order to bring about a more equitable distribution of wealth, the Muslim Law of succession has evolved a scheme under which not only the surviving spouse and the children are entitled to a share in the inheritance but even the parents and, in certain circumstances, even the grand-parents and distant kindred become heirs. The Muslim heirs are divided into three categories, namely, sharers, residuaries and distant kindred and the method of distribution of the estate of a deceased is that first the funeral expenses, debts and legacies must be paid, then the shares prescribed by law must be allotted to the sharers. Then if there is a residue it will go to the residuaries. If there are no sharers, the entire estate will devolve on the residuaries. The distant kindred will come in only if there are not sharers or residuaries. On the failure of all heirs the property of the deceased falls into the *Bait-ul-Mal* (public Treasury) for the benefit of all Muslims. The rule of *Escheat or devolution* upon government as ultimate heir is recognized by Muslim law.

Such a system of distribution prevents the accumulation of wealth in a few hands or a few families and, it is said, that under this scheme even the largest estate disappears in three generations.

In addition to the above, the institution of *Zakat* (poor-Tax) is another unique invention of Islam. It is a religious duty of a Muslim to give a portion of his surplus wealth to the poor and the needy. The state has by law the right to enforce the observance of this duty and even to collect this tax but it does not become a part of general revenues of the State nor can it be spent for any purpose other than social welfare.

The fragmentation of property under the law of inheritance, the operation of the system of Zakat, the prohibition of interest and the enforcement of absolute fairness in all transactions makes the Muslim society a more egalitarian than contemporary socialism.

The law relating to family relations is also sensible, practical and conducive to the production of harmonious existence without unduly fettering the liberty of the individual. Marriage is both a sacrament and a contract. The essentials are puberty, freedom, free consent of both parties expressed in the presence of witnesses and adequate consideration (*Mehr*) for the contract. Even a minor girl given in marriage by her guardian (*Wali*) has the right to repudiate the marriage on attaining puberty (*Khair-al-Balig*) if not yet consummated. Each party to the contract has also the freedom to dissolve it, but in the case of the female only when the union is so obnoxious as to make it impossible for her to live with the limits prescribed by *Allah*.

It is true that a Muslim male is permitted to have as many as four wives at a time if he is able to treat them equally in every way but the wisdom behind this has to be considered in the light of the fact that in pagan societies no limit was prescribed and that adultery is the most heinous crime punishable under Muslim law with death by lapidation. The limitation was not a drastic curtailment of the right hitherto enjoyed but also a practical device for preventing immoral relationships. This scheme has also the tendency to discourage polygamy by saddling the male with responsibility for the Legal Consequences of his lust.

Islamic jurisprudence combines the law of crime and torts into the one under the philosophy that it is the duty of the state not only to punish the culprit but also to compensate the victim. Hence the law of *Qisas* and *Diyat* prescribe the manner and method of realizing compensation for all personal injuries including manslaughter but intentional killing cannot be compounded nor can anti-social crimes punishable by the imposition of the *Hadd* (punishment prescribed by the Holy *Qur'an*) be punished otherwise.

The deterrent principle of punishment is followed by Muslim law and, therefore, for anti-social crimes the general rule is corporeal punishment to be inflicted in public.

The position of the woman under Islamic law also needs to be mentioned. Islam raised her from the position of a chattel and placed her in a position of equality with the male. She has the power

under the law to hold and dispose off property in her own right. She can sue and be sued in her own name; her identity does not merge with that of her husband nor does her income become a part of her husband's income. Her rights and obligations are her own and her husband does not represent her in any legal sense.

So much for substantive law but the most remarkable advancement made by Muslim jurists is in the field of adjective law. The system of administration of justice set up by the Muslims is more advanced than any other system so far designed. The judiciary was separated from the executive even as early as the time of the third *Caliph* and vested with power even to command the *Caliph's* presence and to strike down his orders if they were in conflict with the *Shariah*. All were equally subject to law. There was no immunity for anyone and justice was administered upon the basis of the adversary system after hearing the parties and examining the evidence legally adduced in the case. Decisions were recorded and a review thereof was permissible. There was an hierarchy of courts and appeals lay from a lower court to a higher court with an ultimate appeal to the *Caliph*.

As the administration of justice has its roots in law, sovereignty and state and till the correct concepts of law, sovereignty and state do not come to light the nature of administration justice cannot be comprehended. Hence before the explanation of Islamic administration of justice it is necessary to state as to what is the real Islamic concept of state, sovereignty, law and government. This can be said that the first Islamic state was established during the period of the Holy Prophet (ﷺ) and it was established with a new concept of life and a high objective in the focus. Its first centre was al-Madinah al-Munawwarah where emigrants from Makkah al-Mukarramah, the Muslims of al-Madinah al-Munawwarah, and non Muslim Arabs of al-Madinah al-Munawwarah and the Jew tribes were all included in this state. It seems that these four groups had established a political organization and its nature was a federal city state. Its written Constitution remained preserved. It was the first Islamic society and the first Islamic State which was established with high political concepts. Its political organs were harmonized and the individuals of the state were joined in a political relationship. Its beginning was from al-Madinah al-Munawwarah but gradually the whole Arab peninsula came under the sway of this organization and till the period of the third righteous caliph *Hadrat* Uthman Ghani

Zinnurayn (رضى الله تعالى عنه) the Islamic State extended upto the Bahr Khazr and Africa.

If one looks towards the **Holy Qur'an**, the Prophetic word, action or tacitly declared approved affair (*Sunnat*/سنت) of the Messenger of Allah (صلى الله عليه وآله وسلم) preserved in the storage of *Akhadith*, the *ijtihadat* of the jurists and the implementation of the texts of the Holy Qur'an and Sunnah spread over several centuries then regarding the beginning of the state the idea of Islam seems to be that its construction was based on a social necessity and without state a society cannot survive. Thus **'Allamah** Mawardi (رحمة الله عليه) says: It is natureal that all men of intellect want to entrust their affairs to such a leader who can restrain them from doing wrong to each other and in case of mutual dispute settle it between them. In case there are no powerful persons the anarchy will spread in the world and the civilization and the society will disintegrate. This is how a state began. As for the objective, Mawardi (رحمة الله عليه) says: There must be protection of the faith and the administration of the affairs is maintained. In other words, the beginning of the state was in the manner that the man felt the social need for maintaining discipline in the human society. As for the objectives, tow things are worth consideration. One is the protection of the faith and th second is the running the affairs of the social set up. According to the islamic political concept both these things are mutually essential. In Islam faith and politics are not separate things. Rather, the acts of worship is as essential a thing as the laws of the society. An Islamic leader is religious leader. He leads the congregation in Prayer and also enforces the law. Besides this it seems that in the concept of state morality is given preference over the material benefit. Like Plato Islam also declares the politics subject to morality and the objective of the State is to adorn the morals of the society. Further, an Islamic State poseses a universal concept which embraces in its fold every nation, race, population without discrimination of colour or race. In other words, Islamic State is beyond geograhical and racial barriers. It is for this reason that in Islam there is no terminology of mamlakat and sultanat as by such terminologies there comes in racial and geographical necessity. Rather, Islam has used the term 'Ummat instead of mamlakat which in its vast connotation signifies Islamic fraternity or Islamic brother hood.

Next to mamlakat is the Iqtidar A`la i.e. sovereignty. Though the source of sovereignty is divine as the Constitution under which

the Islamic state was established and the Islamic ruler got sovereign power is from Allah Almighty but this sovereignty is to be exercised by human beings and it should be stated that this sovereignty has been granted to them as a favour. In this manner it is human. This sovereignty was, first of all, vested in *Hadrat Muhammad*, the Messenger of Allah (ﷺ). Thus in Bay'at-i-'Uqbah the people of al-Madinah al-Munawwarah had sincerely accepted the leadership of the Messenger of Allah (ﷺ). However, during the period of the righteous caliphate the sovereignty was transferred to the will of the people (mashiyat-i-'ammah) and this will was vested only in the people of al-Madinah al-Munawwarah. Though this will was exercised indirectly and the Caliph was chosen according to this will. Those who conducted the Intikhab were called ahl al-Ikhtiyar and those who were the candidates were called the Ahl-al-Imamat. For Imamat sometimes the method of nomination was also adopted i.e. the Caliph nominated a candidate but this nomination was not considered as sufficient and it was necessary to get it confirmed by the public opinion. This confirmation by the public opinion was called bay'at. The righteous caliphs had clearly declared that if they did not abide by the injunctions (*ahkam*) of Allah and Raasulullah (ﷺ) they shall be removed from the office of Khalifah. In other words the elected khalifah could hold the office of khalifah till the public will was with him. Khalifah was only head of the executive and was not much involved in lawmaking or administering justice. The law making and the interpretation and analogical deductions were the functions of the jurists (who were experts in law) and the judicial powers were exercised by the judges (*qudat*).

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In the political concept of Muslims there was no clear distinction between state and government. Muslim thinkers considered the Ummat as mamlakat. The khilafat was considered the Government. The organs of the khilafat were the Khalifah and his Executive Council, Muqanninah i.e. the jurists (*fuqaha*) and the judiciary i.e. the judges (*qudat*). These three were the fixed organs of the Islamic State and there was no interference by any of the three in the functions and powers of the others. In other words the concept of separation of powers among the organs of the state existed in Islam a thousand years before Mon Lisky.

Muslim thinkers have not given the kinds of government. It seems that they had only one form of governance and that was democracy. However, in later periods various forms of government

were experienced. Thus after the earlier democracy, during the period of Banu Umayyah there came A`yaniyyat according to which the A`yan of the family ruled over the subjects. During the period of Banu `Abbas the three elements of shakhsi, a`yani and `umumi joined. And thus according to the constitutional kings of England the caliphs also became constitutional. Thus the executive powers of the caliph were exercised by the ministers as delegates in which the Caliph could not interfere. However, those ministers were answerable to the people (public). They were always afraid of the consensus of the 'Ummah. Further, whenever a delegate minister was dismissed his whole cabinet of ministers also stood dismissed. Thus that system resembled the cabinet system of England. In it was hidden the great aspect of responsibility. In Islam, there may be the khilafat or small kingdoms but there is no concept of absolute monarchy (shakhsi hukumat) or rule by force (jabirana government). The reason is that an Islamic State is subject to separation of powers. Khalifah or King is to hold only executive portfolio who has neither legislative nor judicial powers. In this manner Islamic rulers can not be monarchy (shakhsi) nor by force (jabirana). [Tarikh-i-Siyasiyat, Professor Abdul Majid Siddiqi, Idarah Adabiyyat-i-Urdu, Hyderabad Dakkan, 1944 AD, pp. 138-144]

The original sources of Islamic law, which include the constitutional law and the law of the land, are the Holy Qur'an and Sunnah. These two are the Divine sources. However, by the passing of the time the acts of the khulafa-i-rashidin and of the companions (*ridwanullahi ta`ala `alayhim ajma'in*) were also included in it. Their source was still based on the Holy Qur'an and Sunnah. Further by exercising the right of qiyas, which is a favour of Allah Almighty on the Muslim 'Ummah, the law making continued and the results obtained were applied by Muslims practically in their lives and thus confirmed them. like was Consensus ('Ijma' / إجماع) is one of the significant basis of Islamic Law. By this methodology the matters on which there is any ambiguity or doubt and that ambiguity or doubt is removed away by Consensus ('Ijma' / إجماع) those are made an absolute part of the Islamic law on the force or authority of the agreement of the 'Ummah. This shows that the will of the people is, among others, one of the most significant effective thing in the philosophy of Islamic law. Normally, the expert jurists (*fuqaha*) are considered law makers of Islam and it is they who interpret, explain and state the meanings of the Holy Qur'an and Sunnah but when deeply pondered upon the verdict of any single jurist (*faqih* / فقيه) is not accepted. Rather, the agreement of the generality of the men of

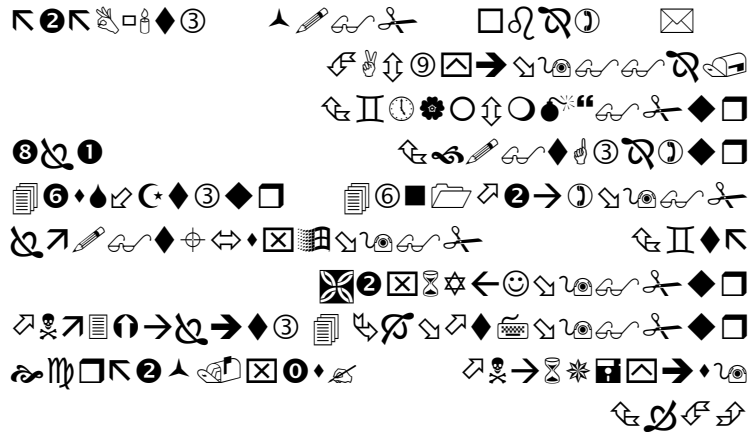
knowledge (عُلَمَاء/`ulama) is necessary to accept such a verdict. At the back of the men of knowledge (عُلَمَاء/`ulama) there is the will of the people in general. In other the 'Ummah gives to the men of knowledge (عُلَمَاء/`ulama) the right of *ijtihad* on its behalf. Out of the A'immah *Ijtihad* whose verdicts have been accepted by the 'Ummah only their conclusions have been declared as acceptable. This shows that the general consensual tendencies have also a role in creating significance (and force) that has come in these *fiqhi qawanin*. In any case, at the back of the men of knowledge (عُلَمَاء/`ulama) there is certainly the public will i.e. the 'Ummah gives the *ulama* the right to exercise *ijtihad* on its behalf. [Islami `Adl Gustari, Abdul Hafiz Siddiqi, 1947 AD, p.18]. Its result is that besides the basic injunctions (*ahkam*) which may be termed as Divine by the advent of the time and by the force of this public will there has taken place a mighty evolution (and development) in the *Fiqh*. Thus in the present era the code of Islamic law is the name of this evolution.

Islamic law i.e. the *Shari`ah* stresses upon moral obligations and duties and besides the religious and domestic life of the Muslims it is comprehending all the aspects of their political and social life. Thus in the *Shari`ah*, besides the injunctions (*ahkam*) relating to the religion and religious duties there are injunctions (*ahkam*) concerning the mutual relations of the individuals of the millat and their discipline and harmony. Further, there are detailed rules and principles regarding every aspect of human life. It is for this reason that in the evolution of Islamic Jurisprudence the needs of life have been given a prominent place and juridical has become merely a secondary thing. Despite this the *Shari`at* is a sacred law which may be called especially the juris law.

Though in every people and in every civilization there exists some sort of concept of justice but it has not remained the same in every time at every place. Rather, every people and every time has observed justice with a particular idea and view point. Thus during every age the standard of punishment has been different. As in every age the standard of morality and the manners of testing the social evils and the methods of eradicating the political evils have been different in the same way the standards of justice and punishment have been different. The concept of justice presented to the world during the medieval centuries was strange for the world. The first thing is that in Islam a caliph or sultan is not the source of justice. Rather, it is the whole Muslim community. And the justice is done in the name of Allah Alone. Secondly, Islam has declared the

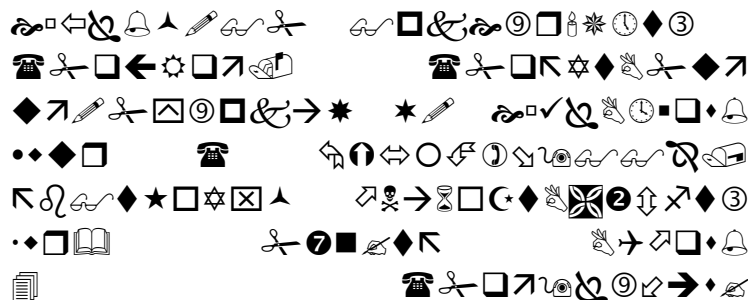


administration of justice as the first and the most essential duty of the State. The Concept of state available in the Book of Allah may be explained in the light of the following verses of the **Holy Qur'an**:



Verily, Allâh enjoins Al-Adl (i.e. justice and worshipping none but Allâh alone - Islâmic Monotheism) and Al-Ihsân [i.e. to be patient In performing Your duties to Allâh, totally for Allâh's sake and In accordance with the Sunnah (legal ways) of the Prophet In a perfect manner], and giving (help) to kith and kin (i.e. All that Allâh has ordered You to give them e.g., wealth, visiting, looking after them, or any other kind of help, etc.): and forbids Al-Fahshâ' (i.e All evil deeds, e.g. illegal sexual acts, disobedience of parents, polytheism, to tell lies, to give false witness, to kill a life without right, etc.), and Al-Munkar (i.e All that is prohibited by Islâmic law: polytheism of Every kind, disbelief and Every kind of evil deeds, etc.), and Al-Baghy (i.e. All kinds of oppression), He admonishes you, that You may take heed.

[16:90]

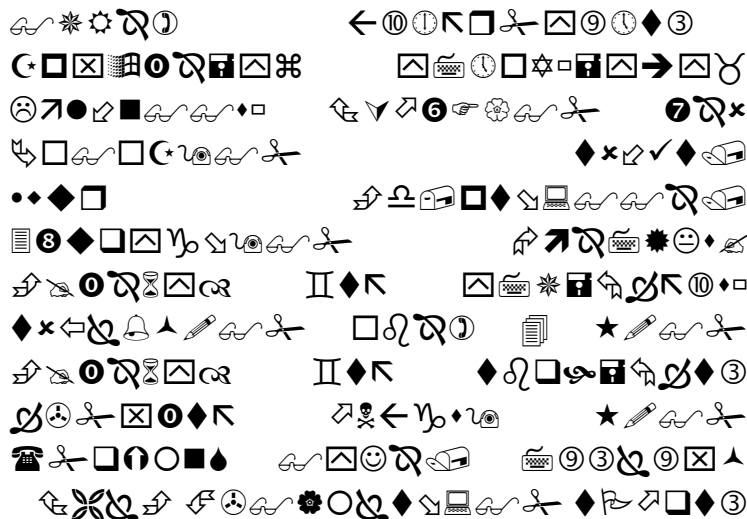


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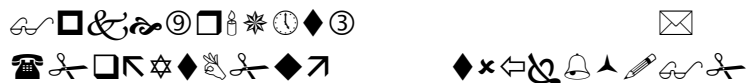
And if two parties or groups among the believers fall to fighting, Then make peace between them both, but if one of them rebels against the other, Then fight You (all) against the one that which rebels till it complies with the command of Allâh; Then if it complies, Then make reconciliation between them justly, and be equitable. Verily! Allâh loves those who are equitable.

[49:9]



O Dâwûd (David)! Verily! We have placed you as a successor on earth, so judge You between men In Truth (and justice) and follow not Your desire for it will mislead You from the Path of Allâh. Verily! those who wander astray from the Path of Allâh (shall) have a Severe torment, because they forgot the Day of reckoning.

[38:26]





O you who believe! Stand out firmly for justice, as witnesses to Allâh, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allâh is a better protector to both (than you). So follow not the lusts (of your hearts), lest you may avoid justice, and if you distort your witness or refuse to give it, Verily, Allâh is ever Well-Acquainted with what you do.

[4:135]

After the Qur'anic concept of justice the Prophetic concept of justice is also worthy of consideration.

**Hadrat `Abdullah** bin `Umar (رضى الله تعالى عنهما) transmitted that the Messenger of Allah (صلى الله عليه وآله وسلم) has said that the Sultan (a believer vested with authority to rule) is the shadow of Allah Almighty on this earth. If the Sultan is just there is reward for him in the Divine Court and if the Sultan is unjust there is its load on him.

**Hadrat `A'ishah Siddiqah** (رضى الله تعالى عنها) transmitted on the authority of the Messenger of Allah (صلى الله عليه وآله وسلم) that the first of all such persons shall be under the shadow of Allah Almighty who accept when they receive

their due and pay the due of the others happily. *Hadrat* Abu Sa'id Khudari (رضى الله تعالى عنه) narrated on the authority of the Messenger of Allah (صلى الله عليه وآله وسلم) that Among the beloved ones of Allah shall be the people who are the just rulers and the hated ones of Allah and on whom there shall be severe punishment shall be the people who are oppressors.

It is transmitted on the authority of Abu Sa'id and *Tariq* bin Shihab that according to the thinking of the Messenger of Allah (صلى الله عليه وآله وسلم) the biggest jihad is to say the truth and just thing on the face of a despot.

Another saying of the Messenger of Allah (صلى الله عليه وآله وسلم) is that when the affairs of men are entrusted to some one and he closes his doors for Muslims or oppressed ones Allah Almighty will not open the door of his Mercy (on the Day of Judgment) for him.

In a *Mashhur hadith* it is transmitted on the authority of the Messenger of Allah (صلى الله عليه وآله وسلم) that a minute spent in justice is better than the worship and hardship suffered for seventy years.

It is transmitted on the authority of *Hadrat* `Abdullah bin `Umar (رضى الله تعالى عنهما) Just and fair rules will be much close to Allah Almighty.

`Abdullah bin `Aufa (رضى الله تعالى عنه) transmitted that the Messenger of Allah (صلى الله عليه وآله وسلم) said: A ruler remains with Allah till he does not do injustice and when he commits injustice Allah leaves him and he becomes with the Satan.

*Hadrat* Buraydah (رضى الله تعالى عنه) has transmitted a saying of the Messenger of Allah (صلى الله عليه وآله وسلم) that he said: The rulers are of three kinds, namely, - Firstly, those who accept the rights and decide accordingly. They shall enter Paradise. Secondly, those who accept the rights but decide wrongly and against such rights. They shall enter the Fire. Thirdly, those who decide the affairs of the people without knowledge. They shall also enter the fire.

`Abdullah bin `Umar and Abu Hurayrah (رضى الله تعالى عنهما) narrated that when a judge sitting in his Court decides a

case and exercise much effort to come to the conclusion and decides correctly he shall be rewarded doubly. But if he errs in his decision even then he shall be rewarded with a single reward.

*Hadrat* Ali (رضى الله تعالى عنه) narrated that when two persons come to you for decision do not decide among them unless you hear both of them about the facts and circumstances of the case.

*Hadrat* Abu Bakr (رضى الله تعالى عنه) narrated that when a judge is in a state of anger he should not decide a case.

In short a judge must be conscious and deeply consider the facts of the case and find out the truth and decide justly. Administration of justice is including in human duties. Justice must be inexpensive. It has been stressed that the proceedings should be conducted by a judge in open court.

Before advent of Islam there was system of confederation (a`hdiyyat). it was mutual intermixing of the Beduine tribes and there was no state in the modern sense nor any organized government to administer justice. Government was the name of acting upon the common custom and usage. The querrals and disputes were settled according to the old custom. These customs were coming since time immemorial and the public will was behind them that served as a moral force and which may be termed as sanction in the modern sense. There was no legislature at that time. This was a deficiency which was made good by Islam.

The word Hakam was used for settling the issues, disputes and querrals. It contained in it both the meanings of hukumat and administration of justice.

The authority behind acting upon the good customs lies in the *Hadith* of Sa'ib which reads:

O Sa'ib! Abide by such good morals during Islam which were kept before your view in the time of Ignorance. [Musnad Ahmad bin Hanbal, Vol.3, Hyderabad, 1310 AH, p. 425]

The different tribes domiciled in the city. Different services were distributed among them . Thus one tribe was entrusted the service

of doing justice between the parties. This function was performed by the head of that tribe. *Hadrat* Abu Bakr Siddiq had also performed this function.

If a person killed a person of another tribe the offender was killed. To kill the offender was the right of the heirs of the deceased or to the Head/chief of that tribe. Compromise was allowed in a murder case on payment of fine or one hundred camels as compensation to be paid by the murderer to the heirs of the deceased person.

Where no evidence was available a certain number of persons were given oath and the matter ended.

Punishments were very severe in nature. Amputation of hand was the sentence of theft. Zanis were stoned to death. Faces were blackened and they were striped with certain numbers. Even on simple hurts high compensation was demanded.

There were no fixed rules for sex relations and inheritance. Divorce was of many kinds and there was no clear cut law on the point.

Onus of proof of the claim lay on the plaintiff and the oath was administered to the Defendant in case the Plaintiff had no witnesses and the defendant denied the claim.

What Islam did was that it maintained such customs which were just and reasonable and not in violation of the injunctions (*ahkam*) of the **Holy Qur'an**. Islam discarded all such customs and usages which were repugnant to the injunctions (*ahkam*) of the **Holy Qur'an** or were against the sound reason and pure conscience.

Such in brief are the essential features of the Islamic Jurisprudence which Pakistan wishes to re-introduce.

The present compilation deals with analysis of law (*hukm*) – its forms, legal value, rights, actions, motive and intention, legal obligation, legal capacity, and obstacles to legal capacity—study of sources of law (*'adillah*), textual implications (*dalalat*) and methodology of deriving rules from the sources by exercising *Ijtihad*.

An attempt has been made to make the concepts clear. For this purpose, examples have been collected from the original sources.

A sincere effort has its reward. Our elders have left a great heritage in the legal field as well. It is we who have to explore and utilise it for solving the problems. The seeking of knowledge is a duty of every Muslim, male and female. It is the knowledge that unveils the truth. The root cause of all sufferings is the falsehood. The remedy lies in the Truth. If we observe within our own selves and without we find that all real urge is for the Truth and all dislike is against the falsehood. None of us likes that anyone may tell a lie to him or take away his right. In other words, we are convinced that it is the duty or obligation of the others to take care of our right. The others are also convinced that it is our duty or obligation to take care of their right. One who takes away the right he commits a wrong. Should this go unnoticed or the wrongdoer be asked to remedy the wrong by making compensation or suffering the punishment. Life and death are both creations. Every human being is born and he is to die. The life span is the period of his trial to see whose performance is the most excellent. The Creator has the right to give the Law and prescribe the standard of punishment in case of violation. The discretion, if any, is to be exercised by the creation subject to the unconditional obedience of the Creator. A vicegerent is never the Creator. He is the most obedient servant of the Creator at all times and in all manners. A vicegerent is obeyed by the leave of the Creator as it is the Creator who invests him with authority and he is ultimately answerable to him in all his affairs whether public or private. A vicegerent is not God. He is from among the human beings. His appointment is for service of his fellow beings. He must always remain sincere to them and obedient to Allah and the Messenger of Allah (Peace and blessings of Allah be upon him). Piety or God fearing conduct is termed as al-taqwa and the Divine command in the Qur'anic words is: "Do justice, it is the nearer most to piety." What is justice? It is keeping the balance even without any fear or favour, between the rich and the poor, the high and the low.

The world is taking the shape of a global village. The advancement in science and technology has unveiled many truths and still new techniques are ahead. It will explore millions of unknown truths in the future and will ultimately proclaim that the light that came out of every particle did submit and prove that it was a creation and there is a Creator and its existence and non existence were both under some law to which it was fully submissive. In other words this all-submissiveness on the part of every minutest atom is its Islamic way of life. Man is no exception to it. Verily, al-Din (the way of life) in the sight of Allah is al-Islam. The Message brought by Hadrat Muhammad (Peace and blessings of Allah be upon him) i.e Al-Qur'an is for the entire mankind. It is a remembrance for all the worlds.



Let me quote with advantage the following words of His Excellency Mr. Justice Christopher Gregory Weeramantry,<sup>16</sup> formerly Professor of Monash University, Australia found in the Preface of *Islamic Jurisprudence: An International Perspective*, London: Macmillan Press, 1988:

*"Law students, particularly in the Western world, enter the legal profession as fully fledged lawyers without any exposure whatsoever to some of the great legal systems of the world. A significant gap in their knowledge is in regard to the Islamic Law. Of this system they often know nothing beyond the name. Such a gap in their knowledge must necessarily make them less suited to make their due contribution to the legal world of the future in which intercommunication between the principal cultural traditions of mankind will be an essential.*

*With the growing importance of Islamic law and with half a hundred Islamic states in the world community of nations, it becomes doubly essential that this irreducible minimum of legal knowledge be part of the intellectual equipment of lawyers in every jurisdiction. One of the most powerful social, cultural, religious and legal forces the world has ever seen cannot be lightly passed over by lawyers in any jurisdiction as being too far removed from the sphere of their concerns.*

*This book seeks to demonstrate the important connections between Islamic law and Western legal and philosophical thought. It draws attention to the vital contributions of Islamic law in the past as well as to its potential for assisting towards a juster world in the future.*

*It is also essential that the intelligent layman in the non-Islamic world become familiar with the basic essentials of this great body of jurisprudence. An important barrier to international understanding is the widespread lack of information regarding Islam. Lack of information leads to misunderstandings and prejudices which in their turn lead to bitterness. Out of bitterness come tensions, national and international. The contemporary world suffers from more than its fair share of these tensions. It is hoped there will be sufficient*

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<sup>16</sup> A member of the International Court of Justice from February 1991 to February 2000, Judge Weeramantry served as the ICJ's Vice-President from 1997-2000.

In 1993, Judge Weeramantry was among the first Members elected to serve on the ICJ's seven-member Chamber for Environmental Matters. Prior to joining the ICJ, he was a Justice of the Supreme Court of Sri Lanka and the Sir Hayden Starke Professor of Law at Monash University in Melbourne, Australia.

*information in this book, couched in language well within the reach of non-lawyers, to generate a greater appreciation of this system and its attitudes.*

*Finally, it is no less important that this work should reach a wide readership within the Islamic world itself. It is essential that both lawyers and laymen in the Islamic world become aware that the richness of their cultural and intellectual traditions is viewed with respect and admiration by the outside world. A long history of lack of awareness and appreciation has generated within the Islamic world a reaction of distrust if not hostility. The cause of international harmony urgently requires that bridges of appreciation be built between the non-Islamic and the Islamic worlds. Each has too much to offer to the other for either section of mankind to discount the other's contribution as unimportant to its intellectual heritage or to its daily concerns."*

Justice Dr. Munir Ahmad Mughal

125/B, Judicial Colony, Lahore

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Nahmaduhu wa nusalli `ala rasulihil karim

## Principles of Jurisprudence

[ʿUṣul al-Fiqh (أصول الفقه)]

# CHAPTER 1

## FIQH

### Definition

The root letters of “*al-fiqh*” (HäD<sup>9</sup>I<sup>1</sup>DšGZ) are FQH فقه.

Literally, the word “*al-fiqh*” (HäD<sup>9</sup>I<sup>1</sup>DšGZ) means “*al-fahm*” (HäD G<sup>1</sup>DšGZ) (the understanding of a thing)”. It is said that its scale (wfy) is:

*Faqiha* (Gäl<sup>9</sup>G•) / *yaʿfaqhu* (HäG<sup>9</sup>D<sup>1</sup>G ) / *fiqhan* (ʔJ D<sup>9</sup>I•) like *ʿalima* (Gäl<sup>9</sup>4G“) / *yaʿlamu* (HäG<sup>9</sup>4D•G ) / *ʿilman* (ʔJ ʔD<sup>9</sup>4I“). It denotes understanding absolutely irrespective of its being deep or surface level. It is also said that its measure is *Faquha* (GäH<sup>9</sup>G•) / *Yafquhu* (HäH<sup>9</sup>D<sup>1</sup>G ) like *karuma* (GvH<sup>9</sup>G“) / *yakrumu* (HvH<sup>9</sup>D<sup>1</sup>4G ) which means to understand a thing has become his habit (*sajiyah* äRÄI<sup>9</sup>G ). It is also said: *tafaqqaha al-rajulu tafaqquhan* (ʔJ S<sup>9</sup>G<sup>1</sup>G† HäH%R•šZ GäR<sup>9</sup>G<sup>1</sup>G†) which means that he has been endowed with understanding.

Prof. Muhammad Taqi Amini, in his famous contribution on the subject of historical background of the Islamic Jurisprudence, has explained with references the true nature and significance of the word *al-fiqh* (HäD<sup>9</sup>I<sup>1</sup>DšGZ) as under:

“[ʿAllamah Zamakhshari stated that] the real meaning of the word *al-fiqh* (HäD<sup>9</sup>I<sup>1</sup>DšGZ) is *al-shiqqu wa al-fathu* (HNDʔG<sup>1</sup>DšZGy SYT<sup>2</sup>šGZ) (to split and to open).<sup>17</sup>

According to Imam Ghazzali (Allah’s Mercy be on him) *al-fiqh* means the understanding (*fahm*), ponderance (*tadabbur* ʔS...G–G†) and insight (*basirat* \G•DÄI<sup>9</sup>G...) in the matter of religion.<sup>18</sup> How beautiful is the appraisal made by the Imam in his famous book *Ihya ʿUlum al-Din*, in the Book of Knowledge, about the blameworthy and the praiseworthy sciences when he wrote:

The people have changed the original meanings of the words *Fiqh* (äD<sup>9</sup>I•), *ʿilm* (äD<sup>9</sup>4I“), *Tauhid* (–DÄIšDÄG†), *Tazkir* (ʔDÄI<sup>9</sup>D–G†) and *Hikmat* ÍG ʔD<sup>1</sup>4Iš and have given them the meaning of their own. As a result, they have become now blameworthy.

<sup>17</sup> Zamakhshari, *Haqiqah al-Fiqh*, Vol. I.

<sup>18</sup> al-Ghazzali, *Ihya al-ʿUlum*, Vol. I, p. 24.

Fiqh (religious learning) has now the meaning of the science of unusual legal cases, mystery of the minutest details of jurisprudence and excessive debates on them. The man who gives attention to such a science is called now Faqih or jurisprudent. In the first century Hijra, it had a different meaning. It was a science of the path of the hereafter and knowledge of the beneficial and harmful matters of soul, knowledge and the meanings of the Qur'an and the domination of the Fear of Allah over the heart. This is proved by the words of Allah in the following verse of the Holy Qur'an:

*"... that they may instruct themselves in the their religion, and may warn their people when they come back to them."*<sup>19</sup>

Fiqh or Jurisprudence is that which gives such a warning and fear rather than details of ordinary divorce (talaq qā'ī), manumission (ʿitāq qā'ī), salam contracts (salam āḥḥ), and hire (i'arah xē'Z), rental (kira'a YZ@), and lease (ijarah xē'Z), which produce neither warning nor fear. Allah Almighty says:

لَهُمْ قُلُوبٌ لَا يَفْقَهُونَ بِهَا

*They have got hearts but they do not understand therewith.*  
[VII:179]

Sa'id ibn Ibrahim al-Zuhri (AH201/AD 816-7) was once asked which of the people of al-Madinah he thought was the most discerning, and he replied, "He who fears God the most," thus pointing out that the fruit of religious insight (fiqh āḥḥ) and piety (taqwa |Āḥḥ) is in fact the fruit of esoteric knowledge rather than that of legal opinions and decisions.

Once the Holy Prophet (Peace and blessings of Allah be upon him) said, "Shall I tell you who is the profoundly discerning man?" They answered, "Yes". Thereupon he said, "The profoundly discerning man is he who has not induced people to despair of the mercy of God; nor made them feel safe rather than urge them to repent during the period of respite which God, out of patience, gives unto man; nor made them lose hope in the spirit of God; nor discarded the Qur'an in favour of something else."

When Anas ibn-Malik related the following words of the Prophet: I prefer sitting in the company of men who praise God from sunset until sunrise to the setting free of four slaves, ; he turned to Yazid al-Raqashi and Ziyad al Numayri and said, ;Our meetings of invocation (zikr @d) were different from your present gatherings in which one of you delivers his sermons before his friends and recites traditions. We used to sit and ponder over [the articles of] faith, study the meanings of Qur'an, enlighten ourselves in [matters of] religion and enumerate the blessings of God upon us.

<sup>19</sup> Al-Qur'an, IX: 123.

Hence [the process] of studying the meaning of the Qur'an and of enumerating the blessings of God was called enlightenment.

The Holy Prophet (Peace and blessings of Allah be upon him) said, "The servant will not attain perfect religious insight until he should hate men in the essence of God and see in the Qur'an several meanings.

This same tradition has been related as a *mawquf* tradition<sup>20</sup> going back to Abu al-Darda who is supposed to have added, "the servant would then turn to himself and would hate himself still more.

Once Farqad al- Sabakhi asked about something and al-Hasan expounded his view. The former retorted, "The jurists disagree with you". There upon al-Hasan exclaimed, "May your mother be bereft of you! Have you ever seen with your own eyes a [real] jurist? Verily the [real] jurist is he who forsakes the world and seeks the hereafter, who understands [the import of] his religion, persists in the worship of his Lord, is pious, restrains himself from attacks on the reputation of his fellow Muslims, abstains from [reaching his hand to] their riches, and gives them advice." Nevertheless, I do not say that the term

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<sup>20</sup> (A mauquf tradition is that where the rawi (transmitter of Hadith) mentions the names of the transmitters (i.e. the chain of transmitters called 'isnad ) goes back upto the companion and stops there and does not mention further. Technically, A mauquf hadith is that saying (qaul) , action (fi'l) or approval by silence (taqrir) attributed to a companion (Sahabi). Such a chain may be continuous or disconnected but it ends at the Sahabi and does not mention further that it was heard by the Sahabi from the Holy Prophet).

The example of Mauquf Qauli Hadith is the statement of the narrator (rawi) that Hadrat `Ali bin Abi Talib (Allah' Pleasure be upon him) said: Tell to the people that which they know. Do you want that Allah and His Messenger be denied? [Bukhari]

The example of Mauquf Fi'li Hadith is the statement of the narrator (rawi) that Hadrat Ibn `Abbas (Allah' Pleasure be upon him) led the congregational prayer while he had performed tayammum. [Bujhari, Kitab al-Tayammum].

The example of Mauquf Taqriri Hadith is the statement of a tabi'i : I did such and such thing in view of such and such companion (Allah' Pleasure be upon him) and he did not object to my action.

Some times the word mauquf is also used for attribution to a person other than a Sahabi. In such a circumstance the mention of the name of the person to whom the hadith is attributed is essential. For example : This Hadith has been transmitted by such and such person as mauquf on Zuhri or `Ata. Both Zuhri and `Ata were not sahabis. They were tabi'i. hence there names were essentially mentioned. [Taysir Mustalhal al-Hadith, Dr. Mahmud al-Tahhan]

jurisprudence (fiqh) did not include legal opinion in civil cases as well.

*Al-faqihu al-'alimu allazi yashaququ al-'ahkama wa yaftashu 'an haqa'iqi ha wa yaftahu ma istaghlaqa min ha*

الفقيه العالم الذى يشق الاحكام و يفتش عن حقائقها و يفتح ما استغلق منها

## D

A jurist (faqih) is a scholar who splits the laws and investigates the realities in them and opens the matters closed in them].<sup>21</sup>

To reach to this depth of *fiqh* (fiqh) besides possessing the knowledge of manifest sciences and arts, the purity of heart and mind and of self and soul is also needed as without it, the generation of the required seriousness in the thought and sight is extremely difficult.

Thus, Imam Hasan Basari (Allah's mercy be on him), keeping in view this fact has declared that a *faqih* is a person:

1. who does not entangle his heart in the material world (i.e., the world is not his objective per se);
2. who is inclined in the acts of the hereafter;
3. who has attained perfect insight in religion;
4. who is constant on the acts of obedience and observes his duty towards Allah;
5. who avoids committing any insult of Muslims and infringing any rights of them;
6. who keeps in view the collective interest and prefers the public interest over any personal interest;
7. who is not greedy of wealth.

Imam Ghazzali has also mentioned these qualities. However, the following sentence in his statement is the most significant:

*Faqihan fi masalih al-khalqi fi al-dunya.*

فقيهها فى مصالح الخلق فى الدنيا

[He is a person who is an expert to diagnose the worldly welfare of the people.]

On this basis, 'Allamah Ibn 'Abidin has transmitted the following opinion:

*Wa man lam yakun 'aliman bi 'ahli zamani hi fa huwa jahilun.*

و من لم يكن عالما باهل زمانه فهو جاهل

[A *faqih* who is not aware and well-informed about the circumstances of the people of his time is an ignorant].<sup>22</sup>

Hadrat A'mash (Allah's mercy be on him) has made a very significant distinction between a Muhaddith and a Faqih which gives the proof

<sup>21</sup> Zamakhshari, *Haqiqah al-Fiqh*, vol. I.

<sup>22</sup> Ibid.

that a Faqih must possess depth of understanding and deep penetration into the niceties when he remarked:

*Ya ma`shar al-fuqaha'i antum al-atibba'u wa nahnu al-siyadalah.*

يا معشر الفقهاء انتم الاطباء ونحن الصيادلة

O jurists! You are the physicians while we are the chemists.<sup>23</sup>

Our job is to collect the good remedies while your job is to check them, to diagnose a disease, to know the temperament of the patient and then to prescribe the proper recipe. Generally, this distinction is not worth consideration as the acumen of Imam Bukhari (Allah's mercy be on him) cannot be denied as he was divinely gifted jurist. However, keeping in view the nature and responsibility of both, it can be observed to a great extent.<sup>24</sup>

From the root F-Q-H six constructions have been used in the Holy Qur'an, in twenty verses, giving the meaning of understanding. Those constructions and the verses are :

**Tafqahuna:** تَفَقَّهُوْا

تُسَبِّحُ لَهُ السَّمَاوَاتُ السَّبْعُ وَالْأَرْضُ وَمَنْ فِيهِنَّ وَإِنْ مِنْ شَيْءٍ إِلَّا يُسَبِّحُ بِحَمْدِهِ وَلَكِنْ لَا تَفْقَهُونَ تَسْبِيحَهُمْ إِنَّهُ كَانَ حَلِيمًا غَفُورًا

Wa lakin la tafqahuna tasbiha hum (But they do not understand their glorification) [XVII:44]

**Nafqahu:** نَفَقَهُ

قَالُوا يَا شُعَيْبُ مَا نَفَقَهُ كَثِيرًا مِمَّا تَقُولُ وَإِنَّا لَنَرَاكَ فِينَا ضَعِيفًا وَلَوْلَا رَهْطُكَ لَرَجَمْنَاكَ وَمَا أَنْتَ عَلَيْنَا بَعِزٌّ

"Qalu ya Shu`aybu! ma nafqahu kathiram mimma taqulu."

(They said: O Shu`ayb! We do not understand most of that which you state.) [XI : 91]

**Yafqahu:** يَفْقَهُوْا

قَالَ رَبِّ اشْرَحْ لِي صَدْرِي (25) وَيَسِّرْ لِي أَمْرِي (26) وَاحْلُلْ عُقْدَةً مِّنْ لِّسَانِي (27) يَفْقَهُوا قَوْلِي (28)

<sup>23</sup> Nashr al-`Urf, p. 129.

<sup>24</sup> Muhammad Taqi Amini, *Fiqh Islami Ka Taikhi Pas Manzar*, Lahore: Islamic Publications Limited, 2<sup>nd</sup> Edn., 1979, pp. 31-33.

Wahlul `uqdatam min lisani **yafqahu** qauli (And loose a knot from my tongue. That they may understand my saying). [XX:28]

**Yafqahuna: يَفْقَهُونَ**

أَيْنَمَا تَكُونُوا يُدْرِكُكُمُ الْمَوْتُ وَلَوْ كُنْتُمْ فِي بُرُوجٍ مُّشِيدَةٍ وَإِنْ تُصِبْهُمْ  
حَسَنَةٌ يَقُولُوا هَذِهِ مِنْ عِنْدِ اللَّهِ وَإِنْ تُصِبْهُمْ سَيِّئَةٌ يَقُولُوا هَذِهِ مِنْ عِنْدِكَ  
قُلْ كُلٌّ مِّنْ عِنْدِ اللَّهِ فَمَّا لِهَؤُلَاءِ الْقَوْمِ لَا يَكَادُونَ يَفْقَهُونَ حَدِيثًا

1. “Fa ma li ha’ula’il-qaumi la yakaduna **yafqahuna** hadithan.” (So what is the matter with these people that they scarcely understand a single fact.) [IV :78]

قُلْ هُوَ الْقَادِرُ عَلَىٰ أَن يَبْعَثَ عَلَيْكُمْ عَذَابًا مِّنْ فَوْقِكُمْ أَوْ مِنْ تَحْتِ  
أَرْجُلِكُمْ أَوْ يَلْبِسَكُمْ شِيْعًا وَيُذِيقَ بَعْضَكُمْ بَأْسَ بَعْضٍ انظُرْ كَيْفَ نُصَرِّفُ  
“الآيَاتِ لَعَلَّهُمْ يَفْقَهُونَ

‘Unzur kayfa nusarrifu al-`ayati la`allahum **yafqahuna**” (See how We display the revelations so that they may understand) [VI:65]

وَهُوَ الَّذِي أَنشَأَكُمْ مِّنْ نَّفْسٍ وَاحِدَةٍ فَمُسْتَقَرٌّ وَمُسْتَوْدَعٌ قَدْ فَصَّلْنَا الْآيَاتِ  
لِقَوْمٍ يَفْقَهُونَ

2. “Qad fassalna’l-`ayati li qaumin **yafqahuna**”(We have detailed our revelation for a people who have understanding ) [VI:98]

وَلَقَدْ ذَرَأْنَا لِجَهَنَّمَ كَثِيرًا مِّنَ الْجِنِّ وَالإِنسِ لَهُمْ قُلُوبٌ لَا يَفْقَهُونَ بِهَا وَلَهُمْ  
أَعْيُنٌ لَا يُبْصِرُونَ بِهَا وَلَهُمْ آذَانٌ لَا يَسْمَعُونَ بِهَا أُولَئِكَ كَالْأَنْعَامِ بَلْ هُمْ  
أَضَلُّ أُولَئِكَ هُمُ الْغَافِلُونَ

3. “La hum qulubun la **yafqahuna** bi ha (having hearts wherewith theyunderstand not) [VII:179]

يَا أَيُّهَا النَّبِيُّ حَرِّضِ الْمُؤْمِنِينَ عَلَى الْقِتَالِ إِنْ يَكُنْ مِّنْكُمْ عَشْرُونَ صَابِرُونَ  
يَغْلِبُوا مِائَتَيْنِ وَإِنْ يَكُنْ مِّنْكُمْ مِّائَةٌ يَغْلِبُوا أَلْفًا مِّنَ الَّذِينَ كَفَرُوا بِأَنَّهُمْ قَوْمٌ لَا  
يَفْقَهُونَ

4. “Yaghlibu ‘alfan minallazina kafaru bi ‘anna hum qaumun la **yafqahuna** (they shall overcome a thousand of those who disbelieve, because they the disbelievers are a folk without intelligence) [ VIII: 65]



فَرَحَ الْمُخَلَّفُونَ بِمَقْعَدِهِمْ خِلَافَ رَسُولِ اللَّهِ وَكَرِهُوا أَنْ يُجَاهِدُوا بِأَمْوَالِهِمْ  
وَأَنْفُسِهِمْ فِي سَبِيلِ اللَّهِ وَقَالُوا لَا تَنْفِرُوا فِي الْحَرِّ قُلْ نَارُ جَهَنَّمَ أَشَدُّ حَرًّا  
لَوْ كَانُوا يَفْقَهُونَ

5. Qul naru jahannama 'ashaddu harran lau kanu **yafqahuna** (Say: The fire of hell is more intense of heat, if they but understand) [IX: 81]

رَضُوا بِأَنْ يَكُونُوا مَعَ الْخَوَالِفِ وَطُبِعَ عَلَى قُلُوبِهِمْ فَهُمْ لَا يَفْقَهُونَ

6. “wa tab`a `ala qulubi him fa hum la **yafqahuna**” (And their hearts are sealed, so that they apprehend not) [IX:87]

وَإِذَا مَا أَنْزَلْتُ سُورَةً نَظَرَ بَعْضُهُمْ إِلَى بَعْضٍ هَلْ يَرَاكُمْ مِنْ أَحَدٍ ثُمَّ  
انصَرَفُوا صَرَفَ اللَّهُ قُلُوبَهُمْ بِأَنَّهُمْ قَوْمٌ لَا يَفْقَهُونَ

7. sarafallahu qulubahum bi `anna hum qaumun la **yafqahuna** (Allah turneth away their hearts because they are a folk who understand not.) [IX:127]

حَتَّىٰ إِذَا بَلَغَ بَيْنَ السَّدَّيْنِ وَجَدَ مِنْ دُونِهِمَا قَوْمًا لَا يَكَادُونَ يَفْقَهُونَ قَوْلًا

8. Hatta `iza balagha baynassaddayni wajada min duni hima qauman la yakaduna **yafqahuna** qaulan (Till when he came between the two mountains, he found upon their hither side a folk that scarce could understand a saying) [XVIII: 93]

مَثَلُ الْجَنَّةِ الَّتِي وُعدَ الْمُتَّقُونَ فِيهَا أَنْهَارٌ مِنْ مَّاءٍ غَيْرِ آسِنٍ وَأَنْهَارٌ مِنْ لَبَنٍ  
لَمْ يَتَغَيَّرْ طَعْمُهُ وَأَنْهَارٌ مِنْ خَمْرٍ لَذَّةٍ لِلشَّارِبِينَ وَأَنْهَارٌ مِنْ عَسَلٍ مُصَفًّى  
وَلَهُمْ فِيهَا مِنْ كُلِّ الثَّمَرَاتِ وَمَغْفِرَةٌ مِنْ رَبِّهِمْ كَمَنْ هُوَ خَالِدٌ فِي النَّارِ  
وَسُقُوا مَاءً حَمِيمًا فَقَطَّعَ أَمْعَاءَهُمْ

9. Fa sayaquluna bal tahsuduna na bal kanu la **yafqahuna** 'illa qalilan (Then they will say: Ye are obvious for us. Nay but they understand not, save a little.) [XLVIII:15]

لَأَنْتُمْ أَشَدُّ رَهَبَةً فِي صُدُورِهِمْ مِنَ اللَّهِ ذَلِكَ بِأَنَّهُمْ قَوْمٌ لَا يَفْقَهُونَ

10. Zalika bi `anna hum qaumun la **yafqahuna** (That is because they are a folk who understand not) [LIX: 13]

ذَلِكَ بِأَنَّهُمْ آمَنُوا ثُمَّ كَفَرُوا فَطُبِعَ عَلَى قُلُوبِهِمْ فَهُمْ لَا يَفْقَهُونَ

11. Zalika bi 'anna hum'amanu thumma kafaru fa taba`a `ala qulubi him fa hum la **yafqahuna** (That is because they believed, then disbelieved, therefore their hearts are sealed so that they understand not). [LXIII:3]

هُمُ الَّذِينَ يَقُولُونَ لَا تُنْفِقُوا عَلَىٰ مَنْ عِنْدَ رَسُولِ اللَّهِ حَتَّىٰ يَنْفَضُوا وَلِلَّهِ  
خَزَائِنُ السَّمَاوَاتِ وَالْأَرْضِ وَلَكِنَّ الْمُنَافِقِينَ لَا يَفْقَهُونَ

12. wa lakinna'l-munafiqina la **yafqahuna** (But the hypocrites comprehend not) [LXIII:7]

**Yafqahu hu:** يَفْقَهُوهُ

وَمِنْهُمْ مَّنْ يَسْتَمِعُ إِلَيْكَ وَجَعَلْنَا عَلَىٰ قُلُوبِهِمْ أَكِنَّةً أَنْ يَفْقَهُوهُ وَفِي آذَانِهِمْ  
وَقْرًا وَإِنْ يَرَوْا كَلَّ آيَةٍ لَا يُؤْمِنُوا بِهَا حَتَّىٰ إِذَا جَاءُوكَ يُجَادِلُونَكَ يَقُولُ  
الَّذِينَ كَفَرُوا إِنَّ هَذَا إِلَّا أَسَاطِيرُ الْأَوَّلِينَ

1. wa ja`alna `ala qulubi him 'akinnatan 'an **yafqahuhu** wa fi 'azani him waqran (And We place on their hearts veils lest they should understand it, and in their ears a deafness. [VI: 25]

وَجَعَلْنَا عَلَىٰ قُلُوبِهِمْ أَكِنَّةً أَنْ يَفْقَهُوهُ وَفِي آذَانِهِمْ وَقْرًا وَإِذَا ذَكَرْتَ رَبَّكَ  
فِي الْقُرْآنِ وَحْدَهُ وَلَوَّا عَلَىٰ أَدْبَارِهِمْ نُفُورًا

2. wa ja`alna `ala qulubi him 'akinnatan 'an **yafqahuhu** wa fi 'azani him waqran. (And We place on their hearts veils lest they should understand it, and in their ears a deafness. [XVII: 46]

وَمَنْ أَظْلَمُ مِمَّنْ ذُكِّرَ بِآيَاتِ رَبِّهِ فَأَعْرَضَ عَنْهَا وَنَسِيَ مَا قَدَّمَتْ يَدَاهُ إِنَّا  
جَعَلْنَا عَلَىٰ قُلُوبِهِمْ أَكِنَّةً أَنْ يَفْقَهُوهُ وَفِي آذَانِهِمْ وَقْرًا وَإِنْ تَدْعُهُمْ إِلَى  
الْهُدَىٰ فَلَنْ يَهْتَدُوا إِلَّا أَبَدًا

3. 'inna ja`alna `ala qulubi him 'akinnatan 'an **yafqahuhu** wa fi 'azani him waqran (Lo! on their hearts We have placed coverings so that they understand not, and in their ears a deafness.) [XVIII: 57].

**yatafaqqahu:** يَتَفَقَّهُوْا

وَمَا كَانَ الْمُؤْمِنُونَ لِيَنفِرُوا كَآفَّةً فَلَوْلَا نَفَرَ مِنْ كُلِّ فِرْقَةٍ مِّنْهُمْ طَائِفَةٌ  
لِّيَتَفَقَّهُوا فِي الدِّينِ وَلِيُنذِرُوا قَوْمَهُمْ إِذَا رَجَعُوا إِلَيْهِمْ لَعَلَّهُمْ يَحْذَرُونَ

1. "Fa lau la nafarun min kulli firqatin min hum ta'ifatun li *yatafaqqahu fi'l-dini*." (Therefore why not asquadron of each division stay behind So that they may obtain (and have developed in themselves a sense of) understanding al-Din (the Religion.) [IX : 122]

In *hadith* literature containing the authentic record of the sayings of the Messenger of Allah (peace and blessings of Allah be upon him) from the root F-Q-H, we find the following constructions:

**Faqiha:** فقها

1. Fa qala yaqulu al-'a`rabiyyu ba`da 'an faqiha<sup>25</sup>
2. Fa zalika mithlu man faqiha fi dinillahi<sup>26</sup>
3. Fa kharaja wa qad faqiha fa qadama'l-Basrata<sup>27</sup>
4. Khiyara kum khayru kum 'islaman, fi'l-'islami 'ahasanu kum 'akhlaqan 'iza faqihu<sup>28</sup>
5. Khayaru hum khayaru kum, Khayarunnasi fi'l-Jahiliyyati khayaruhum, khayarukum fil-'islami 'iza faqihu<sup>29</sup>
6. Ra'awunnasa qad faqihu fiddini hammu 'an...<sup>30</sup>
7. Wa qad sallayna wa faqihna<sup>31</sup>
8. 'an qad 'akhzana zalika `an hu wa faqihna<sup>32</sup>
9. wa nasma'u al- 'asammu wa'l-'abkamu hatta yafqahu<sup>33</sup>
10. 'anna hu 'iza kana yafqahu kama tafqahu'l-kilaba'l-mu`allamata<sup>34</sup>
11. Fa lamma ra'a hu la yafqahu `an hu<sup>35</sup>

<sup>25</sup> Ibn Majah, *Sunan*, Kitab al-Taharah, chapter no. 78.

Ahmad bin Hanbal, *Musnad*, vol. II, page no. 503.

<sup>26</sup> Bukhari, *Sahih*, Kitab al-'Ilm, bab no. 20.

Muslim, *Sahih*, kitab al-Fada'il, hadith no. 15.

Ahmad bin Hanbal, *Musnad*, vol. IV, hadith no. 399.

<sup>27</sup> Ahmad bin Hanbal, *Musnad*, vol. VI, hadith no. 97.

<sup>28</sup> Ahmad bin Hanbal, *Musnad*, vol. II, hadith no. 467, 469, 481.

<sup>29</sup> Bukhari, *Sahih*, kitab al-Anbiya', bab nos. 8, 14, 19; Kitab al-Manaqib, bab no. 1; kitab al-Tafsir, surah 12, bab no. 2;

Muslim, *Sahih*, kitab al-Fada'il, hadith no. 168; kitab Fada'il al- Sahabah, hadith no. 199;

Darimi, *Sunan*, Muqaddamah, hadith no. 24;

Ahmad bin Hanbal, *Musnad*, vol. II, page nos. 257, 391, 421, 438, 485, 498, 525, 529; vol. III, hadith nos. 367, 383; vol. IV, hadith no. 101.

<sup>30</sup> Tirmizi, *Sunan*, Tafsir surah, hadith no. 64.

<sup>31</sup> Ahmad bin Hanbal, *Musnad*, vol. III, page no. 460.

<sup>32</sup> Abu Da'ud, *Sunan*, kitab al-Salat, hadith no. 93.

<sup>33</sup> Ahmad bin Hanbal, *Musnad*, vol. V, page no. 169.

<sup>34</sup> Malik, *al-Muwatta*, kitab al-Sayd, hadith no. 8.

<sup>35</sup> Ahmad bin Hanbal, *Musnad*, vol. VI, hadith no. 268.

12. 'Ud 'ila rasulillahi (Sallallahu 'alay hi wa sallama) la`alla hu lam yafqah<sup>36</sup>
13. Kana kalamunnabiyyi (Sallallahu 'alay hi wa sallama) faslan yafqahu hu kullu 'ahadin lam yakun bi sardi hi sardan<sup>37</sup>
14. La yafqahu, lam yafqah, La yafqahu hu man qar'a'l-Qur'ana, qara'a hu, yaqra'u hu fi 'aqallimmin thalathin; man qar'a'l-Qur'ana fi 'aqallimmin thalathin lam yafqah hu<sup>38</sup>
15. Fa qalu 'awwalu ha la hu yafqah ha<sup>39</sup>
16. Yusma`u dawiyu sauti hi wa la yufqahu ma yaqulu<sup>40</sup>
17. Lam 'afqah haza , hazihi min rasulillahi (Sallallahu 'alay hi wa sallama)<sup>41</sup>
18. La nafqahu ma yaqulu hatta dana min rasulillahi (Sallallahu 'alay hi wa sallama)<sup>42</sup>
19. Yusma`u dawiyu sauti hi wa la nafqahu ma yaqulu<sup>43</sup>
20. Man yuridillahu bi khayrin, 'iza 'aradallahu ('azza wa jalla) bi 'abdin khayran faqqaha hu fiddini<sup>44</sup>
21. Yufaqqihunannasa fiddini<sup>45</sup>
22. Allahumma fqqih hu fiddini<sup>46</sup>

<sup>36</sup> Ahmad bin Hanbal, *Musnad*, vol. II, hadith no. 366.

<sup>37</sup> Ahmad bin Hanbal, *Musnad*, vol. VI, hadith no. 138.

<sup>38</sup> Tirmizi, *Sunan*, kitab al-Qur'an, hadith no. 11;

Abu Da'ud, *Sunan*, kitab Ramadana, bab nos. 8, 9;

Ibn Majah, *Sunan*, kitab al-Iqamah, bab no. 178;

Darimi, *Sunan*, kitab al-Salat, bab no. 173;

Ahmad bin Hanbal, *Musnad*, vol. II, page nos. 164, 165, 189, 193, 195.

<sup>39</sup> Bukhari, *Sahih*, Kitab al-I'tisam, bab no. 2.

<sup>40</sup> Abu Da'ud, *Sunan*, kitab al-Salat, bab no. 1.

<sup>41</sup> Bukhari, *Sahih*, kitab al-'Ilm, bab no. 52;

Nasa'i, *Sunan*, kitab al-Manasik, bab no. 18.

<sup>42</sup> Bukhari, *Sahih*, kitab al-'Iman, bab no. 34;

Muslim, *Sahih*, kitab al-'Iman, hadith no. 8.

<sup>43</sup> Malik, *Al-Muwatta*, kitab al-Safar, hadith no. 94.

<sup>44</sup> Bukhari, *Sahih*, kitab al-'Ilm, bab no. 10; kitab al-Khums, bab no. 7, kitab al-I'tisam, bab no. 10.

Muslim, *Sahih*, kitab al-Imarah, hadith no. 175; kitab al-Zakat, hadith nos. 98, 100;

Tirmizi, *Sunan*, kitab al-'Ilm, hadith no. 4;

Ibn Majah, *Muqaddamah*, bab no. 17;

Darimi, *Sunan*, Muqaddamah, bab no. 24; kitab al-Riqaq, bab no. 1;

Malik, *Muwatta*, kitab al-Qadr, hadith no. 8;

Ahmad bin Hanbal, *Musnad*, vol. I, page no. 306; vol. II, page no. 234; vol. IV, page nos. 92, 93, 95, 96, 9798, 99, 101.

<sup>45</sup> Darimi, *Sunan*, Muqaddamah, bab no. 24.

<sup>46</sup> Bukhari, *Sahih*, Kitab al-Wudu, bab no. 10;

Muslim, *Sahih*, kitab Fada'il al-Sahabah, hadith no. 138;

**Tafaqqaha: آتفاق**

1. La yabi`u fi suqi na 'illa man tafaqqaha fiddini<sup>47</sup>
2. ...tufuqqahu li ghayriddini<sup>48</sup>
3. 'iza tafaqqahna wa qara'na<sup>49</sup>
4. wa 'inna hum sa ya'tuna kum min 'aqtari'l-'ardi yatafaqqahuna fiddini<sup>50</sup>
5. wa 'inna rijalan ya'tuna kum...yatafaqqahuna fiddini<sup>51</sup>
6. 'inna 'unasan min 'ummati sa yatafaqqahuna fiddini<sup>52</sup>
7. Nisa'u'l-'ansari lam [yakun] yamna` hunna'l-haya'a 'an yas'alna `aniddini wa yafqihna fi hi, 'an yatafaqqahna fiddini<sup>53</sup>
8. ji'na ka li natafaqqahu fiddini<sup>54</sup>
9. tafaqqahu qabla 'an tasawwadu<sup>55</sup>
10. wa 'amara hum bi al-tafaqquhi fi'l-Qur'ani<sup>56</sup>
11. Babu ma la yustahya min al-haqqi li al-tafaqquhi fi al-dini<sup>57</sup>
12. waylun li al- mutafaqqihina bi ghayri al- `ibadati<sup>58</sup>

**'Istafaqaha: استفاقة**

1. fa lamma qada hajata hu wa 'istafaqaha ma yuqalu la hu<sup>59</sup>
2. wa 'akhaza yanfadu ra'sa hu ka 'anna hu yastafaqahu ma yuqalu la hu<sup>60</sup>
3. fa 'akhaztu tanfadu ra'sa ka ka 'anna ka tastafaqahu shay'an yuqalu la ka<sup>61</sup>

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Ahmad bin Hanbal, *Musnad*, vol. I, page nos. 266, 314, 328, 335.

<sup>47</sup> Tirmizi, *Sunan*, kitab al-Witr, hadith no. 21.

<sup>48</sup> Darimi, *Sunan*, Muqaddamah, bab no. 22.

<sup>49</sup> ibid, hadith no. 24.

<sup>50</sup> Ibn Majah, *Sunan*, Muqaddamah, Chapter no. 22, hadith no. 255.

<sup>51</sup> Tirmizi, *Sunan*, kitab al-'Ilm, no. 4.

<sup>52</sup> Ibn Majah, *Sunan*, Muqaddamah, bab no. 23.

<sup>53</sup> Bukhari, *Sahih*, kitab al-'Ilm, bab no. 50;

Muslim, *Sahih*, Kitab al-Hayd, hadith no. 61;

Abu Da'ud, *Sunan*, kitab al-Taharah, no. 120;

Ibn Majah, *Sunan*, kitab al-Taharah, bab no. 124;

Ahmad bin Hanbal, *Musnad*, vol. VI, page no. 148.

<sup>54</sup> Bukhari, *Sahih*, kitab al-Tauhid, no. 22.

<sup>55</sup> Bukhari, *Sahih*, kitab al-'Ilm, bab no. 15 [fi al-tarjumah];

Darimi, *Sunan*, Muqaddamah, bab no. 26.

<sup>56</sup> Darimi, *Sunan*, Muqaddamah, bab no. 24.

<sup>57</sup> Bukhari, *Sahih*, kitab al-Adab, bab no. 79.

<sup>58</sup> Darimi, *Sunan*, Muqaddamah, bab no. 24.

<sup>59</sup> Ahmad bin Hanbal, *Musnad*, vol. I, p. 318.

<sup>60</sup> ibid.

<sup>61</sup> ibid.

**Fiqhun: ä•**

1. wa laysa la hum fiqhun fiddini... fa 'in lam yakun la hum fiqhun fiddini<sup>62</sup>
2. [wa]al-fiqhu yamanun<sup>63</sup>
3. 'inna 'l-haya'a ...wa al-fiqa min al-'imani<sup>64</sup>
4. Kathirun, kathiratun shahmu butuni him, qalilun, qalilatun fiqhu qulubi him; qalilun fiqhu qulubi him kathirun shahmu butuni him.<sup>65</sup>
5. haza al-fiqhu bi `ayni hi<sup>66</sup>
6. wa lakin lau qulta yazhabu al-fiqhu<sup>67</sup>
7. fa rubba, fa 'inna hu rubba hamili fiqhin[fi hi] laysa bi faqihin, ghayru faqihin, la fiqa la hu<sup>68</sup>
8. wa rubba hamili fiqhin 'ila man huwa 'afqahu min hu<sup>69</sup>
9. wa takhlusu li 'ahli al-fiqhi wa 'ashrafi al-nasi wa zawi ra'yi him<sup>70</sup>
10. Qala 'akhbirni rajulun min al-'ansari min 'ahli'l-fiqhi<sup>71</sup>
11. ...fi ajnadi,l-muslimina min al-dini wa'l-fiqhi wa'l-'ilmi bi'l-qur'ani<sup>72</sup>
12. ...wa min 'ahli'l-hadithi wa'l-'ilmi wa'l-fiqhi wa'l-qur'ani<sup>73</sup>
13. Qala 'ulu'l-ilmi wa'l-fiqhi<sup>74</sup>

<sup>62</sup> Tirmizi, *Sunan*, kitab al-Manaqib, no. 19.

<sup>63</sup> Bukhari, *Sahih*, kitab al-Maghazi, bab no. 74;

Muslim, *Sahih*, kitab al-Iman, hadith nos. 82, 84;

Ahmad bin Hanbal, *Musnad*, vol. II, page nos. 235, 267, 277, 380, 474, 480, 488, 541.

<sup>64</sup> Darimi, *Sunan*, Muqaddamah, bab no. 43.

<sup>65</sup> Bukhari, *Sahih*, kitab Tafsir surah 41, bab no. 2; kitab al-Tauhid, bab no. 41;

Muslim, *Sahih*, kitab al-Munafiqin, hadith no. 5;

Tirmizi, *Sunan*, Tafsir surah 41, nos. 1, 2;

Ahmad bin Hanbal, *Musnad*, vol. I, nos. 281, 408, 426, 442, 443.

<sup>66</sup> Bukhari, *Sahih*, kitab al-Wudu, no. 33 [fi al-tarjumah].

<sup>67</sup> Darimi, *Sunan*, Muqaddamah, bab no. 18.

<sup>68</sup> Abu Da'ud, *Sunan*, kitab al-'Ilm, bab no. 10;

Tirmizi, *Sunan*, kitab al-'Ilm, no. 7;

Ibn Majah, *Sunan*, Muqaddamah, bab no. 18; kitab al-Manasik, bab no. 76;

Darimi, *Sunan*, Muqaddamah, bab no. 24;

Ahmad bin Hanbal, *Musnad*, vol. IV, page nos. 80, 82; vol. V, page no. 183.

<sup>69</sup> Ibid.

<sup>70</sup> Bukhari, *Sahih*, kitab al-Manaqib, bab no. 46.

<sup>71</sup> Ahmad bin Hanbal, *Musnad*, vol. I, page no. 6.

<sup>72</sup> Ahmad bin Hanbal, *Musnad*, vol. I, page no. 405.

<sup>73</sup> Nasa'i, *Sunan*, kitab al-Fay', bab no. 15.

<sup>74</sup> Darimi, *Sunan*, Muqaddamah, bab no. 24.

14. fa man sawwada hu qauma hu `ala al-fiqhi kana la hu hayatan wa la hum<sup>75</sup>
15. wa man sawwada hu qauma hu `ala ghayri'l-fiqhi kana halakan la hu wa la hum<sup>76</sup>
16. Babu ma ja'a fi fadli al-fiqhi `ala al-`ibadati<sup>77</sup>
17. Babu al- samari fi al- fiqhi wa'l-khayri ba'da'l-`isha'i<sup>78</sup>
18. 'iza sallu al--`isha'a al-'akhirata jalasu fi al- fiqhi<sup>79</sup>
19. laysa bi him raghbatan fi al-dini wa la raghbatan fi al-fiqhi<sup>80</sup>
20. la ba'sa bi al-samari fi al- fiqhi<sup>81</sup>
21. min fiqhi al-rajuli rifqa hu fi ma`ishati hi<sup>82</sup>
22. fa 'inna min fiqhi al-rajuli 'an yaqula li ma la ya`lamu, la `ilma la hu 'allahu 'a`lamu<sup>83</sup>
23. min fiqhi al-mar'i 'iqbala hu `ala hajati hi hatta yaqbalu `ala salati hi<sup>84</sup>
24. fi hi min al-fiqhi 'anna hu lam yasta'zan hum hina qama wa kharaja<sup>85</sup>
25. 'inna tula salata al-rajuli wa qasra khutbati hi muthannata min fiqhi hi<sup>86</sup>
26. wa 'in kana 'aqalla min hum fiqhan<sup>87</sup>
27. Fa yata`allamuna'l-fiqha wa'l-`ilma<sup>88</sup>
28. Khaslatani la tajtami`ani fi munafiqin husnu samtin wa la fiqhu fi al-dini<sup>89</sup>

### Faqihun **آء** [pl. Fuqaha'u فقهاء]

1. Faqihun [wahidun] 'ashaddu `ala al-Shaytani min 'alfi `abidin<sup>90</sup>

<sup>75</sup> Ibid, no. 26.

<sup>76</sup> Ibid.

<sup>77</sup> Tirmizi, *Sunan*, kitab al-`Ilm, no. 19.

<sup>78</sup> Bukhari, *Sahih*, kitab al-Mawaqit, *bab* no. 40.

<sup>79</sup> Darimi, *Sunan*, Muqaddamah, bab no. 51.

<sup>80</sup> Ahmad bin Hanbal, *Musnad*, vol. I, page no. 155.

<sup>81</sup> Darimi, *Sunan*, Muqaddamah, bab no. 51.

<sup>82</sup> Ahmad bin Hanbal, *Musnad*, vol. V, page no. 194.

<sup>83</sup> Muslim, *Sahih*, kitab al-Munafiqin, hadith no. 40;

Ahmad bin Hanbal, *Musnad*, vol. I, page no. 381.

<sup>84</sup> Bukhari, *Sahih*, kitab al-'Azan, no. 42 [fi al-Tarjumah].

<sup>85</sup> Bukhari, *Sahih*, kitab al-Isti'zan, bab no. 10.

<sup>86</sup> Muslim, *Sahih*, kitab al-Jumu`ah, hadith no. 47;

Darimi, *Sunan*, kitab al-Salat, no. 199;

Ahmad bin Hanbal, *Musnad*, vol. IV, page no. 262.

<sup>87</sup> Ibid, nos. 494-495.

<sup>88</sup> Darimi, *Sunan*, Muqaddamah, bab no. 32.

<sup>89</sup> Tirmizi, *Sunan*, kitab al-`Ilm, no. 19.

2. 'inna hu qari'un li kitabillahi faqihun fi dinillahi<sup>91</sup>
3. 'asaba 'inna hu faqihun<sup>92</sup>
4. 'innahu kana fi bani 'isra'ila rajulun faqihun `alimun `abidun mujtahidun<sup>93</sup>
5. 'innama al-faqihu al-zahidu fi al-dunya<sup>94</sup>
6. 'innama al-faqihu man yakhafullaha<sup>95</sup>
7. wayhaka wa ra'ayta 'anta faqihan qattu<sup>96</sup>
8. ...'in kana la faqihan<sup>97</sup>
9. ...'an yakuna faqihan haliman<sup>98</sup>
10. Haqqa `ala kulli man qara'a al-qur'ana 'an yakuna faqihan<sup>99</sup>
11. 'inna al-faqiha haqqun al-faqihu man lam yuqnat al-nasa min rahmatillahi<sup>100</sup>
12. wa 'anna zamanan 'akunu fi hi faqihu 'ahli al-kufati zamanu su'in<sup>101</sup>
13. Fa qala wasiyyati ma 'ittafaqa `alay hi fuqaha'u 'ahli al-basrati<sup>102</sup>
14. Qala la hu fuqaha'ul-'ansari , fuqaha'u hum 'amma zawu ra'ayna [ya rasulallah] fa lam yaqulu shay'an<sup>103</sup>
15. Laysa hakaza yaqulu al-fuqaha'u<sup>104</sup>
16. wa sa ya'ti `ala al-nasi zamanun qalilun fuqaha'u hu kathirun qurra'uhu<sup>105</sup>
17. Innaka fi zamanin kathirin fuqaha'uhu qalilun qurra'uhu.<sup>106</sup>
18. Li yaqdi kullu qaumin bi ma 'ijtama'a `alay hi fuqaha'u hum<sup>107</sup>

<sup>90</sup> Tirmizi, *Sunan*, kitab al-'Ilm, no. 19;

Ibn Majah, *Sunan*, Muqaddamah, bab no. 17.

<sup>91</sup> Ahmad bin Hanbal, *Musnad*, vol. I, p. 349.

<sup>92</sup> Bukhari, *Sahih*, kitab Fada'ili Ashab al-Nabi, bab no. 28.

<sup>93</sup> Malik, *Muwatta*, kitab al-Jana'iz, no. 43.

<sup>94</sup> Darimi, *Sunan*, Muqaddamah, no. 29.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, Kitab al-Fara'id, no. 6.

<sup>98</sup> Bukhari, *Sahih*, kitab al-Ahkam, no. 16.

<sup>99</sup> Darimi, *Sunan*, Muqaddamah, bab no. 32.

<sup>100</sup> Ibid, no. 29.

<sup>101</sup> Ibid, no. 22.

<sup>102</sup> Ibid, Kitab al-Wasaya, no. 8.

<sup>103</sup> Bukhari, *Sahih*, kitab al-Khums, bab no. 19;

Muslim, *Sahih*, kitab al-Zakat, hadith no. 132.

<sup>104</sup> Darimi, *Sunan*, Muqaddamah, bab no. 29.

<sup>105</sup> Malik, *Muwatta*, kitab al-Safar, hadith no. 88.

<sup>106</sup> Ibid.

<sup>107</sup> Darimi, *Sunan*, Muqaddamah, bab no. 52.



19. ...wa qallat fuqaha'u kum<sup>108</sup>
20. Babu 'ikhtalafi al-fuqaha'i<sup>109</sup>
21. Thakaltuka 'ummu ka ya ziyadu 'in kunta la 'a`addu ka min fuqaha'i 'ahli al-madinati<sup>110</sup>
22. 'atayna hu fi nafarin min fuqaha'i 'ahli al- kufati<sup>111</sup>
23. Kunu rabbaniyyina qala `ulama'u, hulama'u, fuqaha'u<sup>112</sup>
24. Ma 'adraktu fuqaha'u 'ardina 'illa yusallimuna fi kulli ithnatayni min al-nahari<sup>113</sup>

#### 'Afaqhu: ä-Z

1. Ma na`lamu 'anna hu kana fi na rajulun 'a`lamu bi kitabillahi min ka wa la 'afqahu min ka wa la min 'abi ka<sup>114</sup>
1. Fa qala , fa qama khasmu hu[al-khasmu] al-'akhira wa huwa 'afqahu huma, 'afqahu minhu, wa kana 'afqahu min hu.<sup>115</sup>
2. 'afqahu hum fi dinillahi<sup>116</sup>
3. wa 'afqahu na , wa 'ibnu 'afqaha na<sup>117</sup>
4. ma haza bi 'afqaha min ba`iri hi<sup>118</sup>
5. fa nazartu 'ila 'afqaha al-nasi ba`da hu<sup>119</sup>
6. man 'afqahu 'ahli'l-madinati<sup>120</sup>

<sup>108</sup> Ibid, no. 22.

<sup>109</sup> Ibid, no. 52.

<sup>110</sup> Ibid, no. 29.

<sup>111</sup> Ibn Majah, *Sunan*, Muqaddamah, bab no. 10.

<sup>112</sup> Bukhari, *Sahih*, kitab al-`Ilm, bab no. 10 [fi al-tarjumah];

Darimi, *Sunan*, Muqaddamah, bab no. 32.

<sup>113</sup> Bukhari, *Sahih*, kitab al-Tahajjud, no. 25 [fi al-tarjumah].

<sup>114</sup> Ahmad bin Hanbal, *Musnad*, vol. VI, no. 25.

<sup>115</sup> Bukhari, *Sahih*, kitab al-Shurut, bab no. 9; kitab al-Ayman, bab no. 3; kitab al-Hudud, bab nos. 30, 38, 46;

Muslim, *Sahih*, kitab al-Hudud, hadith no. 25;

Abu Da'ud, *Sunan*, kitab al-Hudud, bab no. 24;

Tirmizi, *Sunan*, kitab al-Hudud, no. 8;

Nasa'i, *Sunan*, kitab al-Qudat, bab no. 22;

Ibn Majah, *Sunan*, kitab al-Hudud, bab no. 7;

Darimi, *Sunan*, kitab al-Hudud, bab no. 12;

Malik, *Muwatta*, kitab al-Hudud, hadith no. 6;

Ahmad bin Hanbal, *Musnad*, vol. IV, page no. 116.

<sup>116</sup> Ahmad bin Hanbal, *Musnad*, vol. VI, page nos. 68, 436.

<sup>117</sup> Ibid, vol. III, no. 108

<sup>118</sup> Abu Da'ud, *Sunan*, kitab al-Manasik, bab no. 24;

Nasa'i, *Sunan*, kitab al-Manasik, no. 49.

<sup>119</sup> Abu Da'ud, *Sunan*, kitab al-Salat, no. 10.

<sup>120</sup> Darimi, *Sunan*, Muqaddamah, bab no. 29.

7. 'in kunta la 'ara ka, la 'azannu ka man 'afqahu rajulin bi'l-madinati.<sup>121</sup>

“Man yuridillahu bi hi khayran *yafqih* hu fi'l-dini.”

(Whom Allah wants to do a favour, He grants him an understanding in religion).<sup>122</sup>

Technically, it was defined earlier by Imam Abu Hanifah (Allah's mercy be on him) in a general and comprehensive manner as follows:

*Al-fiqh ma`rifatu'l-nafsi ma laha wa ma `alayha*

الفقه معرفة النفس ما لها وما عليها

“*Fiqh* (فقه) is the knowledge of soul: its rights and obligations.”<sup>123</sup>

This definition is general and consists of rulings of:

- Al-I'tiqadiyyat (المعتقدات) (the beliefs), like the faith being obligatory etc.;
- Al-Wajdaniyyat (الوجدانيات) (the morals and the mystic ways); and
- Al-A'maliyyat (الأماليات) (the practices), like al-Salat (the prayer) (الصلاة), al-Saum (the fasting) (الصوم), al-Bay' (the transactions of sale) etc., and this is the great jurisprudence (al-fiqh al-'akbar).

Prof. Dr. Ahmad Hasan, in his *Principles of Islamic Jurisprudence*, says:

*“It appears that the term fiqh (فقه) in the time of Imam Abu Hanifah (Allah's mercy be on him) was used in the sense of the Shari'ah, comprehending dogma, law, morality, and rituals. Subsequently, dogma and morality became independent subjects and were dealt with in theology and mysticism or ethics. The term fiqh was confined to matters relating to law and rituals.”*

Hence, *fiqh* was defined in the later period as follows:

*Al-'Ilmu bi'l-'ahkami al-shar'iyyati al-'amaliyyati al-muktasabi min 'adillati ha.*

(*Fiqh* is the knowledge of the command of the Shari'ah relating to the conduct of the man derived on the basis of their detailed proofs.)<sup>124</sup>

<sup>121</sup> Ibn Majah, *Sunan*, kitab al-Fitan, no. 26;

Ahmad bin Hanbal, *Musnad*, vol. IV, page nos. 160, 219; vol. VI, page no. 26.

<sup>122</sup> Muslim, *Sahih*, *Kitab al-Imarah*, Bab la Tazalu Ta'ifatun min Ummati...Hadith no.

<sup>123</sup> Sadr al-Shari'ah, `Ubayd Allah bin Mas`ud, *Al-Taudih*, along with its commentary *Al-Talwih*, Cairo: Dar al-'Ahd al-Jadid li'l-Tiba'ah, 1957, I, p. 10.

Some jurists name the collection of such commands of the Shari`ah the sciences of *Fiqh*. By adding the qualification "*shar'iyyah*" (relating to the Shari`ah) those commands are excluded from the domain of *Fiqh* that are known through sources other than the Shari`ah, such as reason, perception, habit, and experience. The qualification of "*amaliyyah*" (relating to the conduct) excluded the commands of the Shari`ah which relate to beliefs (*`aqa'id*) and the principles of *Fiqh* (*'Usul al-Fiqh*) (لَادِئِدْشْزْ هُذَاهْ هَزْ) from the domain of *Fiqh*. It may be noted that the word *`amal* (deed or action) has been used in a comprehensive sense. It includes the actions of the limbs, tongue and heart. Thus *Fiqh* comprehends the commands relating to deeds (*af'al*), such as the obligatory command of prayer, and prohibition of murder and theft, and the injunctions concerning acts of utterances (*aqwal*), such as prohibition of abuse and vilification, obligation of recitation of the Qur'an in prayer, and the commands relating to the actions of the heart, such as the obligations of intention, prohibition of harbouring malice and grudge.

The qualification "*muktasab*" (acquired or derived) implies that *Fiqh* is a collection of those commands which are known by means of consideration, reflection, study and search. By this condition the knowledge of God is excluded from the definition of *Fiqh*, for it is not acquired. Similarly, the knowledge of the Prophet, Gabriel, and other angels is excluded from the jurisdiction of *Fiqh*, for it is gained through revelation, and not through reflection, study and reasoning.

The qualification "*tafsiliyyah*" (detailed or particular proofs) excludes the knowledge of conformists or followers of a particular legal school about the precepts of the Shari`ah, since they unquestioningly follow their masters (*a'immah*) in respect of knowledge of the commands of the Shari`ah. Their knowledge of the commands cannot be named *Fiqh*, for it is not gained through proofs. The knowledge of each command is based on a particular proof. A conformist (*muqallid*) does not belong to the class of people who are well versed in independent reasoning, for he unquestioningly follows a particular legal school."<sup>125</sup>

*Fiqh* is the knowledge of the practical rules of Shari`ah acquired from the detailed evidence in the sources.<sup>126</sup> It is concerned with the

<sup>124</sup> Al-Baydawi, Nasir al-Din, *Minhaj al-Wusul 'ila 'Ilm al-'Usul*, Cairo: Matba'ah Kurdistan al-'Ilmiyyah, 1326 AH, p. 3.

<sup>125</sup> Prof. Dr. Ahmad Hasan, *Principles of Islamic Jurisprudence*, Islamabad: Islamic Research Institute, 1993, vol. I, pp. 6-7.

<sup>126</sup> Al-Amidi, Sayf al-Din, Abu al-Husayn `Ali ibn Abi `Ali bin Muhammad al-Tha`labi (d. 631/1233), *Al-Ihkam fi Usul al-Ahkam* (Precision in the Source Methodology of Law), [4 Vols., Cairo: Matbu`at al-Ma`arif, 1332/1914. Also Cairo: Muhammad `Ali Subayh, 1347/1929. Also 1968. Also al-Tab`ah 1. Dar al-Kitab al-`Arabi, 1404 / 1984. Also al-Tab`ah 1. Beirut: Dar al-Kutub al-`Ilmiyyah, 1405/1985, Beirut, 1402/1982, pp. 1-6; al-Qadi al-Shaukani, *Irshad al-Fuhul* (Guidance of the Masters), Dar al-Ma`rifah, Beirut, p. 3.

knowledge of the detailed rules of Islamic law in its various branches.<sup>127</sup>

'*Usul al-fiqh* (اصول الفقه) or the roots of Islamic law, expound the indications and methods by which the rules of *fiqh* are deduced from their sources.<sup>128</sup>

'*Usul al-fiqh* (اصول الفقه) is the science of the sources and methodology of the law. It is concerned with the methods that are applied in the deduction of the rules of Islamic law from their sources.<sup>129</sup>

The principles of jurisprudence are those rules that are the means (*wasilah*/وسيلة) to deduce the Shari'ah values (*Ahkam shar'iyyah*/احكام شرعية) from their detailed indications (*dala'il*/دلائل).<sup>130</sup>

The science of these rules is called the Science of Principles of Jurisprudence (علم اصول الفقه).<sup>131</sup>

### Subject Matter

The subject matter of this science is the four sources (*adillah arba'ah*/ادلة اربعة) in the sense that they indicate towards the Shari'ah values and the deduction of the Shari'ah values from them.<sup>132</sup>

#### The four sources of Islamic Law are:

1. The Holy Qur'an;
2. The Sunnah of the Messenger of Allah (peace and blessings of Allah be upon him);
3. *Ijma`* (إجماع); and
4. *Qiyas* (قياس).

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*Al-Ihkam fi Usul al-Ahkam* is the summarisation of four major works, namely, *al-'Ahd*, *al-Mu'tamad*, *al-Burhan* and *al-Mustasfa*. The same four major works had also been summarised by Imam Fakhr al-Din al-Razi (d. 600 AH) in his book *al-Mahsul fi 'ilm 'usul al-fiqh* (The Sum and Substance), it has been edited by a renowned scholar Dr.Taha Jabir al-'Alwani, and printed in six volumes by Imam Muhammad ibn Sa'ud University, 1st Edition, 1399/1979, part 1, 94.

<sup>127</sup> Kamali, Muhammad Hashim, *Principles of Islamic Jurisprudence*, Malaysia, 1989, p. 2.

<sup>128</sup> Ibid, p.1

<sup>129</sup> Ibid, pp. 1-2.

<sup>130</sup> *Fawatih al-Rahamut Sharh Musallam al-Thubut*, Bahr al-'Ulum Muhammad 'Abdul 'Ali bin Nizam al-Din Muhammad al-Ansari al-Lakhnawi (d. 1180/1766), [First Ed. Bulaq, 1322 AH. Also reprinted Baghdad, 1970], Dar Ihya al-Turath al-'Arabi, Beirut, volume 1, p. 14.

<sup>131</sup> *Usul al-Fiqh*, Al-As'adi, Muhammad 'Ubaydullah, Karachi, n.d. p.17.

<sup>132</sup> Ibid, p.16.

The Shari`ah indications (*dala'il*/دلایل) must relate to any one of them and the Shari`ah value (*hukm*/حكم) must have been deduced from anyone of them to become reliable.

#### **Proof of Dependence of the Shari`ah indications upon the four sources of Law**

It is proved on the authority of the Holy Qur'an, Hadith, practice and reason that the Shari`ah indications depend upon the four sources and their mutual sequence. In case an indication is not available in the Holy Qur'an it should be searched in the Sunnah of the Messenger of Allah (peace and blessings of Allah be upon him). If the indication is not available in the Sunnah then it should be searched in the *Ijma`* (إجماع). In case it is not found in any of the three then to take the support of *Qiyas* (قياس) to find the solution of the problem.

(a) The Holy Qur'an says:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا (59)

*Ya ayyuhallazina amanu  
ati`ullah wa ati`urrasula  
wa ulil-amri minkum  
fa in tanaza` tum fi shay'in  
farudduhu ilallahi warrasuli  
in kuntum tu'minuna billahi  
wa bilyaumil akhiri  
zalika khayrun  
wa ahsanu ta'wila."*  
"O ye who believe!

Obey Allah and obey the Messenger,  
And those charged  
With authority among you.  
If ye differ in any thing  
Among yourselves, refer it  
To Allah and His Messenger,  
If ye do believe in Allah  
And the Last Day:  
That is best, and most suitable  
For final determination."  
[4:59]

In the above verse, four things have been mentioned and each one of them refers to the four sources in sequence.<sup>133</sup>

In the aforesaid verse, commandment is to obey Allah and the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) and the Uli'l-Amr. Alongwith this a direction has been given that in case there occurs conflict of opinion in any matter then matter must be referred to the *Kitabullah* and Sunnah *Rasulullah* (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ). Such conflict may occur in two ways. Either the matter is such concerning which no explicit guidance is available in the Holy Qur'an and Sunnah or the guidance is available but there may be different aspects of its interpretation (ta'wil). In both these cases the Qur'anic injunction is to refer back to the Holy Qur'an and Sunnah.

In other words if the conflict is of the nature of interpretation (ta'wil/تأويل) then such interpretation shall be adopted which finds support from other similar cases of the Holy Qur'an and Sunnah. And if the matter relates to *ijtihad* / اجتihad then this thing will be seen in the *ijtihad* / اجتihad that in the under discussion matter which thing may be the most close to the Holy Qur'an and Sunnah and a thing which fully fits their standard that will be adopted.

In this verse two more matters are most specifically worthy of attention.

One is that in this verse the command to obey has been given in respect of three things, namely, Allah, *Rasulullah* and those persons who are vested with authority ('uli'l-amr) but where the conflict appears the reference is to be made to only two, i.e. Allah and *Rasulullah* (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ). The Uli'l-amr are not included in the referees. The reason is that the source of all law is originally Allah Almighty and the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ). The Uli'l-amr are not the source of law nor they have this right to take any step independent of Allah and Rasululla (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ). Rather in the case of occurrence of any conflict the command to refer towards Allah and *Rasulullah* (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) has in fact been made to the Uli'l-'amr.

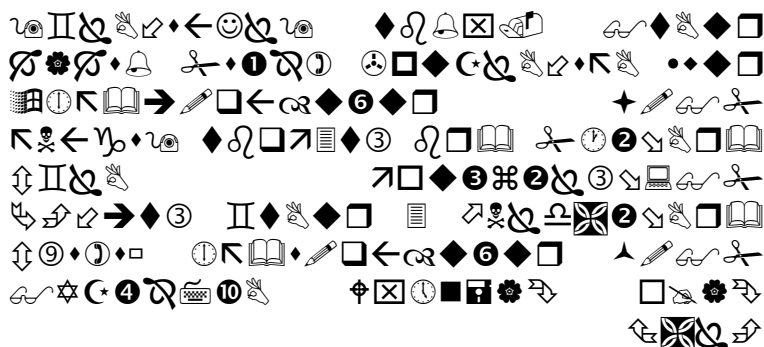
Second is that in this verse the word "اطيعوا" has been used for both Allah and *Rasulullah* (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) separately. However, it has not been repeated in the case of 'Uli'l-'amr. In it there is an indication that the obedience to Allah and obedience to *Rasulullah* is permanent and unconditional while obedience to 'Uli'l-'amr not permanent nor unconditional. Rather it is conditional with the condition that their commands shall be subject to the injunctions (ahkam) of Allah and Rasululllah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ). Further, the commands issued by the 'Uli'l-'amr shall not be contradictory and repugnant to the injunctions (ahkam) of Allah and *Rasulullah* (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ).

<sup>133</sup> *Ruh al-Ma'ani*, Sayyid Mahmud Alusi Baghdadi, Mustafa'i Press, Deoband, Vol. 5, p.67.

In brief, according to the above verse of the Holy *Qur'an*, the obedience to Allah and the obedience to the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) have a status which in its nature is basic, permanent and unconditional. As for the obedience to the 'Ulil-'amr is concerned it has been declared as non-permanent, conditional and subject to obeying Allah and *Rasulullah* (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ).

'Umara', hukkam, a'immah mujtahidin, 'ulama' and jurists (*fuqaha*) are all including in the category of 'ulil-'amr. The authoritativeness (*hujjiyyat*/حُجِّيَّة) of their juristic opinions (*fiqhi 'ara'*/فقهى آراء), academic views (علمى اقوال), legal opinions (*fatawal*/فتاوى), researches (*tahqiqat*/تحقيقات), and personal judgments (*ijtihadat*/اجتهادات) shall always be subject to the Holy Qur'an and Sunnah. The Divine command "Obey Allah" is the authority on the absolute authoritativeness of the Holy *Qur'an* and the Divine command "Obey the Messenger" is the authority on the absolute authoritativeness of the Sunnah of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ). As for the store prepared by the researches, views and personal judgments of the 'ulil-'amr i.e. A'immah mujtahidin its status is that of the third and fourth source (of law in Islam). If on any issue out of the aforesaid four sources of law any two are mutually in conflict and the reconciliation (*tabiq*/تطبيق) is not possible then always the precedent shall have preference over the subsequent and a strong argument/evidence cancels the weak argument/evidence. No one has the right to differ with the Holy *Qur'an* and Sunnah.

Allah Almighty says:



It is not fitting for a believer, man or woman, when a matter has been decided by Allah and His Messenger to have any option about their decision: if any one disobeys Allah and His Messenger, He is indeed on a clearly wrong path.

[33:36]

The *Shari'at* has undoubtedly commanded to get benefit of the *ijtihadat* of the jurists (*fuqaha*) and mujtahidin and to have their opinions and views but this is allowed only when on any issue the

Holy Qur'an and Sunnah are silent or the texts available on the issue are genuinely very difficult to understand. Further, the authoritativeness of the *ijtihadat* of the jurists and *mujtahidin* is conditional hence to differ with their opinions by other men of knowledge on the basis of their own research is not invalid. In such a situation, the final arbiter shall be the Holy Qur'an and Sunnah.

This is clear from the Qur'anic words: *فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ*.

The Sunnah of the Messenger of Allah (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) also supports this methodology. The Prophetic guidance available in the *hadith* Mu'az (رَضِيَ اللَّهُ تَعَالَى عَنْهُ) is worth mentioning. When the Messenger of Allah (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) appointed Hadrat Mu'az bin Jabal the *Qadi* of Yemen the following dialogue had taken place between the Messenger of Allah (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) and Hadrat Mu'az (رَضِيَ اللَّهُ تَعَالَى عَنْهُ):

كيف تقضى اذا عرض لك قضاء؟

The Messenger of Allah (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) asked Mu'az (رَضِيَ اللَّهُ تَعَالَى عَنْهُ):

How will you decide an issue that is put before you for decision?

قال: اقضى بكتاب الله

He (رَضِيَ اللَّهُ تَعَالَى عَنْهُ) submitted: I shall decide it according to the Book of God.

قال: فان لم تجد في كتاب الله؟

He (رَضِيَ اللَّهُ تَعَالَى عَنْهُ) asked him (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ): If you do not find (any text) in the Holy *Qur'an* (then what will you do)?

قال: فبسنّة رسول الله

He (رَضِيَ اللَّهُ تَعَالَى عَنْهُ) submitted: I shall decide it according to the Sunnah of the Messenger of Allah (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ).

قال: فان لم تجد في سنّته؟

He (رَضِيَ اللَّهُ تَعَالَى عَنْهُ) asked him (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ): If you do not find (any text) in his Sunnah (then what will you do)?

قال: اجتهد رأي و لا آلى

He (رَضِيَ اللَّهُ تَعَالَى عَنْهُ) submitted: I shall exercise my personal judgment and will leave no stone unturned in that exercise (and decide the issue according to it).

فضرب رسول الله على صدره و قال الحمد لله الذى وفق رسول الله لما يرضى رسول الله.

[Hearing this reply] the Messenger of Allah (صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) patted Mu'az's chest and said: "Praise be to Allah Who has guided the



messenger of His Messenger to that which pleases the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ).<sup>134</sup>

From this saying of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) the following golden principles become available to the Muslims throughout the globe:

1. The solution of every issue relating to knowledge and faith shall first of all be searched from the Holy *Qur'an*.
2. If after maximum due effort no command is found in the Holy *Qur'an* then in the same manner maximum due research shall be made in the Sunnah of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ).
3. If the solution is not found both in the Holy Qur'an and Sunnah despite maximum due effort, then in the light of both the Holy Qur'an and Sunnah, maximum due effort shall be made in the exercise of *ijtihad* to arrive at a personal judgment.
4. For conducting *ijtihad* all the requirements of knowledge and faith as to competency shall be fulfilled and best efforts be made to find the solution.

In the same manner once the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) had instructed Hadrat `Abdullah bin Mas'ud:

اقض بالكتاب والسنة اذا وجدتهما فاذا لم تجد الحكم فيهما اجتهد رأيك

Decide according to the Book of God when you find (any text of the rule) in the *Kitabullah* (Holy *Qur'an*) and when you do not find the command in both of them (i.e. in the Holy Qur'an and Sunnah) then exercise your personal judgment.<sup>135</sup>

The following saying of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) also contains clear guidance on the subject of holding fast this manner:

The Holy Prophet (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) said:

تركت فيكم امرين لن تضلوا ما تمسكتم بهما: كتاب الله وسنة رسوله صلى الله عليه وسلم.

I have left behind among you two affairs. You shall never go astray if you hold fast both of them. Those are the *Kitabullah* and the Sunnah of his Messenger (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ).<sup>136</sup>

It is narrated on the authority of Hadrat Sa'id bin al-Musayyib (رضي الله عنه) that Hadrat `Ali (رضي الله تعالى عنه) once asked the Holy

<sup>134</sup> *Mishkat al-Masabih*, Khatib Baghdadi, Rashidiyah Press, Delhi, p.324.

<sup>135</sup> Subhi Mahmasani, *Falsafah al-Tashri'fi al-Islam*, p. 188.

<sup>136</sup> Ibn al-Qayyim, *i'lam al-Mu'aqqi'in*, Vol. 2 p. 173.

Prophet (ﷺ): If we are confronted with a problem concerning which nothing is revealed in the Holy *Qur'an* nor we find any Sunnah of yours what should we do in such a case? The Messenger of Allah (ﷺ) said: Collect the learned from among the believers and establish counselship between them and do not decide on the solitary opinion of a single person.<sup>137</sup>

The same was the practice during the period of the four righteous califs in the matter of finding solutions of the problems. Details are available in the books on the authorities of Sayyiduna Abu Bakr (رضي الله تعالى عنه), Sayyiduna Umar *Fanuq* (رضي الله تعالى عنه), Sayyiduna Ali (رضي الله تعالى عنه), and other companions.

Abdul Wahhab Khallaf says:

maymun bin Mahran narrated that when a litigation came before Hadrat Abu bakr (رضي الله تعالى عنه) he searched its solution in the *Kitabullah* and if he could find any he would decided according to it. And if he did not find any solution in the Holy *Qur'an* and find in the Sunnah of the Messenger of Allah (ﷺ) he would decide according to it. If he did not find anything in the Sunnah of the Messenger of Allah (ﷺ) he used to collect the people and the best among them and asked their advice. If they people had come to a consensus on any solution he (رضي الله تعالى عنه) decided the matter accordingly. Hadrat Umar also did the same way. All big companions and leaders of the Muslims remain established on this way and nothing was found in their conduct against this way of procedure and its sequence.<sup>138</sup>

عن الشعبي قال كتب عمر الى شريح: اذا اتاك امر في كتاب الله فاقض به ولا يفتنك عنه الرجال فان لم يكن في كتاب الله فيما في سنة رسول الله فان لم يكن في كتاب الله و سنة رسول الله ولا فيما قضى به ائمة الهدى فانت بالخيار (و في رواية) وما لم يتبين لك في السنة فاجتهد رأيك

Imam Ibn Hazm narrated on the authority of Sha'bi that Hadrat Umar (رضي الله تعالى عنه) sent the instructions in writing to Qadi Shurayh:

*When you find a command in the Kitabullah decide according to it. People should not be able to make you deviating from it. And if the solution is not available in the Kitabullah then you should decide according to the Sunnah of the Messenger of Allah (ﷺ). And if*

<sup>137</sup> Ibid., Vol1, p. 65.

<sup>138</sup> 'Ilm 'Usul al-Fiqh, p. 19.

*the solution is not available both in the Holy Qur'an and Sunnah of the Messenger of Allah (ﷺ) and neither it is found in the decisions of the a'immatul-Huda the rightly guided leading jurists then you have the option to exercise your own personal judgment.<sup>139</sup>*

All the schools of jurisprudence agree on it that the said problems should be solved on the basis of the Shar'iyyah evidence in that very sequence which has been established as the sequence of sources in the science of the Principles of Law (اصول الفقه).<sup>140</sup>

**THE WAY OF RESEARCH OF IMAM A'ZAM ABU HANIFAH (RAHMATULLAH 'ALAYH):**

*Imam A'zam* said: My way of *Ijtihad* and my school of thought is that first of all I put the problem before the *Kitabullah* (i.e. the Holy *Qur'an*). If I do not find any text in it I put up the problem before the Sunnah of the Messenger of Allah (ﷺ) and thereafter when no solution is available in the *Kitabullah* and the Sunnah *Rasulullah* (ﷺ) I look into the words of his Companions and I never go out of their words nor pay any heed to the words of those who are besides them. When a final verdict is given by Ibrahim, Sha'bi, Ibn Sirin, Hasan, Ata', Sa'id bin Jubayr then they were the persons who exercised *ijtihad* during their own period. So I also exercise my *ijtihad* as they exercised.<sup>141</sup>

**DIFFERENCE OF DEGREES OF AUTHORITATIVENESS BETWEEN THE PROPHETIC SAYINGS, COMPANIONS VERDICTS, TABI'IN'S VIEWS:**

*Imam A'zam* (رضي الله تعالى عنه) has maintained difference of degrees of authoritativeness between the sayings of the Messenger of Allah (ﷺ), the verdicts of the *Sahabah* (ridwanullahi ta'ala 'alayhim ajma'in) and the views of those believers who followed them i.e. the Tabi'in

<sup>139</sup> Ibn al-Qayyim, I'lam al-Mu'addi'in, Vol.1, p. 63,84 and 85 and Vol. 2 p. 227; Ibn Hazm, Al-Ihkam fi 'Usul al-Ahkam, Vol 6, p. 295.

<sup>140</sup> Tahqiq-i-Masa'il ka Shar'i Uslub, Prof. Muhammad Tahirul-Qadiri, Markazi Idara Minhajul-Qur'an, Lahore, 1985, p. 13.

<sup>141</sup> Ibn 'Abd al-Barr, al-Intiqa', p. 143.

(*rahmatullahi `alayhim ajma`in*). The words of *Imam* A`zam on the point are:

ما جاءنا عن رسول الله صلى الله عليه وسلم قبلناه على الرأس العيين  
و ما جاءنا عن اصحابه رحمهم الله اخترنا منه و لم تخرج عن اقوالهم  
و ما جاءنا عن التابعين فهم رجال و نحن رجال

That which came to us on the authority of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) we accept it with all the respect at our command, and that which came to us on the authority of the Companions (رضى الله تعالى عنهم اجمعين) we adopt any verdict out of them and never go out of their verdict. And that which came to us on the authority of the Tabi`in (رحمة الله عليهم اجمعين) so they were men and we are also men.

From the above statement the following results come out before us:

1. According to the school of *Imam* A`zam *Abu Hanifah* (*rahmatullahi `alayh*) there is no scope in the *Shari`ah* to avoid any of the injunctions (*ahkam*) that are established on the authority of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) authentically. The same is clear from the statement of *Imam* Azam: اذا صح الحديث فهو مذهبي *When a Hadith of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) is proved authentic (thiqah) then my school of thought is to obey it fully.*
2. Out of the different verdicts, fatawa and ijtihadat of the *Sahabah* (*ridwanullahi ta`ala `alayhim ajma`in*) any one may be adopted for the reasons available to adopt it. To abandon all the views of the *Sahabah* (*ridwanullahi ta`ala `alayhim ajma`in*) is not valid.
3. The men of knowledge may differ with the views and ijtihadat of the Tabi`in and those who came after them on the basis of any evidence (daliil/دليل) *Shar`i*.

After the Holy *Qur'an* the Sunnah of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) is absolutely authoritative. This is the concept existing among *Imam* Malik (*rahmatullahi `alayh*), *Imam* Shafi'i (*rahmatullahi `alayh*), *Imam* Ahmad bin Hanbal (*rahmatullahi `alayh*)

and other leading jurists and their companions consensually.

### SCHOOL OF **IMAM MALIK** (رضى الله تعالى عنه):

**Imam** Malik (رضى الله تعالى عنه) also for the establishment of the rules has held fast this sequence in the matter of sources of law (دلائل شرعية).

He gave preference to **Kitabullah** and Sunnah **Rasulullah** (صلى الله عليه وآله وسلم) over all other evidences and sources. He turned towards ta'amul Madinah and then towards Fatawa and Aqwal **Sahabah** (ridwanullahi ta'ala 'alayhim ajma'in) only after the **Kitabullah** and Sunnah **Rasulullah** (صلى الله عليه وآله وسلم). He never gave significance to his own words as against the text [of the Holy Qur'an and Sunnah].

**Hadrat** Ma'an bin 'Isa (رضى الله تعالى عنه) stated: I heard **Imam** Malik (رضى الله تعالى عنه) saying:

انما انا بشر اخطئ و اصيب

فانظروا فى قولى

فكل ما وافق الكتاب والسنة فخذوا به

وما لم يوافق الكتاب والسنة فاتركوه

The truth is not beyond it that I am a mortal. I may err and I may be correct in my opinion. Hence do consider well my word. And that which you find in conformity with the Holy Qur'an and Sunnah act upon it and that which does not conform with the Holy Qur'an and Sunnah discard it.<sup>142</sup>

How graceful is the following statement of **Imam** Malik (رضى الله تعالى عنه):

ما من احد الا هو ماخوذ من كلامه و مردود عليه الا رسول الله

(صلى الله عليه وآله وسلم).

Except the Messenger of Allah (صلى الله عليه وآله وسلم) there is no such person in whose speech there is not anything worth taking and discarding.<sup>143</sup>

<sup>142</sup> Tahqiq-i-Masa'il ka Shar'i Uslub, Prof. Muhammad Tahirul-Qadiri, Markazi Idara Minhajul-Qur'an, Lahore, 1985, p. 13. quoting l'lam al-Mu'aqqi'in, Vol.1, p. 75,

<sup>143</sup> Al-Insaf, Shah Waliyullah Dehlawi, p. 38.

In his book *Al-Ihkam fi 'Usul al-Ahkam* at p.880, Ibn Hazm has written that on an issue of divorce *Imam* malik (رضى الله تعالى عنه) gave the fatwa of the three *talaqs* had occurred in the circumstances of that case and then he looked towards Ashhab who had written down the fatwa. He directed him to undo that writing. I say a thing and you make it the Qur'an. You do not know if tomorrow I may withdraw that view and declare that (in the circumstances of this case) only a single *Talaq* has occurred.<sup>144</sup>

From the above event it can be very well assessed that according to *Imam* Malik (*rahmatullahi `alayh*) how great was the difference between the authoritativeness and absoluteness of the Qur'anic texts and his own research and *ijtihad*.<sup>145</sup>

**SCHOOL OF IMAM SHAFI'I** (رضى الله تعالى عنه):

*Imam Shafi'i* (رضى الله تعالى عنه) has also adhered to this standard very strictly.

Ibn Qayyim (*rahmatullahi `alayh*) says:

1. It is established with tawatur that he (*Imam Shafi'i*) said: If an *authentic (thiqah) hadith* becomes available then strike my word to the wall.<sup>146</sup>
2. It is established on his authority with authenticity that he said: If I narrate a *Hadith* from the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) and do not base my own word on it then know it well that I have lost my reason.<sup>147</sup>
3. It is also established on his authority with authenticity that he said: In the presence of a saying of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) the saying of anybody else is of no worth.<sup>148</sup>

<sup>144</sup> I'lam al-Mu`aqqi'in, Ibn Qayyim, Vol1, p. 75,

<sup>145</sup> Tahqiq-i-Masa'il ka Shar'i Uslub, Prof. Muhammad Tahirul-Qadiri, Markazi Idara Minhajul-Qur'an, Lahore, 1985, p. 17.

<sup>146</sup> I'lam al-Mu`aqqi'in, Ibn al-Qayyim, Vol.2, p. 266.

<sup>147</sup> I'lam al-Mu`aqqi'in, Ibn al-Qayyim, Vol.2, p. 266.

<sup>148</sup> I'lam al-Mu`aqqi'in, Ibn al-Qayyim, Vol.2, p. 2633.

4. Al-Asamm and Shaykh Abu Muhammad al-Jarudi (*rahmatullahi `alayhima*) stated: We both heard Rabi` (*rahmatullahi `alayh*) saying that Imam Shafi'i had said: if you find anything in my book which is against the Sunnah of the Messenger of Allah (ﷺ) then announce your opinion in accordance with the Sunnah of the Messenger of Allah (ﷺ) and repel that which I had said.<sup>149</sup>
5. Ahmad bin `Ali bin `Aini al-Razi has narrated on the authority of Rabi` (*rahmatullahi `alayh*) that Imam Shafi'i (رضي الله تعالى عنه) had said: All the problems on which I had spoken and against that some authentic (*thiqah*) *hadith* of the Holy Prophet (ﷺ) is found established by the people of transmission then I will withdraw my words in this life and even in the life after death.<sup>150</sup>
6. It is also transmitted on the authority of Imam Shafi'i (رضي الله تعالى عنه) that he had said: Whenever I say any thing or make any principle, if any saying of the Messenger of Allah (ﷺ) becomes available against such saying of mine then the ruling shall be in accordance with the saying of the Messenger of Allah (ﷺ) (and not on my words).<sup>151</sup>
7. Regarding the juristic rules and regulations Imam Shafi'i (رضي الله تعالى عنه) said: Knowledge is of varying degrees. The first is the *Kitabullah* and Sunnah thabitah of the Messenger of Allah (ﷺ) and then is the place of Ijma' in the case where no text of the *Kitabullah* and Sunnah *Rasulullah* (ﷺ) is available. Then the third are such aqwal of the *Sahabah* (*ridwanullahi ta'ala `alayhim ajma'in*) concerning which there is no conflict. The fourth are the aqwal of *Sahabah* (*ridwanullahi ta'ala*

<sup>149</sup> I`lam al-Mu`aqqi`in, Ibn al-Qayyim, Vol.2, p. 266.

<sup>150</sup> I`lam al-Mu`aqqi`in, Ibn al-Qayyim, Vol.2, p. 266.

<sup>151</sup> Al-Insaf, Shah Waliyyullah Muhaddith Dehlawi, p. 37

*alayhim ajma'in*) in which there is conflict. The fifth place is the place of al-*Qiyas*.<sup>152</sup>

*Ijma`* (اجماع) on the point has the authority that Hadrat `Ali transmitted that the Messenger of Allah (peace and blessings of Allah be upon him) said: "When you do not find an injunction in the Holy Qur'an and Hadith, do not decide on the opinion of a single person. Rather, collect the men of knowledge from among the Muslims and settle the matter by mutual counsel."<sup>153</sup>

It was the practice of the Messenger of Allah (peace and blessings of Allah be upon him) that if he did not find any injunction regarding any problem in the Holy Qur'an he used to decide it according to his own judgement and sometimes he consulted the companions.

The same was usual with his Caliphs that they first of all looked into the Holy Qur'an, if the solution was not found they turned towards the Sunnah of the Messenger of Allah (peace and blessings of Allah be upon him) and in case of finding no solution there they sometimes collected all the available Muslims and consulted them and sometimes they decided the matter by exercising their personal judgement and established it with argument. This was the usual practice of Hadrat Abu Bakr al-Siddiq, Hadrat `Umar Faruq, Hadrat `Uthman Ghani and Hadrat `Ali Ibn Abi Talib (Allah's pleasure be on all of them). This practice is also narrated by Hadrat Ibn Mas'ud and Hadrat Ibn `Abbas (Allah's pleasure be on them).<sup>154</sup> The same is the sequence reported on the authority of Imam Abu Hanifah (Allah's mercy be on him).<sup>155</sup>

The proof of this dependency also appeals to reason as the fundamental principle with respect to the Shari'ah value is that its indication must be established by the revelation. But it is not always so established. Further it is also fundamental that the revelation is of two kinds:

<sup>152</sup> I'lam al-Mu`aqqi'in, Ibn al-Qayyim, Vol.2, p. 229.

<sup>153</sup> *Al-Madkhal ila 'Ilm Usul al-Fiqh*, Muhammad Ma'ruf Dawalisi, Dar al-'Ulum lil-Malayin 5, p.333. See also *Majma' al-Zawa'id*, Bab al-Ijma'.

<sup>154</sup> Ibid, pp.86-88; and also *Tarikh al-Tashri' al-Islami*, Muhammad Khudri Bak, Al-Maktabah al-Tijariyah al-Kabiri, Egypt, p.114.

<sup>155</sup> *Tarikh al-Tashri' al-Islami*, Muhammad Khudri Bak, Al-Maktabah al-Tijariyah al-Kabiri, Egypt, p.232.



- (1) Recited revelation (*Wahy Matlu*); or the Holy Qur'an with its absolute inimitability (*I'jaz*). The words of the revelation are divine and those are recited as an act of worship. This is the Holy Qur'an as we find in the Mushaf.
- (2) Non-recited revelation (*Wahy Ghayr Matlu*); or the Sunnah of the Holy Prophet (peace and blessings of Allah be upon him). The words of the revelation are not divine that they be recited as an act of worship.

The *ghayr wahy* refers to the intellect and the judgement. It is also of two kinds:

- (1) A judgement or opinion that is collective and settled by the consensus of all. This is the *Ijma'* (إجماع).
- (2) A judgement or opinion that is individual or of a few individuals. This is *Qiyas* (قياس).<sup>156</sup>

### Object and Advantage

The object of this science is to know the Shari'ah values (*ahkam*) through their concise indications and to become aware of the concise indications of the Shari'ah values.

Its advantage is that due to its being a mode of acting upon the Shari'ah values, it is a means to attain the bliss in the Hereafter.<sup>157</sup>

Dr. al-'Alwani has stated its benefit to both those who are qualified to perform Ijtihad and those who are not in the following words:

"The science of 'Usul al-Fiqh (أصول الفقه) engenders the ability to have knowledge of Shari'ah rulings through study, on the part of those qualified to perform Ijtihad and who meet all its requirements, of the legal proofs revealed in the the sources by the Lawgiver.

The benefit to be had from the science to those not qualified to perform Ijtihad is that , through their study of the madhahib (classical schools of legal thought) of the mujtahidin (those who practice Ijtihad) and the reasoning behind their rulings , the student of Source Methodology in Islamic Jurisprudence is enabled to understand various schools of thought, to analyze them, to choose from among their interpretations and assign preference, and to adduce legal arguments on the basis of the principles formulated by the classical mujtahidin."<sup>158</sup>

<sup>156</sup> *Nur al-Anwar ma' Hashiyah Qamar al-Aqmar*, Dehli, Kutub Khana Rashidiyah, 1946, Mulla Jiwan, Ahmad bin Abi Sa'id [Shaykh Mulla] (d. 1129/1731) Amaythawi, Qayyumi, Press, Kanpur, p.7.

<sup>157</sup> *Fawatih al-Rahamut Sharh Musallam al-Thubut*, 'Abdul 'Ali, Bahr al-'Ulum, Lakhnawi, Dar Ihya al-Turath al-'Arabi, Beirut, volume I, p.17.

<sup>158</sup> 'Usul al-Fiqh al-Islami (Source Methodology in Islamic Jurisprudence) , Dr. Taha Jabir al-'Alwani, English ed. by Yusuf Talal Delorenzo, A.S. Al-Shaikh Ali, International Islamic Institute of Islamic Thought, Herndon USA, 1990, pp.1 and 2.

### Importance

All Muslims are bound to abide by the injunctions of Islam. After the death of the Messenger of Allah (peace and blessings of Allah be upon him) the knowledge of Shari'ah values can only be obtained through these principles. The remote was the period, the new circumstances and problems were coming on the scene and the need and paying attention towards these principles increased to such an extent that the said principles were compiled in a systematic manner.<sup>159</sup>

The said rules are needed when Shari'ah value is not explicitly found in the Holy Qur'an and Sunnah and in the *Athar Sahabah* (reports of the Companions).<sup>160</sup>

### History

Like all other Islamic sciences, the origin and source of the principles of this science are also the Holy Qur'an and Sunnah hence its principles are also well known since the period of the Messenger of Allah (peace and blessings of Allah be upon him). However, there has been expansion and the companions and the *Mujtahidin* that came after them presented these principles in a polished and improved shape. Now those principles found preserved in several hundred thousand pages and in the shape of books. For a time these principles remained verbal but by the efforts of the four leading Jurists of Islam they were written down. The first such writing was that of Hadrat `Umar (Allah's Pleasure be on him) that was sent to Hadrat Abu Musa al-Ash'ari (Allah's Pleasure be on him) and the later Jurist declared it the fundamental constitution.<sup>161</sup> Thereafter more principles and rules were deduced. Those who compiled them in the shape of books for the first time were Imam Abu Yusuf and Imam Muhammad (Allah's mercy be on them) but their books are not available. In this discipline the oldest, the most authentic and the most useful book available is the *Al-Risalah* of Imam Shafi'i (Allah's mercy be on him).<sup>162</sup>

### Old and Significant Books on Jurisprudence written by Hanafi Jurists:

- (1) Abu Hanifah, al-Nu'man ibn Thabit ibn Zuta (d. 150 AH/767 AD). *Al-Fiqh al-Akbar*. Cairo, 1323.

<sup>159</sup> *Ibn Qudamah wa Atharuhu al-Usuliyyah*, `Abdul `Aziz bin `Abd al-Rahman, Jami'ah al-Imam Muhammad bin Sa'ud, pp.17-18.

<sup>160</sup> *Al-Taudih wa al-Talwih*, Sadr al- Shari'ah Sa'd Taftazani, Amir `Ali, Naul Kishor Press, Lakhnau, p.603

<sup>161</sup> *Al-Madkhal ila `Ilm Usul al-Fiqh*, Muhammad Ma'ruf Dawalisi, Dar al-'Ulum lil-Malayin, p. 88.

<sup>162</sup> *Tarikh al-Tashri' al-Islami*, Muhammad Khudri Bak, Al-Maktabah al-Tijariyah al-Kabiri, Egypt, pp. 21-22.

- (2) Maturidi, Muhammad ibn Muhammad, Abu Mansur (d.333/944). *Sharh al-Fiqh al-Akbar*. Sayda: Manshurat al-Maktabah al-'Asriyah, n.d.
- (3) Karkhi, 'Abd Allah ibn al-Husayn, al- (d. 340/951). *Risalah fi al-Usul*.
- (4) ———. *Al-Aqwal al-Usuliyah*. 1<sup>st</sup> ed. Saudi Arabia: al-Juburi, 1989.
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- (11) Books written by 'Ali bin Musa al-Qummi (d. 305 A.H.)
- (12) 'Usul, al-Shashi (d. 335 A.H.)
- (13) 'Usul, al-Jassas (d. 370 A.H.)
- (14) Books written by Al-Dabusi, Abu Zayd 'Ubaydullah ibn 'Umar 'Isa (d. 430 AH/1039 AD)
- (15) Books written by Al-Bazdawi (d. 482 A.H.)
- (16) 'Usul, al-Sarakhsi (d.490 A.H.)
- (17) 'Usul, al-Sadr al-Shahid (d. 536 A.H.)
- (18) 'Usul, al-Samarqandi (d. 540 A.H.)
- (19) *Al-Taudih*, al-Sadr al-Shari'ah (d. 747 A.H.)
- (20) *Al-Tahrir*, Ibn al-Hammam (d.861 A.H.)
- (21) *Al-Manar*, al-Nasafi (710 A.H.)
- (22) *Muntakhab*, Hisam al-Din (d. 644 A.H.)
- (23) *Musallam al-Thabut*, Muhibbullah al-Bihari (d.119 A.H.).

Many commentaries of the above works have been written which are significant and very important contributions on this subject.



## Chapter 2

### Shari`ah Values (A<sup>h</sup>kam)

#### Definition:

According to the 'ulama of 'usul (أصول)

الحكم هو خطاب الله المتعلق بأفعال المكلفين بالاعتناء والتخيير والوضع

Al-hukmu huwa khitabullahi al-muta'alliqu bi 'af'al al- mukallafina bi al-'iqtida'i wa al-takhyiri wa al-wad'i.

A Shari`ah value (Hukm) is a speech or communication from Allah concerning the conduct of the persons in full possession of their faculties which consist of a demand (*talab* or *iqtida*), and option or choice between alternatives (*takhyir*) or a declaration (*wad`*).

A demand is usually communicated in the forms of either a command (*'amr*) or a prohibition (*nahy*).

A command (*'amr*) demands the responsible person (*mukallaf*) to do something.

A prohibition (*nahy*) demands the responsible person to restrain himself from doing something.

A demand may either be binding which leaves the *mukallaf* with no choice but to conform or it may not be so binding.

According to the majority view, when a demand to do something is established in definitive proof (*dalil qat'i*) it is referred to as *wajib*.

When a demand not to do something is established in definitive proof (*dalil qat'i*) it is referred to as *haram*.

According to the Hanafi view:

*If the text, which conveys a demand to do some thing, is not definitive either in its meaning (dalalah) or in its authenticity (thubut), it is obligatory (wajib).*

*If the text which conveys such a demand to do something is definitive both in its meaning and authenticity, it is compulsory (fard).*

*If the text, which conveys a demand to avoid doing something, is not definitive either in its meaning (dalalah) or in its authenticity (thubut), it is makruh tahrimi.*

*If the text which conveys a demand to avoid doing something is definitive both in its meaning and authenticity it is unlawful (haram).*

*If a demand is not utterly emphatic and leaves the individual with an element of choice it is known as recommended (mandub).*

An option or discretion (*takhyir*) is a variety or a kind of Shari'ah value which leaves the individual at liberty whether to do or to avoid doing something. A *hukm* of this kind is commonly known as permissible (*mubah*).

An enactment (*wad'*) is neither a demand (*talab* or *iqtida*) nor an option (*takhyir*) but an objective exposition of the law which enacts something as a Sabab (Reason) or a condition (*shart*) or obtaining something else or it may be conveyed in the form of a hindrance / obstacle / impediment/Intercepting factor (*mani'*) that might operate as an obstacle towards obtaining it.

### Essential Elements of Law (*Arkan Hukm*)

There are four essential elements of law:

1. The Law Giver ,which in the matter of Shari'ah value is Allah Almighty (*Hakim*);
2. The responsible person to whom the Law applies (*Mahkum 'alayhi*);
3. The objectives of law; acts of the person responsible for doing or avoiding to do (*Mahkum fi hi*); and
4. The Law and its nature such as obligatory or forbidden or commendable or improper (*hukm or mahkum bi hi*).

### Classification of laws

With reference to the objectives of law or human acts the laws are classified into two divisions, namely, defining laws and declaratory laws.

#### Defining (*taklifi*) laws

They are the laws that define or indicate the extent of man's liberty of action and restraint imposed upon it, or , in other words, his rights and obligations.

#### Declaratory (*wad'i*) laws.

They are the laws that indicate the component elements of a defining law, namely, whether certain facts or events are the cause/means (*sabab*), condition (*shart*) or constituents (*rukn*) of a command. Its function is interpretive in relation to a defining law.

For instance, it is by means of a declaratory law that we know that in a transaction of sale, \_

the proposal and acceptance are the cause of origination of proprietary rights in the thing sold in the buyer, and cause of extinction of propriety rights in the thing in the seller;

*that the pronouncement of the formula of divorce is the cause of extinction of the marital rights and obligations of the husband and the wife;*

*that the death of a person is the cause of vesting the rights of inheritance in his heirs in respect of the property left behind by him;*

*that the usurpation of a man's property is the cause of obligation on the part of the usurper to restore the said property to its owner or to pay him its value;*

*that maturity of understanding is the condition of a voluntary disposition such as by gift, will or waqf.*

**With regard to enforceability the laws are divided into three classes**

1. Laws which concern men in their social and individual existence in this world, their object being to regulate men's relations to and dealings among one another. Since observance of laws of this kind is necessary to the preservation of humanity, their enforcement has been delegated to and is made incumbent on the community.

*Examples of this class of laws are the laws relating to contracts, transfer of property, succession, domestic relations, wrongs crimes and the like.*

2. Laws which solely concern the spiritual aspect of individual life, though some of them may relate to worldly transactions, these are enforced by God alone by means of spiritual rewards and punishments.

*Examples of this class of laws are laws enjoining commendable acts, such as alms, supererogatory prayers, and fasting, or prohibiting condemned acts, such as sale during call to prayers, and laws imposing the duty of making atonement.*

3. Laws that mainly concern the spiritual aspect of individual life, but also affect the Muhammadan communal life in its religious aspect; the enforcement of these is not incumbent on the State, but is left to its discretion.

*Examples of this class of laws are the laws enjoining the duties of saying the five daily prayers, of paying the poor rate, and of fasting during the lunar month of Ramadan; these duties the State may enforce by means of disciplinary measures.*

### **RESPONSIBILITY (TAKLIF)**

**Definition**

To demand the doing of an act which involves some hardship.

**Essential Elements of Responsibility**

The essential elements of responsibility are:

1. The being who imposes the responsibility (Mukallif), i.e., Allah Almighty or Hakim.
2. The person on whom the responsibility is imposed, i.e. the responsible (Mukallaf), i.e., the mankind and the Jinns or Mahkum 'alayhi.
3. The responsibility (Mukallaf bi hi) or Mahkum fihi, i.e., the Hukm.

**Object of responsibility (Ghard al-taklif)**

The object of putting responsibility on man is to the well being and welfare of man in both the worlds and to remove the excuse in respect of the Hereafter as a perfect argument.

**Conditions of Responsibility**

Conditions of responsibility are of two kinds, viz.,

1. Relating to the responsible.
2. Relating to the responsibility.

A responsible should be a person capable of bearing the responsibility. This is called legal capacity.

**Legal capacity is of two kinds, viz.,****Receptive legal capacity (Ahliyyat al-Wujub)**

It is a capacity to receive or inhere rights and obligations.

**Active legal capacity (Ahliyyat al-ada)**

It is a capacity for the active exercise of rights and obligations.

Receptive Legal Capacity is of two categories, viz.,

1. Deficient (naqis); and
2. Complete (kamil).

A deficient receptive legal capacity is such where the responsible has the rights on others but no right of others on him, e.g., an embryo while in the womb of his mother has the entitlement to inheritance and will but no obligation in respect of the right of any one falls upon him.

A complete receptive legal capacity is such where the responsible has the rights and obligations from birth to death. He inherits and is inherited.

**Active Legal Capacity (ahliyyat al-ada)****Definition**

The existence of such capability in a person whereby the words uttered and the actions performed by him are relied upon in the Shari'ah and the laws become applicable to him. It is a capacity for the active exercise of rights and obligations.

**Types of Active Legal Capacity**

There are two types of active legal capacity:

**1. Deficient active legal capacity (naqis ahliyyat al-ada)**

A deficient active legal capacity is such where a person responsible has the capability of performance of some words and acts. In other words the words uttered or the acts performed by a person are dependent on the opinion of prudent persons in the matter of reliance and usefulness. For example a child, who is wise enough, his



financial dealings are relied upon and some of his acts depend upon the opinion and the permission of his guardian.

## 2. **Complete active legal capacity (kamil ahliyyat al-ada)**

A complete active legal capacity is such where a person responsible has the capacity of performance of words and acts independently and those are relied upon without the opinion or permission of any other person. For example, the words uttered and the acts performed by an adult and sane person.

### **Note:**

The use of responsibility appears only when a person is highly capable of both the receptive legal capacity and the active legal capacity. Hence, generally, only those conditions are mentioned in respect of the responsible that are reliable in that state. The pivotal role in this behalf is that of maturity of intellect. The following are the additional conditions:

1. *Adult*
2. *Knowledge of the indication of responsibility whether immediate or at a later stage and directly or indirectly.*
3. *Knowledge of Arabic language whether directly or through some other language*
4. *Islam (in the matter of branches (funu`at) ie actions and not in the matter of beliefs (`aqa'id)).*
5. *Male (in respect of certain Shari`ah values).*

### **Conditions of Responsibility**

There are three conditions in respect of responsibility:

1. The responsibility should be known.
2. The responsibility should not be impossible.
3. The responsibility should not be extremely difficult or hard.

### **Obstacles of Responsibility**

The circumstances that affect and hinder the legal capacity in any manner are called the obstacles of responsibility.

### **Kinds of Obstacles of Responsibility**

They are of two kinds:

1. Voluntary (ikhtiyari) or self-earned obstacles (`awarid muktasibah)

These are the obstacles in which the man itself has a part. They are:

- i. *intoxication*
- ii. *idiocy (i.e., despite having mental faculty not to take care about one's speech and the place and purpose of expenditure);*
- iii. *Ignorance;*

- iv. *joke*;
  - v. *mistake*;
  - vi. *coercion*;
  - vii. *journey*
2. Involuntary (ghayr ikhtiyari) or heavenly obstacles (ʿawarid samawiyyah)

These are the obstacles beyond the control of a person. These are:

- i. Madness
- ii. Unsoundness of mind
- iii. unconsciousness
- iv. minority
- v. death bed illness
- vi. death
- vii. slavery
- viii. forgetfulness
- ix. menstruation
- x. childbed

The occasions of effectiveness of the obstacles is not found in each and every circumstance. There are great details in respect of them that are fully available in big volumes on the subject.

The manner of their effectiveness in the responsibility is also different, such as, —

1. *Some obstacles extinguish both the Receptive Legal Capacity and the Actual Legal Capacity. The example is the death of a person.*
2. *Some obstacles affect the Actual legal capacity. The examples are the madness, the unsoundness of mind, and the unconsciousness of a person.*
3. *Some obstacles change the effectiveness in the responsibility despite the presence of both the receptive and actual legal capacities of a person. The example is the going of a person on a journey.*

## Section 2

### Defining Laws (al-ahkam al-taklifi)

#### Definition

A defining law is a speech or communication from the Law Giver addressed to the mukallaf which consists of a demand or of an option. A demand may either be binding which leaves the Mukallaf with no choice but to conform, or it may not be so binding.

**Grades of defining laws :**

With regard to the indications of proof of Shari'ah values and the limitations mentioned in the definition of the defining law they are of eleven grades. This gradation is on the basis of the strength of demand and the scales of value contained in the demand. The detail of the grades is as under:

1. *Fard* (Compulsory or Obligatory of the first degree)
2. *Wajib* (Obligatory of the second degree)
3. *Sunnat Mu'akkadah* (Mandatory recommendation)
4. *Sunnat Ghayr Mu'akkadah* (Directory recommendation)
5. *Mustahabb* (Commendable)
6. *Haram* (Forbidden)
7. *Makruh Tahrimi* (Condemned)
8. *'Asa'at* (Disapproved)
9. *Makruh tanzihi* (Improper)
10. *Khalaf 'Ula* (Uncommendable)
11. *Mubah* (Indifferent, permissible or discretionary).

The grades 1 to 5 and 6 to 10 form opposite pairs. Their demand is different in direction though strength is the same. Grade 11 is optional and common.. It may be committed or omitted. The legal consequence of its direction also follows the same pattern.

**Fard (an act obligatory in the first degree)****Definition:**

When a demand to do a thing is established in definitive proof (dalil qat'i). It is an act obligatory in the first degree.

**Legal Effect:**

To believe from the core of ones heart in the binding nature of such demand and to act upon it by the body is necessary. A person who refuses to believe in the binding nature of a command which is established in definitive proof becomes an infidel (al-Kafir) and one who neglects to act upon it without any just and legal excuse becomes a transgressor (fasiq).

**Kinds of Fard:**

1. Fard `ayn: Personal Duty.  
*It is addressed to every individual sui juris and it cannot, in principle, be performed for or on behalf of another person. Its Examples are the Five timely daily regular prayers, fasts of Ramadan, Zakat, Hajj. Fulfilment of contracts and obedience to ones parents.*
2. Fard Kafa'i: Collective Duty.

It is addressed to the community as a whole. If only some members of the community perform them, the law is satisfied and the rest of the community is absolved of it. For example the duty to participate in Jihad, Funeral prayers, the hisbah, that is, the promotion of good and prevention of evil, building hospitals, extinguishing fire, giving testimony and serving as a judge etc. are all collective obligations of the community. If no one performs this duty, the whole community shall become sinful.

### Wajib (an act obligatory in the second degree)

#### Definition of Wajib:

If the text which conveys a demand to do or not to do a thing is not definitive in its meaning (*dalalah*) or authenticity (*thubut*) it is wajib. It is an act obligatory in the second degree.

In other words it is established by an indication concerning which from some aspect there is doubt. It is either not definitive in meaning (*zanni al-dalalah*) (âGšGêG-šZçTÂG') or not definitive in proof (*zanni al-thubut*). (l\ÂH=SšZ HçTÂG')

#### Legal Effect

To act upon a wajib is necessary with *zann ghalib*, its denial without any *ta'wil* is going astray (*dalalat*) and its abandonment without *ta'wil* and legal excuse is transgression (*fisq*).

#### Examples:

Sacrifice of animals is wajib. Its proof is available in the Qur'anic text:

إِنَّا أَعْطَيْنَاكَ الْكَوْثَرَ (1) فَصَلِّ لِرَبِّكَ وَانْحَرْ (2)  
 إِنَّ شَانِئَكَ هُوَ الْأَبْتَرُ (3)

*Fa salli li rabbika wa'nhar*

Therefore to thy Lord

Turn in prayer

And Sacrifice.

[CVIII : 3]

Thus the proof (*thubut*) is definitive (*qat'i*) but the meaning (*ma'na*) is *zanni* (çTÂG') (not definitive) as it is not the agreed upon meaning as other meanings have also been taken.

Prayer of Witr is wajib. Its proof is available in *ghayr mutawatar* transmissions in the proof of which there is doubt due to lack of *tawatur*. However, the meaning is free from any doubt and there exists the circumstance of its being necessary, as there is verbal stress by the Messenger of Allah (peace and blessings of Allah be upon him) and there is practical abiding by it without abandoning it ever.

**Fard and Wajib used as synonyms:**

Sometimes the word *wajib* is applied to a *Fard* and vice versa. In such a case the distinction is made by naming the technical *fard* (*fard istilahi*) as *fard* and *wajib i'tiqadi* and the technical *wajib* (*wajib istilahi*) as *fard* and *wajib `amaliyy* (practical). It is so because to believe sincerely in the former being necessary is must while to act upon the later is necessary and to believe is not necessary.

**Preliminaries of Fard and Wajib**

The performance of preliminaries of Fard and Wajib are also Fard and wajib. For example, Wudu in respect of prayer.

**Sources of proof of Fardiyyat or Wujub of an act**

The proof of wujub or fardiyyat is not dependent on a technical imperative (fi'l amr). Rather there are three sources of it. They are:

1. The words that have the meaning of obligation like the Arabic words: *Farada, wajaba, aujaba, Kataba `ala, qada*.
2. The words those have the meaning of obligation in grammar like, the verb imperative, noun of action in the sense of amr, masdar in place of fi'l amr like the verse of the Holy Qur'an, "fadarbarriqabi."

The word "darb" which is in an infinitive mood (*masdar*) has been used here in place of the imperative verb (fi'l amr), i.e., "idribu."

**III. SUNNAH****1. Definition**

Literally the word *Sunnah* means a clear path or a beaten track. It also means normative practice or an established course of conduct. Its plural is *Sunan*. Its opposite is *Bid`ah*.

Technically it means all that is narrated from the Messenger of Allah (peace and blessings of Allah be upon him), his acts, his sayings and what ever he has tacitly approved plus all the reports which describe his physical attributes and character. In the Holy Quran the phrase used is '*Uswah Hasanah* (The excellent conduct). Allah Almighty says:

*La qad kana lakum fi Rasulillahi 'uswatun hasanatun li man kana yarjullaha wal yaumal 'akhirah wa zakarallaha kathira.*

لَقَدْ كَانَ لَكُمْ فِي رَسُولِ اللَّهِ أُسْوَةٌ حَسَنَةٌ لِّمَن كَانَ يَرْجُوا اللَّهَ وَالْيَوْمَ الْآخِرَ  
وَذَكَرَ اللَّهَ كَثِيرًا (21)

(Ye have indeed  
In the Messenger of Allah  
A beautiful pattern (of conduct)

For any one whose hope is  
 In Allah and the Final Day,  
 And who engages much  
 In the praise of Allah.)  
 [XXXIII : 21]

Juristically, Sunnah has been defined as an act whose not binding demand to do it is in a manner that doing of it is with emphasis.

The proof of Sunnah with respect to its definitiveness (*qat'iyyat*) and non-definitiveness (*zanniyat*) (لَا تَأْغِي) can be from all the four kinds of proofs. However, its proof with definitiveness (*qat'iyyat*) is only when there exists some such circumstance that requires Sunnah instead of *Fardiyyat* or *Wujub*. Likewise its proof with non-definitiveness (*zanniyat*) (لَا تَأْغِي) is only when there does not exist any circumstance of *Fardiyyat* or *Wujub* and there does exist a circumstance of Sunnah.

The proof of Sunnah from the first kind of proof is like the wiping over the two light leather boots (*khuffayn*). Its proof is based on such transmissions which are of definitive proof (*qat'i al-thubut*) as they are *mutawatar* and are of definitive meaning (*qat'i al-dalalah*).

The proof of act of brushing the teeth being a Sunnah (*Sunniyat miswak*) is based on such transmissions which are not of definitive proof (*qat'i al-thubut*) but those are definitely of definitive meaning (*qat'i al-dalalah*). The proof from the remainder two categories of indications is clear and well known.

## 2. Legal Effect (*hukm*)

Stress to do it is without being binding (like *fard* or *wajib*). One who acts upon it deserves appreciation and gets reward. One who does not act upon it deserves blame and reprimand. If the abandonment is persisted without any legal excuse it is reprimanded. If it is a *Shi'ar* (symbol of Islam) and the whole community abandons it, the fight against such community is *wajib*. For example, *Azan* is a *shi'ar* (symbol of Islam). If it is abandoned fighting against such is *wajib* on the Islamic State.

## 3. What Refers to Sunnah (*Misdaq Sunnah*)

The word Sunnah applies to those acts, the proof of which is available from the Messenger of Allah (peace and blessings of Allah be upon him) himself or his Companions (Allah's pleasure be on them) whether the said proof is by words (*qaulan*), actions (*fi lan*), or silence (*taqriran*).

Sometimes, the word Sunnah is also applied to an act which is *wajib* (a definitive of the second grade).

## 4. Kinds of Sunnah (*Aqam Sunnah*)

Sunnah is of two kinds:

### 1. **Sunnah al-Huda**

Those acts, the proof of which is available as an act of worship with full formality. And those are the acts by means of which an act which is *fard* and *wajib* is completely accomplished. For example, *azan*, *iqamat*, *jama'at* (congregation), etc. They are termed as *sunnat mu'akkadah*.

And the effect of sunnah, that has been stated, is of this kind.

### 2. **Sunnah al-Za'idah**

Those acts, the proof of which is available either as a habit, [i.e., those words and acts that are related to the common human life and human needs and requirements, e.g., the standing, sitting, wearing, walking, etc., of the Messenger of Allah (peace and blessings of Allah be upon him)] or as an act of worship but those are not the acts by means of which a *fard* or *wajib* is completely accomplished and on account of abiding such acts daily and regularly, those have become a habit like recitation of the Holy Qur'an in the prayer and to prolong the duration of *ruku`* and *sajdah*.

### 5. **Status of various kinds of Sunnah**

A *Sunnah al-Za'idah* is lesser in superiority than a *Sunnah al-Huda* and above *mustahabbat* (commendable acts) in the matter of action. It is so because *sunnah al-za'idah* are those acts the proof of which is available that the Messenger of Allah (peace and blessings of Allah be upon him) used to do them with full formality but as a habit. If such acts are performed as acts of worship, they do not remain *sunnah al-za'idah*. Further, in the matter of *mustahabbat* (commendables) no proof of their observance by the Messenger of Allah (peace and blessings of Allah be upon him) with full formality is available. Still further, the leaving of those acts which are *sunnah al-huda* is *makruh tahrimi* (condemned) while the leaving of the acts which are *sunnah al-za'idah* is *makruh tanzih* (Improper).

### 6. **Kinds of Sunnah al-Mu'akkadah (The Emphatic Sunnah)**

A *Sunnah al-Mu'akkadah* is the other name of *Sunnah al-Huda*. It is of two kinds:

#### i) ***Sunnah al-Mu'akkadah `ala al-Ayn***

*It is an act, which is not binding but demanded with stress from every member of the Muslim community, like congregation of daily five-time regular prayer, and the prayer of tarawih.*

#### ii) ***Sunnah al-Mu'akkadah `ala al-Kifayah***

*It is an act, which is not binding but demanded with stress from every member of the Muslim community. If some members of community perform such act, the rest of the community is absolved of it, like the congregation of tarawih and the i'tikaf in the last ten days of Ramadan.*

## 7. Sources of Proof of Sunnah

There are two sources of the proof of the Sunnah, viz.:

### (i) *Qauli*

It is a Sunnah the demand of which is with such a circumstance (*qarinah*) that indicates that the acts is not *wajib* or it is with such a stress that is lesser than a stress of *wujub*.

### (ii) *Fî ʿil*

It is a Sunnah which is casually left without excuse but mostly it is performed regularly with full formality or it has been intended to be performed regularly but due to some excuse regularity has not been maintained and in case if it is not left, there is no denial of its non-performance.

## IV. MUSTAHABB (Commendable)

### 1. Definition

It is an act, which is not binding, and its demand is without stress but with approval.

### 2. Other titles of a *Mustahabb*

Those are:

*Mandub*

*Nafil*

*Adab*

*Tatawwu`*

*Fadilat*

*Yambaghi*

*La ba'sa.*

Sometimes, the jurists apply the words *nafl* and *mustahabb* both to the Sunnah and *Mustahabb*. And sometimes, they apply it only to the Sunnah. Similarly, sometimes the word Sunnah is applied to *Mustahabb*.

### 3. Sources of Proof of *Mustahabb*

The source of proof of *Mustahabb* is also from the Messenger of Allah (peace and blessings of Allah be upon him) and his Companions (Allah's pleasure be on them) but with the condition that there exist circumstances showing the legal impediments / obstacles (*man'i qara'in*) of *wujubiyyat* and *sunniyyat*. By words, like this that the demand is not with stress and by action, like this that the act had been performed causally or without any regularity.

### 4. Legal Consequence

The doing of an act that is *mustahabb* brings reward but the non-doing of an act that is *mustahabb*, there is neither any blame nor any accountability.



5. **Wujub of an act which is Sunnah or Mustahabb**

An act which is *sunnah* or *mustahabb*, once begun, its complete performance becomes *wajib*. If it is left in between, the *qada* of it becomes *wajib*.

6. **Legal Consequence of Denial of a Sunnah or Mustahabb**

If a Sunnah or *Mustahabb* is proved by an argument / indication (*dali*) which is beyond any doubt, its denial is *kufr*.

**Example**

Allah Almighty says:

*"Ash-hidu zaway`adlin min kum."*

It is definitive (*qat'i*) in its meaning (*dalalah*) and also in its authenticity (*thubut*). In this verse, the command is to bear the testimony of two reliable persons in certain matters. This command is only a recommendatory command (*hukm istihbabi*).

V. **Haram (Unlawful)**

1. **Definition**

An unlawful is an act the necessary demand of not doing it is established by some definitive indication.

2. **Legal Effect (Hukm)**

Belief in its prohibition is required with certitude;

Avoidance of its commission is required as a must;

*To deny its being unlawful is an act of infidelity;*

*To leave it is an act of appreciation and reward; and*

*To commit it without any just and lawful excuse is an act of blame and punishment.*

3. **Examples**

Zina, theft, murder etc. are unlawful acts.

4. **Kinds of unlawful acts**

There are two kinds of unlawful acts, viz.,

a. **Unlawful per se (Haram li`ayni hi)**

It is an unlawful object the unlawfulness of which is due to some attribute found in its own self. For example, the dead and the wine.

*To eat and drink the dead and the wine is unlawful due to the attribute find in themselves.*

b. **Unlawful on account of some external object (Haram li ghayri hi)**

It is an unlawful object the unlawfulness of which is due to some external object. For example, the use of goods or property belonging to another person. The goods or property

in itself does not have any such attribute that may render its use as unlawful. Rather, the unlawfulness is due to its use without the leave or permission of the owner.

#### 5. Occasions of unlawfulness (*mawaqif hurmat*)

Besides the matters the necessary demand of not doing of which is established by a definitive evidence (*dalil qat'i*), the command of unlawfulness is also in respect of the following occasions:

- a. Leaving (*tark*) an act which is obligatory of the first degree (*fard*), while there is only one aspect as against it.  
*Its example is leaving the belief ('iman) as the only aspect as against it is dis-belief (kufr).*
- b. Leaving an act which is obligatory of the first degree while as against it there is not a single aspect but it remains an act obligatory of first degree on account of doing another act.

### V. *Makruh Tahrimi*

#### Definition

An act the necessary demand of not doing of which is proved by some such evidence that has some sort of doubts.

*According to the Kitab al-Ta'rifat, a Makruh Tahrimi is that which is nearly unlawful.*

#### Legal Effect (*Hukm*)

With the probability of prohibition, avoidance of commission of such act is necessary.

Without any *ta'wil* its denial amounts to going astray.

Its commission is liable to blame and punishment.

#### Example

Use of black dye is prohibited by the Messenger of Allah (peace and blessings of Allah be upon him) as per hadith and there is a warning against doing it.

#### Occasions of *Karahat Tahrimi*

Besides the matters the necessary demand of not doing of which is established by some non-definitive evidence, the *karahat tahrimi* has been commanded in the following matters as well:

- a. Leaving of an obligatory act of first degree (*tark fard*) while there is not only a single opposite aspect of it and the act performed after leaving the *fard* does not become the source of expiry of the *fard*.
- b. Leaving of an obligatory act of second degree (*tark wajib*).
- c. Leaving of an Emphatic Sunnah (*sunnah al-mu'akkadah*)
- d. To exaggerate the rank of an act which is Sunnah or Mustahabb, in belief or in action. For example, to give them

*the status of an obligation of the first degree (fard) or an obligation of the second degree (wajib).*

- e. *To perform such permissible act (Mubah) that becomes the source of mischief in respect of the beliefs of the masses.*

#### **What Refers to Absolute Abomination (Misdaq Karahat Mutlaqah)**

If at any occasion the word abomination (karahat) is used absolutely, it generally refers to the unlawful abomination (karahat tahrimiyyah).

#### **6. Preliminaries of unlawful and abominable (Muqaddamat Haram and Makruh Tahrimi)**

The preliminaries of the unlawful and the abominable that is the matters that become the source of reaching them are also unlawful and abominable respectively by the fiction of law. For example, to see or touch the body of a strange woman with lust.

#### **7. Sources of Proof of unlawfulness (Hurmat) and abomination (Karahat Tahrimiyyah)**

- a. The words that give the meaning of unlawfulness and prohibition literally. For example,
  - Mana`a* (He restrained);
  - Naha* (He forbade);
  - Harrama* (He made unlawful);
  - `Adima hallun* (He made its lawfulness non-existent);
- b. The words that indicate to the prohibitive mood. For example:
  - Fi'l Nahyi* (prohibition verb)
- c. A command with stress to remain away from anything and to avoid it.
- d. The mention of a warning or threat on the commission of an act.

### **VI. Makruh Tanzihi**

#### **Definition**

An act the demand of not doing of which is not binding but is with stress (*ta`kid*) is called *Makruh Tanzihi*.

*In the Kitab al-Ta`rifat, it is defined as that act which approaches the lawful.*

#### **Legal Effect (Hukm)**

Its leaving is worthy of praise (*ta`rif*) and brings reward (*thawab*).

Its doing is worthy of blame (*mala`mat*) and brings punishment (*itab*).

#### **Examples**

To proclaim the call of prayer while the proclaimer is not in a state of *wudu*.

**Occasions of Reprehensibility (*Karahat Tanzihyyah*)**

Besides the matters, the non-binding demand of not doing of which is with stress (*ta'kid*).

The following forms are also covered by reprehensibility approaching lawfulness:

- a. An act in the commission of which any sunnah is left.
- b. Leaving of a sunnah *ghayr mu'akkadah*.

**What Refers to Reprehensibility (*Misdaq Karahat*)**

Reprehensibility is sometimes applied to the unlawful as it is applied to both the reprehensibility that is near unlawful and the reprehensibility that is approaching lawful. However, the word "reprehensible" is used less for unlawful and reprehensibility approaching lawful. Hence, when it is used without any restriction and there is also no circumstance available, then generally it refers to reprehensibility that is near unlawful. Even then it is stated on account of this extensive use of this word that some evidence should be seen.

**Other name of *Makruh Tanzih***

An other name of reprehensible approaching lawful, is *khalaf'ula*.

**Sources of proof**

There are three sources of proof of reprehensibility:

- i. Use of the root *kurhun* and *karahatun*;
- ii. Prohibition (*mumani'at*) along with the existence of some circumstance that is an obstacle / impediment / hindrance (*mani'*) in the way of unlawfulness (*hurmat*);
- iii. Denial and lesson with displeasure.

**V. *Khalaf ula*****Definition**

An act regarding the doing of which there is mention of some ugliness (*qabahat*)

**Legal Effect (*Hukm*)**

Leaving its performance is better and brings reward.

Doing against it is better but it will neither bring punishment nor blame nor chastisement.

**Examples**

Leaving the offering of the sun rise prayer (*tark al-salat al-duha*).

**4. What Refers to the Non-existence of Precedence (*Misdaq 'adam 'ulawiyyat*)**

Besides the matters regarding which it is established by any evidence that their performance is not better, the leaving of *mustahabbat* is also *khalaf ula*.

## 5. Other name of *Khalaf ula*

The phrase *la ba'sa* means: there is no harm. This is also used to give the meaning of *khalaf ula*.

## VI. *Mubah*

### Definition

An act the doing or not doing of which is optional is called *Mubah*.

### Legal Effect (*Hukm*)

Its doing or not doing is equal. Neither there is any reward nor any blame nor any punishment nor any chastisement.

### Examples

General human needs like food, drink, clothes, housing, etc.

### Sources of Proof

- i. *Inconvenience;*
- ii. *Sin;*
- iii. *Negation and Denial of inconvenience*
- iv. *Statement of Lawfulness;*
- v. *Silence of Shari'ah on the existing state along with the existence of such circumstance that is an indication of its permissibility (*ibahat*).*

### *Istihbab*, *Wujub* and *Hurmat* of *Mubah*

The real command in respect of *Mubah* is the same that has been mentioned. However, on account of other states the *Mubah* is applied to the word *istihbab* or *wujub* or *hurmat*.

- a. *If in any act of obedience, an act is done with the intention to help or considering it as a command of God and his Messenger (peace and blessings of Allah be upon him) then such an act becomes mustahabb and worthy of reward.*
- b. *If an act becomes the cause of disobedience (*ma'siyat*), it becomes prohibited to the extent of the disobedience.*
- c. *If an act becomes the cause of disorder among the masses, it becomes a reprehensible act approaching unlawfulness.*
- d. *If by such an act an unlawful dealing is conducted, it becomes wajib.*

### Legal Consequence of Denial of *Mubah*

A *Mubah* act which is proved by a definitive indication, if such an act is denied, it amounts to infidelity.

### Division of Defining Laws( Ahkam Taklifiyyah) with regard to the circumstances of the Mukallafin

Basically the Mukallafin are confronted with two types of circumstances, namely, the general circumstances which are faced by all in their daily life and the special circumstances that is the obstacles and excuses which are faced by a few casually. With regard to these circumstances the Defining Laws (Ahkam Taklifiyyah) are also of two kinds, namely, Strict Laws (al-`Azimat) and Concessionary Laws (al-Rukhsat).

#### a. Strict Laws (al-`Azimat)

##### Definition:

Those commands that are for mankind in general with respect to their general circumstances (that is, they are not based on obstacles and excuses).

#### b. Concessionary Laws (al-Rukhsat)

##### Definition:

Those commands that are for particular individuals with respect to their particular circumstances and obstacles and excuses.

### Kinds of Concessionary laws (Aqsam al- rukhsat)

There are two special kinds of Concessionary laws : -

1. Rukhsat Haqiqi; and
2. Rukhsat Ghayr Haqiqi.

#### 1. Rukhsat Haqiqi

It is further sub divided into two kinds.

- a. Rukhsat haqiqi 'Ula; and
- b. Rukhsat Haqiqi Ghayr 'Ula

#### a. Rukhsat Haqiqi 'Ula

##### Definition

Those Commands which have been declared Mubah despite the existence of both the indication of unlawfulness (*dalil Hurmat*) and the unlawfulness (*Hurmat*).

### Legal Effect

To act upon al-`Azimat is better even if by acting upon al-`Azimat one loses ones life.

##### Example

*Where a believer is under immediate threat of his death or loss of an organ, it is permissible (Mubah) for him to utter a word of disbelief (Kufr) but it is better for him not to utter any word of disbelief even if he loses his life.*

**b. Rukhsat Haqiqi Ghayr 'Ula****Definition**

Those commands which have been declared *Mubah* due to the postponement of command, despite the existence of indication (*dalil*)

**Legal Effect**

To act upon al-*'Azimat* is better provided it does not become the cause of loss of life otherwise it will not be permissible to act upon al-*'Azimat*

**Example**

The compulsory observing of fast (*fardiyyat*) by a sick person or by a person who is on journey, is postponed despite due to the excuse of sickness or journey and when there remains no such excuse, and such a person has the occasion to observe the expired fast, such observance becomes compulsory. But it is better for such a person to observe the compulsory fast if there is no apprehension of death. In case there is an apprehension of death, to act upon concession (al-*Rukhsat*) is permissible.

**Rukhsat Majazi**

It has two kinds

1. Rukhsat Majazi Atamm
2. Rukhsat Majazi Ghayr Atamm

**Rukhsat Majazi Atamm****Definition**

Those commands in which complete concession is found metaphorically. Those are not concession really as their lawfulness (*Mashnu'iyat*) does not remain in favour of any person.

**Legal Effect**

Concessionary law (al-*Rukhsat*) shall be acted upon as the Strict law (al-*'Azimat*) did not remain legislated (*Mashnu'*).

**Example**

All those commands of past *shari'ats* that have been abrogated (*Mansukh*) for the Muslims :

*For example , the offering prayer at any place other than a mosque was not valid under the Laws prior to Islam. This law has been abrogated in respect of its application to Muslims by the Islamic Shari'ah.*

**Rukhsat Majazi Ghayr Atamm****Definition**

Those Concessionary laws that have been legislated in respect of some persons and some matters and have not been legislated in respect of some persons and some matters.

**Legal Effect**

It is necessary for those persons in whose favour the concessionary law has been legislated to act upon the concessionary law.

**Example**

Shortening of prayer by a person on journey. Eating of dead by a person under dire and extreme compulsion.

**Section II**

**Declaratory Laws**  
(*Ahkam Wad'iyyah*)

**Definition**

It is a communication from the Law giver which enacts some thing into a Sabab (Reason), a condition (*shar*) or a hindrance (*man*) to some thing else.

**Kinds of declaratory law**

It has four kinds with respect to establishment, viz.,

**Effective Cause ('*illat*)****Definition**

Literally, '*illat* (pl. '*ilal*) is such an attribute (*wasf*) due to which a change takes place in the original state of a thing and a defect occurs in it. Hence, it is used in the sense of disease, disorder, and defect.

Technically, it refers to such external attribute regarding a *hukm* which is effective in its existence. In other words, it is such an attribute which is not part of any action. Rather, it is external to it. But when such attribute is found, the *hukm* is definitely found and if such attribute is not found, it is not necessary that the *hukm* is also not found. It is so because there can be more than one causes for an effect (*ma'lul*). Therefore, if there does not exist an effective cause, there may exist other effective cause.

**2. Legal Effects**

By the presence of the effective cause ('*illat*), the presence of the *hukm* and the liability of the person who commits the '*illat*.

**Examples**

- (a) Sale is the '*illat* of ownership but the ownership can be proved even without sale.
- (b) Qatl is the '*illat* of *qisas* as a qatil is liable for the offence.

**Kinds and other details**

There are seven kinds of '*illat*:

**i. '*Illat ismi***

'*Illat ismi* is that effective cause which is made (*wad*) for a *hukm* according to *shar* and the *hukm* relates to it directly.



The example of it is *ijab mu`allaq*, i.e., something should be attached on the basis of some condition, i.e., the *hukm* could be related to it but on account of the condition such *hukm* cannot be attached to it and does not have effect. For example, after breaking the oath to pay the expiation. Here the status of oath is earlier and of the expiation later and the breaking of oath is the *`illat* of *kaffarah* (expiation) and not of the oath.

Similarly, the *kaffarah* is related to oath but the oath has not been made for expiation. Hence, the oath is considered as *`illat* of *kaffarah* only for the sake of name and not to break the oath although its real effective cause (*haqiqi `illat*) is the breaking of the oath. The real effective cause will exist at the time when the oath is broken and the oath does not exist when it is broken and it extinguishes. *`Illat haqiqi* is that in the presence of which the *hukm* is proved and it is not an *`illat haqiqi* which when extinguishes, the *hukm* is proved.

Likewise, where a person attaches a condition for divorce or for setting free a slave, then in both such circumstances the *hukm* shall relate to divorce or freedom, as both to divorce or to set free are the effective causes of *hukm*. However, there being a condition in between, the *hukm* is not directly attached to them nor it can have effect until and unless there exists the condition. Such *`illat* is called *`illat ismi*.

In other words, it is an *`illat* which is on account of the name of a thing. Here, the oath is related to divorce and freedom although these are not *`illat* in reality. Such *`illat* is called *`illat majazi*.

## ii. *`Illat ma`nawi*

*`Illat ma`nawi* is that *`illat* which has its effect in proving the *hukm* in any way. It is in the *hadith* of the Messenger of Allah (peace and blessings of Allah be upon him) that where the close relative (like mother, father, son, etc.) of a slave becomes him master, he becomes free. Here the *`illat* is *`illat murakkab* and the combination are of close relation and ownership. The *`illat* relating to freedom shall be to the ownership but the closeness has also an effect in it.

There is difference of opinion between the *fuqaha* as to whether the *`illat murakkab* is effective in respect of each ingredient of the compound or not. Some *Fuqaha* say the whole *`illat* is effective in the whole *ma`lul* and they do not believe that each ingredient has separate effect but the *Muhaqqiqin* are of the view that it is not a general rule (*qa`idah kulliyah*). Rather, each ingredient can have its separate effect. Thus, no physician denies that for a compound disease, each ingredient of a compound medicine has its separate effect. The same is the case of *murakkab `illat*.

## iii. *`Illat hukmi*

*`Illat hukmi* is that *`illat* by the existence of which the *hukm* is proved in such manner that it is joined with it. The example of it is that *hukm* which is attached with a condition. For example, to attach divorce with a condition. Here, the *`illat* of *talaaq* is a condition (*shart*) and they both

are joint with each other, i.e., when the condition is fulfilled, only then the divorce will come into existence; or the *murakkab* should be the final portion of *'illat* as to purchase a slave who is close relative. Such a slave shall become free immediately on coming into the ownership of the purchaser. The *'illat* of his freedom is ownership that makes the freedom mandatory.

In fact, these are three states of *'illat* which are called as its kinds metaphorically. Sometimes, it is single, while sometimes it is combination of two. Haqiqi *'illat tammah* shall be only when these three states, viz., *ismi*, *ma'nawi* and *hukmi* are combined.

**iv. *'Illat ismi wa ma'nawi wa hukmi***

The example of it is sale, the object of which is ownership.

Another example of it is *nikah*, the object of which is the lawfulness of the wife.

Still another example is to free a slave, the object of which is to remove the slavery and to establish the freedom.

Another example is to give divorce, the object of which is separation from the wife and to end the wedlock.

These are *'illat ismi* as they have been made for the same objective. For example, the sale is for ownership, *nikah* is for lawfulness, etc. Here the *hukm*, i.e., the ownership etc., relate directly to the *'illat*. In this view of the matter, it is *'illat ma'nawi* as for the same *hukm* or objective those have been made according to *shar'*. It is *'illat hukmi* in the sense as the *hukm* is proved by the same *'illat* and is not proved without it.

**v. *'Illat ismi wa ma'nawi***

The example of it is *bay' mauquf*. This *'illat milkiyyat* is only by the name of sale and in reality it is not so. The sale is, in fact, made for ownership. It is *'illat ma'nawi* in the sense that this contract takes place according to *shah* between the parties, i.e., the vendor and the vendee. And it is *mufid hukm*, i.e., *mufid milkiyyat*. The sale is completed impliedly which is his pure right and there is no loss of anyone else. But it is not *'illat hukmi* as in it there will be loss to the owner. In the case of *'illat hukmi*, the thing goes into the ownership of the purchaser without the permission of the owner of the thing, but when the owner gives consent then this ownership is considered from the time of entering into the contract. If during this period, some new or additional things occur as an animal gives a birth to a child or a tree bears fruit, all which will belong to the purchaser. This shows that there existed in it *'illat ismi* and *'illat ma'nawi*.

Another example of it is *bay' bi'l-khayar* (sale or purchase with option to repudiate). In it there are present both the forms besides *hukmi*. The same is the *'illat* in the *ijarah*. In it there exist *'illat ismi* and *ma'nawi* and not *hukmi*. It is the ownership of non-existent and a non-existent cannot become the place of the ownership.

**vi. *'Illat ismi wa hukmi***

The example of it is a journey or a sickness which is the *'illat* of *rukhsat* (leave / permission / concession / grace / convenience). The effect in the *hukm* is in fact of *mushaqqat* (hardship) but the journey or the sickness is its *dalil*. Declaring the *dalil* as standing in place of the *madkul*, the journey has been declared as *'illat*. The *hukm* can be related to both of them and not towards the hardship. Therefore, they both are called *'illat ismi wa hukmi*. Hardship is an inner state and goes on changing with the circumstances of the people while it is essential that an *'illat* must be manifest (*zahir*) and regulated (*mundabit*). Hence, the journey and the sickness were made *'illat* and the hardship was not made *'illat*.

Likewise, the sleep is the *'illat* of *hadath* i.e., breaking of *wudu*. The real *'illat* in this case is the *istirkha' al-a'da'* (relaxation / looseness of the joints). In a state of sleep, the joints become relaxed whereby the *wudu* breaks. This sleep is a *dalil* of it. Here also *dalil* has been made to stand in place of the *madkul* and made *'illat*.

#### vii. *'Illat ma'nawi wa hukmi*

This refers to the last portion of *murakkab 'illat* as it is effective to a certain extent and *hukm* is also joint with it. But this *'illat* is not made for such *hukm* nor the *izafat* of *hukm* is towards it completely. For example, the Messenger of Allah (peace and blessings of Allah be upon him) said: "Where a person, who purchases his close relative and becomes his owner, such slave shall become free at once."

Here the *'illat* of freedom is combination of two things, viz., *qarabat* (close relationship) and *milkiyyat* (ownership). The *milkiyyat* is the last portion of *'illat*. The *hukm* that is the *nisbat* of freedom is made towards the *milkiyyat* because by becoming owner, the slave becomes free. The *qarabat* is not mentioned, i.e., by the meaning the effective is referred to (*ya'ni ma'na say murad mu'aththir hota hay*). The freedom is the *hukm* whose *nisbat* is towards the *milkiyyat*. Therefore, it is *'illat ma'nawi wa hukmi*.

**Another example** of it is *riba al-nasi'a*, i.e., gold and silver or any other thing of weight or measure being borrowed in consideration for the other.

There are two *'illats* of *riba*, viz., *qadr* and *jins*. *Qadr* refers to those things which are sold by measure or weight. *Jins* means such two things which are of the same *jins*. When both these conditions are fulfilled, it will be *riba al-fadl*. But in case of *riba al-nasi'a*, if only one attribute is present, it will become *riba*. In other words, if a person sells silver in lieu of gold by cash transaction, it is lawful, but to sell by credit silver in lieu of gold is unlawful, i.e., where possession is not given immediately and is deferred to some other time.

Here, both the *'illats*, i.e., the *qadr* and *jins* when separate from each other shall become *'illat* of unlawfulness of *riba*. *Riba al-Nasi'a* (credit) is based on care and caution. It is proved earlier than *riba al-fadl*.

The Messenger of Allah (Peace and blessings of Allah be upon him) said: "When things are of different kinds, sell as you like but the condition is that the transaction must be hand to hand, i.e., the possession must be delivered in the same session and not after the session. From this, it is proved that *riba al-nasi'a* is proved when any one of the two of the said attributes is present. In this example, each one of the two attributes is *'illat ma'nawi wa hukmi*.<sup>163</sup>

ii. **Sabab (Reason)**

Literally, such way or mode is called a *sabab* by means of which an access is made to an other thing. It also means a rope, a door, or a path.

Technically, the *sabab* is the name of such path by means of which an access is made to the *hukm* which is the objective and it is the path which itself reaches to the *hukm*. For example, a person is to reach Makkah al-Mukarramah. Now he has got two means to reach there. One is the path and the other is to walk on that path. Here the path is the *sabab*, while the walking is the *'illat*.

**The definition of *sabab* is**

*Kullu ma kana tariqan ila al-hukmi bi wasitatin li yas'a sababan shar'an.*

[Every such thing which is the way to reach the *hukm* and is a means between that path and *hukm*. Such path is called *sabab* while such means is called *'illat*.]

*For example, to draw water from the well by means of a bucket and a rope. Here, the bucket and the rope are sabab while to put the bucket or to draw out the water is 'illat. This means is called 'illat. As a sabab is an accessor to the hukm but is not effective in the hukm. Therefore, to effect into the hukm, the 'illat is necessary which is a means in between to the hukm and the sabab. A hukm is attached to its sabab and is proved by its 'illat and it exists when the condition exists. According to the terminology of Shari'ah, an effective external affair is called an 'illat. The nisbat of hukm towards it without any means. It exists being conditional with the existence of the condition but the nisbat of a conditioned / stipulated (mashrut) is not towards the shart (condition).<sup>164</sup>*

A Sabab (Reason) is an attribute (*wasf*) which is evident (*zahir*) and constant (*mundabat*) and the Law giver has identified it as the indicator of *Hukm* in such a way that its presence necessitates the presence of the *hukm* and its absence means that the *hukm* is also absent.

<sup>163</sup> Sarakhsi, *Al-'Usul*, vol. II, pp. 312-320. See also Muhammad Taqi Amini, *Fiqh Islami ka Tarikhi Pas Manzar*, pp. 204-206.

<sup>164</sup> Dr. Abdul Karim Zaydan, *Al-Wajiz fi Usul al-Fiqh*, urdu translation by Prof. Dr. Ahmad Hassan by the title *Jami' al-Usul*, Lahore: Matba' Mu'taba'i Pakistan, 1986, pp. 293-4.

A cause may be within the power of the *mukallaf* or beyond the control of the *mukallaf*.

*When a cause is present its effect is automatically present, even if the Mukallaf had not intended it to be.*

#### **Difference between *`Illat* and *Sabab***

*`Illat* is effective directly while *Sabab* is effective indirectly. It is said for this reason that every *sabab* is only a means to reach the *hukm* (*musabbab*) otherwise, the existence of *hukm* is due to its *`illat*, which is definitely present in between the *hukm* and the *sabab*. For example, purchase is the means of ownership of the body of the female slave and if she is a Muslim or a Kitabiyyah, it is also the means of ownership of getting particular benefit of her. In the former case, the purchase is the *`illat* as it is directly effective in it; and in the later case, the *sabab* is *`illat*, which is effective indirectly. It is so that particular benefit can be owned by the ownership of the body and the being. It has also been stated that if a connection between an effective attribute and its *hukm* is understandable by reason, the attribute is called *`illat* and the *hukm* is called *ma'ul* and if such connection is not understandable by reason, the attribute is called *sabab* and the *hukm* is called *musabbab*. For example, time is the *sabab* in respect of prayer. The connection between the two is not understandable by reason. The purchase is the *`illat* of ownership and the connection between the two is understandable by reason. Some scholars do not differentiate between the two.<sup>165</sup>

#### **Condition (*shart*)**

*A condition (shart) is an evident (zahir) and constant (mundabat) attribute (wasf) whose absence necessitates the absence of the hukm but its presence does not automatically brings about its object (mashrut).*

*A condition normally complements the cause and gives it its full effect. The legal consequences of a contract are not fully realised without the fulfilment of its necessary conditions.*

*A condition laid down by the Lawgiver is called a *shart shar'i* or legal condition while a condition laid down by the mukallaf is called an improvised condition (*Shart Ja'li*).*

*A condition (shart) differs with an essential requirement (rukhn).*

*An essential requirement (rukhn) partakes in the essence of a thing. The law (hukm) cannot exist in the absence of its essential requirement (rukhn). When the whole or a part of the essential requirement (rukhn) is absent, the law (hukm) collapses completely and the result is that the law (hukm) becomes null and void (batil).*

*A condition (shart) does not partake in the essence of a thing although it is complementary part of it.*

<sup>165</sup> *Al-Masadir al-Shar'iyyah*, p. 50.

## Sign ( `alamat )

It is the fifth kind of declaratory law with respect to negation.

### 1. Definition of Sign

That external attribute regarding any *hukm* which is the means to know such *hukm* but it is neither effective in the existence of the *hukm* nor in its *wujub* nor it is dependent (*mauquf*) on such *hukm*. In other words, a sign is only a source to know the *hukm*.

### 2. Legal Effect

On the existence of the attribute, the *hukm* becomes applicable for which it was declared a sign.

### 3. Examples

- (a) *The signs of the times of prayer by which the arrival of the time, i.e., the cause of wujub of prayer is known.*
- (b) *In case of zina, the sign for punishment for zina is ihsan / muhsin (free, adult, sane, Muslim, and married person).*

## v. Hindrance / Obstacle / Impediment (*mani`*)

### Definition

- (a) Literally, the word *manî* (pl. *mawani`*) means the one who impedes or hinders.
- (b) Technically, a hindrance / obstacle / impediment (*manî*) is an act or attribute whose presence either nullifies the *hukm* or the cause of the *hukm*. In either case the presence of the *manî* means the absence of the *hukm*.

An external attribute relating to a *hukm* that hinders it to come into existence. In other words the existence of a hindrance becomes effective in the non-existence of the *hukm*. The non-existence of hindrance neither the existence nor the non-existence of *hukm* is necessary.

### 2. Legal Effect of an obstacle

In case of the existence of the aforesaid external attribute, the *hukm* relating to it becomes absent.

### Kinds of an obstacle (*Aqşam Mani`*)

There are two kinds of an obstacle, namely, Obstacle in the way of declaratory law and Obstacle in the way of defining law.

### Obstacle in the way of declaratory law ( *Mani` hukm wad`i* ).

#### 1. Definition.

It is an obstacle which bars the existence of a declaratory law.

#### 2. Forms of obstacle in the way of declaratory law:

There are four forms of obstacle in the way of declaratory law, namely, bar against the establishment of the *`illat*, bar against

completion of the *`illat*, bar against the establishment of the Sabab (Reason), and bar against the completion of the Sabab (Reason).

**1. An obstacle that hinders the establishment of *`illat* (*manī in'iqad' illat*)**

*It is an attribute that hinders the *`illiyat* of the *`illat* (effectiveness of the effective cause). In other words it does not allow an *`illat* to become an *`illat*.*

For example, the sale of a free man. Here the freedom of a free person becomes a hindrance in the *`illat* of ownership which is the sale. Therefore the sale does not take place.

**2. An obstacle in the way of completion of *`illat* (*manī tamam' illat*)**

It is an attribute that serves as a bar in the completion of the *`illat*. For example, the sale of a thing belonging to another. In this case the sale takes place as the thing that is being sold can be sold but the sale is not complete as the permission of the owner is yet to be obtained.

**3. An obstacle in the way of a cause to become it a cause (*manī in'iqad sabab*)**

It is an attribute that serves as a bar and does not allow the cause to become a cause. For example, the *nisab* is the cause of *wujub* of *zakat*. But if there is any debt payable by the *sahib nisab* equal to the *nisab* or a little less, such debt hinders in becoming cause of *wujub* of *zakat* and the *zakat* does not become *wajib* on him.

**4. An obstacle that becomes a hindrance in the completion of cause. (*manī tamam sabab*)**

It is an attribute that serves as a bar against the completion of a cause that is in existence. For example, the destruction of the property equal to *nisab* prior to the completion of an year becomes a hindrance in the completion of cause.

**Difference between Defining Laws (*Ahkam Taklīfiyyah*) and Declaratory Laws (*Ahkam Wad'iyyah*)**

1. The objective of Defining Laws (*Ahkam taklīfiyyah*) is to make the servants liable to responsibility whether it is in respect of doing an act or not doing an act or option.

*The objective of Declaratory Laws (*ahkam wad'iyyah*) is to state the relation and equal action between the cause and the effect and the condition and the conditioned.*

2. A Defining Law ( *Hukm taklīfī* ) is within the power of servants and the realisation of it is required from the servants.

*It is not necessary in the case of a Declaratory Law (*hukm wad'iyyah*). It is either beyond the power of servant like the sunset or if it is in the power of servants, its existence is not required from the servants. Like the collection of property equal to the Nisab on the existence of which payment of Zakat becomes compulsory. Although*

*it is in the power of the servants but it is not a requirement that they should collect so much property that the payment of Zakat becomes compulsory on them.*

3. It is necessary for a Defining Law (*Hukm Taklifi*) that there should be a *Mukallaf* but for a Declaratory Law (*hukm wad'i*) it is not necessary that there should be a *Mukallaf*.

*For example, the activities and actions of a child are free from responsibility as a child is not a person responsible under the law but those are not free from wad'. Thus, some of the Shari'ah values (ahkam) are applicable to them.*

4. A Declaratory Law (*hukm wad'i*) is not a part of any act. Rather it is external to the original act while a Defining Law (*hukm taklifi*) is a part of an act.

*For example, prayer is a compulsory duty and its actions come under various kinds of Defining Laws (ahkam taklifiyyah). The cause of fardiyyat of prayer is time. It is not included in the actions of prayer, i.e., it is not a part of prayer.*

### **Obstacle in the way of defining law (man'i hukm taklifi)**

#### **1. Definition**

An obstacle in the way of defining law is called a *man'i hukm taklifi*.

#### **Kinds of obstacles in the way of defining law.**

(*aqsam man'i hukm taklifi*)

There are three kinds of obstacles in the way of defining law, namely, an obstacle that comes at the very beginning of a defining law, an obstacle that comes in the way of completion of a defining law and an obstacle that comes in the way of binding and permanence of the defining law.

#### **An obstacle that comes at the very beginning of a defining law.**

An attribute that serves as a bar at the very beginning of a defining law.

*For example, sale of goods with the stipulation of option (Khiyar Shart). It serves as a bar against ownership in a sale.*

#### **An obstacle that comes in the way of completion of a defining law.**

An attribute that stops the completion of a defining law after the said law comes into existence.

*For example, sale with the option of examination (Khiyar ru'yat). In this way the ownership follows the sale but the sale it self is not completed.*



**An obstacle that comes in the way of binding and permanence of the defining law.**

An attribute that stops the binding and permanence of a defining law after such law comes into existence and becomes complete.

*For example, option of return of the goods sold on finding any defect in them. (khiyar `ayb).*

In such a case the sale is complete but the option serves as a bar in its binding nature and permanence. In other words the right to annul the sale remains with the buyer if he finds any defect in it.

**Note:**

***Khiyar Shart*** means the option in the matter of sale or purchase of goods, giving time to think over it for a period of three days.

***Khiyar Ru`yat*** means the option to return the goods purchased without inspection after inspection if not liked by the purchaser.

***Khiyar `Ayb*** means the option to return the goods purchased on finding a defect in them, which were purchased considering having no defect.

## Chapter 2

### Sources of Islamic Law

#### I. I -Qur'an (The Holy Qur'an)

##### 1. Definition

Literally, the word Qur'an is either in the sense of Qir'at (to read) as Allah Almighty says:

إِنَّ عَلَيْنَا جَمْعَهُ وَقُرْآنَهُ (17) فَإِذَا قَرَأْنَاهُ فَاتَّبِعْ قُرْآنَهُ (18)

*Inna `alayna jam`ahu wa qur'anahu,*

*fa iza qara'nahu fattabi` qur'anahu*

It is for us to collect it

And to promulgate it:

But when we have

Promulgated it, follow thou

Its recital (as promulgated):

[75 : 17 ,18]

Or it is in the sense of *Maqru'* (that is read), as Allah Almighty says:

إِنَّا أَنْزَلْنَاهُ قُرْآنًا عَرَبِيًّا لَعَلَّكُمْ تَعْقِلُونَ

*Inna anzalnahu qur'anan `arabiyyan la'llakum ta`qilun.*

We have sent it down

As an Arabic Qur'an,

In order that ye may

Learn wisdom.

[12 : 2]

Technically the Qur'an consists of manifest revelation (wahy zahir) which is defined as communication from God to Hadrat Muhammad, the Messenger of Allah (peace and blessings of Allah be upon him), in Arabic, conveyed by the Arch angel Jibra'il, in the very words of God and transmitted to us by continuous testimony or *tawatur* and is today present in the *Musahif* (singular *Mus-haf*) of the seven leading recitors (*sab`ah qurr'a*).<sup>166</sup>

### What is meant by the Holy Qur'an

It is not the words alone that we read in the Holy Qur'an, the Holy Qur'an. Rather the meaning of those words are also the Holy Qur'an that we understand ourselves and make others to understand and also the speech of Allah Almighty that has been conveyed to us in the form of the words which is technically known as *kalam nafsi* i.e., the speech which does not take the form of letters and words. Its real nature is best known to God.

### The words of the Holy Qur'an as per transmission

The words of the Holy Qur'an as per transmission of three kinds, namely, mutawatar, mash-hur, and shaz and ahad.

**(a). Mutawatar**

The words of the Holy Qur'an that have been continuously transmitted since the time of the Messenger of Allah (peace and blessings of Allah be upon him) by a great number of transmitters.

**(b). ash-hur**

The words of the Holy Qur'an that have been transmitted in the beginning by less number the transmitters but thereafter the number of the transmitters increased.

**(c). hazz and ahad**

The words of the Holy Qur'an that have been transmitted by one or two individuals and their transmission did not reach to the standard number of ma`ruf or mash-hur.

In the above definition the mention of the words, "that have been continuously transmitted" make it clear that a word of the Holy Qur'an which has not been transmitted with continuity will not be called the Holy Qur'an technically. In other words, those words whose transmission is with shuhrah or only one or two individuals are their transmitters, such words are not the Holy Qur'an technically. Technically speaking the Holy Qur'an is the recitations of the seven reciters or the recitations of the ten reciters. The *Mash-hurah* and *Shazzah* recitations are not included in them for example some of the recitations of Hadrat Abdullah bin Mas`ud and Hadrat Ubayy bin Ka'b etc.

Whoever a distinction is made with regard to Hukm between the Mash-hurah and Shazzah recitations. By the former istidlal is made in respect of ahkam and by the later istidlal is not made in respect of ahkam.

*For example in the mutawatar words of the Holy Qur'an there is mention of three fasts to be observed as an expiation of breaking of an oath and the belated offer of fasts of Ramadan without imposing a condition that those shall be observed continuously.*

In the qir'at of `Abdullah bin Mas`ud the transmission contains such words that give the meaning that such fasts are to be observed continuously. In respect of the fasts of expiation of oath the recitation

of such restriction is mashhur while in respect of the fasts of Ramadan the qir'at is shazz. Therefore, in former the hukm is far observance of fasts continuously and in the later it is not so.<sup>167</sup>

#### 4. Verses of Injunctions (Ayat Ahkam)

The verses of the Holy Qur'an containing injunctions and necessary to be learnt by a jurist are five hundred verses.<sup>168</sup>

#### 5. Subject matter of Usuliyyin (Jurists).

The subject matter that comes under the discussion of the Usuliyyin (Jurists) is the words of the Holy Qur'an which are the means of knowing the meaning of the Holy Qur'an. Although the real objective of the speech are its meaning and the Jurists also discuss the meanings but the words being the means and source, there whole research depends upon the words.<sup>169</sup>

#### 6. Divisions and kinds of the words of the Holy Qur'an

In the matter of the words the Jurists (Usuliyyin) divide them into five categories and each category has further subdivided into four kinds and in this manner there are twenty kinds of the words of the Holy Qur'an.

- a. *With respect to the subject matter for which meaning it is made (Maudu' lahu).*
- b. *With respect to the manifestation (Zuhur) of the meaning.*
- c. *With respect to the hidden nature (Khifa) of the meaning.*
- d. *With respect to the usual (Musta'mal) meaning.*
- e. *With respect to the forms and methods to understand the meaning of the speaker (Murad Mutakallim).<sup>170</sup>*

#### Kinds of words with reference to the meanings for which a word is made

There are four kinds of a word with reference to the meaning for which it is made, viz., Specific(Khass), General / Unspecified ('Am), Homonym (Mushtarak), and (Mu'awwal).

<sup>167</sup> Fawatih al-Rahmut Sharh Musallam al-Thubut, `Abdul `Ali Bahr al-`Ulum Lakhnawi, Dar Ihya al-Turath al-`Arabi, volume 2, p. 15-16.

<sup>168</sup> Nur al-Anwar Sharh al-Anwar, `Abdul Halim Lakhnawi, Qayyumi Press, Kanpur, p. 6 ;

Al-Madkhal 'ila `Ilm 'Usul al-Fiqh, Muhammad Ma`ruf Dawalisi, Dar al-`Ulum lil Malayin, Ed 5<sup>th</sup>, p. 21, 413 ; and

Tafsir al-Nusus fi al-Fiqh, Muhammad Adib Salih, al-Maktab al-Islami, Ed 2, vol 1, p. 153.

<sup>169</sup> Nur al-Anwar Sharh al-Anwar, `Abdul Halim Lakhnawi, Qayyumi Press, Kanpur, p. 11 ;

<sup>170</sup> Ibid.

### Specific (Khass)

#### 1. Definition

Specific (*Khass*) is a word that is made to apply to any single meaning.

#### 2. Explanation

The making of a word for application to a single meaning does not mean that the meaning to which a specific word applies is only an individual person. Rather, sometimes it applies to many individuals, but in the specific word those individuals are not considered. Rather, the consideration is of the single reality or meaning that are found jointly in all those individuals. Hence, *Khass* is of various forms.

#### The specific of Genus (Khass Jinsi)

It is a word that is applied to a limited number of things belonging to a genus (*jins*) such as a human being (*insan*).

#### The specific of specie (Khass Nau'i)

It is a word that is applied to a limited number of things belonging to a certain species (*Nau'*). For example, a horse or a bird.

#### The specific of individual (Khass Fardi)

It is a word that is applied to a single individual or to a single subject, or a specified number thereof. For example, Khurram, `Amir, Ahmad, Fuwad or Hammad are the names of the particular individuals. Similarly, Makkah al-Mukarramah, Al-Madinah al-Munawwarah, Bayt al-Maqdas, are the names of the particular places.

#### The Specific of Attribute (Khass Wasfi)

It is a word that is applied to a specific attribute. For example, knowledge (*'ilm*) and ignorance (*jahl*).

#### The Specific of number (Khass `Adadi)

It is a word which is applied to a specific or definite number. For example, the names of numbers, i.e., those words that tell the numbers and counting.

#### 3. Requirements and Legal Consequences (*ahkam*)

- a. The *madlul* (indicated) of *Khass* is definitive (*qat'i*) in its import and free from all ambiguities and to act upon it is necessary.
- b. If there is any indication / evidence (*dalil*) showing that the *madlul* is not definitive, it shall be non-definitive.
- c. Where a solitary report (*khbar wahid*) or **Qiyas** (قياس) is against the *Khass* with regard to its meaning whereby a subject is established totally against the *khass* or there occurs an addition in the meaning of the *khass*, if there is some way to act upon the both in accordance with the rules (*'usul*) (uâ Z), both shall be acted upon, otherwise, the report and the **Qiyas** (قياس) will not be relied upon.

#### 4. Examples

- a. The Qur'anic injunction in respect of the prayer is:

"*Ya ayyuhallazina 'amanurka'u wasjudu*"

The words *ruku`* and *sujud* have a specific meaning. *Ruku`* means the bowing of head to a certain extent in the reality of which *tamaniyyat* (remaining in *ruku`* till one's heart feels satisfaction, i.e., the *masnun* manner of *ruku`*) is not included.

The Hadith that mentions that without it (i.e. the *tamaniyyat*) there is no prayer.

To reconcile the literal meaning of the Qur'anic text and the real nature of the *ruku`* and *sujud* as mentioned in the Hadith, the jurists have said that the real meaning is *fard* while *tamaniyyat* is *wajib*.

- b. The Qur'anic injunction in respect of the *'iddat* is as under:

وَالْمُطَلَّاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ  
اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ  
فِي ذَلِكَ إِنْ أَرَادُوا إِصْلَاحًا وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ  
عَلَيْهِنَّ دَرَجَةٌ وَاللَّهُ عَزِيزٌ حَكِيمٌ (228)

"*Wa'l-mutallaqatu yatarabbasna bi anfusihinna thalathata quru'in*"

"And the divorced women shall restrain themselves for three menstrual cycles." [2:228]

The word **quru** has two meanings, namely, *hayd* (menstruation) and *tuhr* (the clean period between menstruations). The word *hayd* is used as feminine while the word *tuhr* is used as masculine.

The **Qiyas** (قياس) requires that whereas the word *thalath* has a suffix of *ta* and has been used as a feminine, hence the meaning of *quru`* should be *tuhr*. But as in this manner the specific meaning of *thalathata* which is three is not completed, hence the **Qiyas** (قياس) has not been relied upon.

#### 5. Classification of Specific words

There are many kinds of a specific (*khass*) word but the jurists discuss only four kinds, viz., command (*amr*), prohibition (*nahyi*), absolute (*mutlaq*), and qualified (*muqayyad*). It is so because mostly the verses containing Qur'anic injunctions relate to these four categories, and even among them, the first two categories. The reason is that all the Shari'ah values either demand the doing of an act or not doing of an act. The former is called a command (*amr*) and the later a prohibition (*nahyi*).

## Imperative

### 1. Definition

Literally, the word 'amr (pl. 'awamir) means to command.

Technically, the word 'amr means:

*al-lafẓu'l-maḍu`u li talabi'l-fi`li `ala sabili'l-isti`la`i*

*[A word made to demand the doing of an act by way of superiority].*

In this definition two things are worth consideration. Firstly, in the definition there is the restriction that the command is by way of superiority. This restriction shows that it is not the condition that the commander should in fact be possessing an upper hand. Rather, the condition is that he considers for himself that he is having upper hand though in fact he may or may not be so vested.

Secondly, the learned in law agree that 'amr is used in its real meaning and it signifies that specific statement which is for commandment.

The generality of the scholars state that metaphorically fi`l is also called 'amr as the Holy Qur'an says:

إِلَىٰ فِرْعَوْنَ وَمَلَأَتْهُ فَاتَّبَعُوا أَمْرَ فِرْعَوْنَ وَمَا أَمْرُ فِرْعَوْنَ بِرَشِيدٍ (97)

wa ma 'amru fir'auna bi rashidin

[While the act of Pharaoh was not correct].

[XI: 97]

In the above verse the word 'amr refers to the act of Pharaoh. Here the sabab has been applied to the musabbib.<sup>171</sup>

The demand to do an act may be made in many ways.

By the sighah of 'amr as:

'if'al (Thou do).

By the sighah of lam ámr in Mudari` as:

li yaf'al (He should do).

By such Jumlaḥ khabariyyah the objective of which is to command or demand and not to merely give information, as the following verse of the Holy Qur'an:

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ وَلَا يَحِلُّ لَهُنَّ أَنْ يَكْتُمْنَ مَا خَلَقَ اللَّهُ فِي أَرْحَامِهِنَّ إِنْ كُنَّ يُؤْمِنَنَّ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ

<sup>171</sup> Shaukani, Muhammad bin `Ali (d. 1255 AH) Irshad al-Fuhul, Matba` Mustafa al-Halabi, Cairo, 1937, p. 91

فِي ذَلِكَ إِنْ أَرَادُوا إِصْلَاحًا وَلَهُنَّ مِثْلُ الَّذِي عَلَيْهِنَّ بِالْمَعْرُوفِ وَلِلرِّجَالِ  
عَلَيْهِنَّ دَرَجَةٌ وَاللَّهُ عَزِيزٌ حَكِيمٌ

*wa'l-mutallaqatu yatarabbasna bi 'anfusiinna thalathata quru'in*

And the divorced women shall restrain themselves for three menstruations. [II:228]

The demand for doing of an act may be in many ways.

The superiority may be actual or fictitious, i.e., the person making the demand feels that he is superior though in fact he may not be so.

## 2. Requirements and Legal Consequences

- a. For a command an imperative word should be used.
- b. An imperative is basically and generally of binding nature, i.e., it is a mandate or obligation whether it is a command of doing a thing after its prohibition or without it. On the basis of circumstances sometimes it denotes other meaning as well.
- c. Mere command does not require the repetition of the thing commanded. The repetition in respect of a command is proved by other texts, circumstances and causes.

For Example, to offer regular prayer five times in a day is *fard* due to its cause, i.e., due to the repetition of time.

- d. With a thing commanded its preliminaries are also necessarily become binding. For example, *wudu* is one of the preliminaries of Prayer, it is, therefore, *fard* like the Prayer.
- e. Binding by way of command is some times of a determined thing and some times any one of some known things. For example the expiation of oath is by way of feeding ten needy persons, to provide them clothes or to free a slave. To do any one of these three things is necessary.
- f. Legally, every thing that is commanded must be graceful.

## 3. Words used as imperatives

The following words are used as a command:

1. *An imperative verb whether for a third person or for a second person.*
2. *A Noun of Action in the sense of an imperative such as "dunaka".*
3. *A masdar in the sense of an imperative verb such as "fadarbarriqabi" Here the masdar "darb" is in the sense of imperative verb "idribu" and it gives the meaning "kill their necks".*
4. *A non-imperative verb used in the sense of a demand. For example: "wal walidatu yurdi`na". Here the word "yurdi`na" is*



*actually a present or future tense in Arabic language but here it conveys the sense of a demand or an imperative.*

#### 4. Meanings of the verb imperative

An imperative verb is used in 20 meanings but the basic and general meaning remains the obligation and binding nature. Any other meaning will depend upon the circumstances to that effect.

1. *Wujub* (Obligation)
2. *Istihbab* (Commendation)
3. *Ibahat* (Permissibility)
4. *Tahdid* (Warning)
5. *Irshad* (Guidance)
6. *Ta'dib* (Training, discipline)
7. *Ta'jiz* (helplessness)
8. *Du'a* (Prayer)
9. *Imtinan* (To Oblige)
10. *Ikram* (To honour)
11. *Taskhir* (To control)
12. *Ihanat* (To disgrace)
13. *Taswiyah* (To render equal)
14. *Tamanna* (To entreat)
15. *Haqarat* (To look down upon)
16. *Takwin* (To command to a non existent to come into existence or to be)
17. *'Amr bi ma'na khabar* (Command in the sense of information)
18. *Khabar bi ma'na 'amr* (Information in the sense of command)
19. ?
20. ?

#### 5. Proof of the meaning of commendable in an imperative

The other important and relating to jurisprudence meanings of an imperative are two, viz., *istihbab* (commendability) and *ibahat* (permissibility) as an imperative in the presence of certain circumstances gives any one of the said two meanings. For example, the Qur'anic Injunction is:

وَأَنكِحُوا الْأَيَامَىٰ مِنكُمُ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِن يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ (32)

"Katibu hum in `alimtum fi him khayran"

“If you feel any good in respect of the slaves, do enter into a contract of freedom for them in lieu of some consideration.”  
[XXIV : 32]

Here the imperative is in the sense of a commendable act.

Another injunction of the Holy Qur'an is:

يَا بَنِي آدَمَ خُذُوا زِينَتَكُمْ عِنْدَ كُلِّ مَسْجِدٍ وَكُلُوا وَاشْرَبُوا وَلَا تُسْرِفُوا إِنَّهُ لَا يُحِبُّ الْمُسْرِفِينَ (31)

“Kulu washrabu”

“Eat and drink.” [VII : 31]

Here the imperative is in the sense of permissibility.

## 6. Divisions of Imperative

There are five divisions of an imperative, namely, with regard to the excellence, punctuality, fixation of form, restriction of quantity and the subject matter itself. Let us discuss them one by one.

### (I) With regard to the excellence of the subject-matter of command

With regard to the excellence (*husn*) of the subject-matter, an imperative is of two kinds:

#### (a) Directly/Per se excellent (*hasan li `aynihi*)

##### 1. Definition

A subject-matter whose excellence / grace / goodness / beauty (*husn*) is personal or direct.

##### 2. Forms

It has two forms.

- (i) A verb whose excellence is with regard to its making (*wad`*). In other words, excellence is included in its making and reality such as,

Belief is thanks-giving to the Real Grantor of all favours.

Prayer consists of uttering a collection of words of respect. To offer thanks to the Grantor of favour and to respect are good and favourite actions with regard to their real nature.

However there is distinction between the belief and the prayer with regard to the Legal Effect (*hukm*). The demand and excellence of belief never drops while demand of prayer drops whether it is by way of its performance or by way of forgiveness by the Commander Himself such as in favour of a woman who is in a state of menstruation or child birth.

- (ii). An action whose excellence is indirect and an action which becomes a means to the excellence. It is not within the control of man.

*For example, zakat and Fasting etc. Their excellence is not personal. Rather the excellence of Zakat is on account of fulfilment of the need of the needy and the excellence of fast is on account of restraining the self from desires. The need of the needy and the desires of the self are not within the control of men.*

**(b) Indirectly / Not per se excellent (*hasan li ghayrihi*)**

**1. Definition**

A subject-matter of a command whose excellence (*husn*) is not personal and is indirect, and the act that becomes a means of excellence of it is within the control of man.

**2. Forms**

It is of two forms.

- a. On account of performance of the subject-matter, the external act that becomes the means is also performed for example the excellence of funeral prayer is on account of respect of Islam of the dead person. By offering funeral prayer respect is also paid to him.
- b. After performance of the subject-matter, there should be the need to perform that thing which becomes the means of excellence. For example, the excellence of effort for Friday prayer is due to the Friday prayer. After the effort, the performance of Friday prayer is necessary. Mere effort is not sufficient to discharge the liability of offering Friday prayer.

**3. Requirements and Legal Consequences (*ahkam*)**

The obligation (*wujub*) of an act which is directly excellent (*hasan li 'aynihi*) drops by its performance or due to some just legal excuse (*'arid*). For example, the prayer as already stated above.

The obligation (*wujub*) and demand (*mutalabah*) of an act which is indirectly excellent (*hasan li ghayrihi*) depends upon the obligation (*wujub*) of another act.

**II. With regard to the punctuality and non-punctuality of time of subject-matter**

It is also of two kinds, namely, absolute (*mutlaq*) and restricted / limited (*muwaqqat*).

**Absolute (*mutlaq*)**

**Definition**

Literally, the word *mutlaq* means without any limitation and free.

Technically, the word *mutlaq* means a subject-matter regarding the performance of which there is no restriction of any particular time.

**Legal Effect (*hukm*)**

The demand and binding of the subject-matter is not immediate. There is scope and permission for delay (*ta'khir*) provided that its time

of performance is not expired but promptness (*ta`jil*) is desired (*matlub*) and commendable (*mustahabb*).

### 3. Examples

There is essentially no time fixed for the payment of *zakat*. Its payment becomes obligatory on the completion of an year. It may be paid at any time, namely, before the completion of the year or immediately on completion of the year or after sometime or after sufficient time, but it should not remain unpaid.

### Restricted (*muwaqqat*)

#### Definition

Literally, the word *muwaqqat* means for which a time is fixed.

Technically, the word *muwaqqat* means a subject-matter for the performance of which a particular time is fixed.

### 2. Legal Effects (*hukm*)

If there is scope of time, its performance with delay to the extent prior to the expiry of time is permissible.

If the time is very short then immediate performance is essential.

### 3. Kinds of *Muwaqqat*

There are four kinds of *muwaqqat*, namely,

- a. Where the time is also an adverb, a cause of obligation and a condition of performance;
- b. Where the time is the standard and cause of obligation;
- c. Where the time is the standard;
- d. Where the time is the standard and also adverb.

#### (a) Where the time is also an adverb, a cause of obligation and a condition of performance

##### 1. Definition

The time being adverb (*zarf*) means that the subject matter does not encompass the whole time, i.e., it is performed within the time in the manner that after its performance some portion of time still remains and if a man desires, he can perform some other act like the act of the subject-matter.

The time being a Sabab (Reason) means that the time is effective in the obligation of the subject-matter.

The time being the condition of performance (*shart ada'*) means that without the time, i.e., prior to the arrival of the time the performance of the subject-matter is not valid.

#### Legal Effect (*hukm*)

The fixation of the subject-matter must be made by intention.

#### Example

**Fard Prayer**

The compulsory regular (*fard*) prayer is a subject-matter which is restricted (*muwaqqat*). In its timings, all the three things are found.

The time is an adverb (*zarf*) for prayer as in the performance of no prayer the whole span of time is not utilised. Rather, some portion of time is still left as remainder.

The time is also cause of obligation (*wujub*) of prayer as it is the time that its arrival becomes the cause of obligation of performance of prayer.

The time is also the condition of performance (*shart ada'*) as no prayer can be performed before the arrival of its time.

Therefore, whenever any prayer is offered, it should be determined by intendment (*niyyat*) that it is such and such prayer.

**(b) Where the time is the standard (*ma'yar*) and cause of obligation (*sabab wujub*)**

**1. Definition**

The time being standard (*ma'yar*) means that the subject-matter encompasses the whole span of time. Therefore, no act like the subject-matter can be performed in that span of time, so much so that the length or shortness of time makes the subject-matter lengthy or short.

**2. Legal Effects (*hukm*)**

A subject-matter, with the intendment (*niyyat*) of the same with the explicitness of *fardiyyat* and with the mistake of attribute (*wasf*), such as, a person saying the word *nafl* instead of *fard* and absolute in the matter of intendment that the act is in consideration but there is no limitation that it is a *fard* or *nafl* becomes performed (*ada'*) and is also valid (*sahih*).

Not only this but also that in some circumstances even if instead of the subject-matter commanded, some other subject-matter is intended, the subject-matter commanded stands performed.

During the time span of such subject-matter commanded, neither any other act like it can become obligatory nor its performance is valid. Rather, the performance of the same subject-matter commanded is essential.

**3. Example**

***The fast of Ramadan***

For it, the time is a standard as the fast encompasses the whole span of time and during its span, i.e., from the rise of dawn till the sunset neither any other fast can become obligatory nor can be performed. The time is also the cause of obligation of the fast of Ramadan irrespective of the intendment of *fard* or by mistake uttering the word *nafl* or intending any other obligatory fast or intending simply a fast. The performance shall be only of the *fard* fast of Ramadan.

**(c) Where the time is the standard****1. Definition**

The time being standard (*ma`yar*) means that the subject-matter encompasses the whole span of time. Therefore, no act like the subject-matter can be performed in that span of time, so much so that the length or shortness of time makes the subject-matter lengthy or short.

**2. Legal Effect (*hukm*)**

Fixation is necessary in the intendment. It is also necessary that the intendment should be made prior to the arrival of the time as during the same time some other act similar to it can become necessary and also can be performed.

**3. Example**

The fast of Ramadan, the performance of which could not be made during the prescribed time and now their performance is a delayed performance (*qada*) and a fast of vow (*saum nazar*) for which no time was fixed. For them, the time is only the standard (*ma`yar*). For the performance of them, fixation is necessary in the intendment that such and such fast is being observed on a particular day. It is also necessary that the intendment should be made from night and at least prior to the dawn. It is so because on the day when such a fast is observed, some other fast can become obligatory and its performance can be made and it is also valid.

**(d) Where the time is the standard (*ma`yar*) and also adverb (*zarf*)****1. Definition**

The time being standard (*ma`yar*) means that the subject-matter encompasses the whole span of time. Therefore, no act like the subject-matter can be performed in that span of time, so much so that the length or shortness of time makes the subject-matter lengthy or short.

The time is an adverb (*zarf*) for prayer as in the performance of no prayer the whole span of time is not utilised. Rather, some portion of time is still left as remainder.

**2. Legal Effect (*hukm*)**

It is performed by the intendment of the subject-matter and by the intendment of such act absolutely, i.e., without putting any restriction of *wujub*.

**3. Example**

Hajj (pilgrimage).

The time is standard as well as adverb for Hajj.

The time is standard as throughout the whole life Hajj becomes compulsory only once and the times fixed for its performance are such that only one Hajj can be performed during that span of time.

The time is adverb as the whole life of a person and the whole times are not encompassed by the Hajj.

The performance of the Fard Hajj takes place by intendement of the fard Hajj or intendment of absolute( mutlq) Hajj.

By intendemnt of any other obligatory or supererogatory (nafl) hajj the Compulsory (fard) Hajj is not performed.

In the above four kinds a delay in the second kind without any just lawful excuse is not permissible. The reason is that for fard fasts the month of Ramadan is fixed. However, prompt offering of prayer, delay in the offering of Qada (performance in time of which is missed) and Nazr (vowal) fasts, and delay in the performance of Hajj is permissible provided these acts are not left unperformed and the prescribed prayer time is not expired.

**(iii) With Regard to the fixation and non-fixation of the subject matter.**

It is not necessary that a subject matter is always a fixed or determined thing hence with regard to the fixation and non-fixation of the subject matter it is of two kinds.

1. *Fixed or determined (Mu`ayyan ) subject matter.*
2. *Non-fixed or non-determined (Mubham) subject matter.*

**(i) Fixed Subject Matter (Mu`ayyan ma'mur bihi)**

**1. Definition**

It is a subject matter the form of which is fixed or determined by the Lawgiver (Shari`) or the Law (Shari`ah).

**2. Legal Effect.**

It is essential to adopt the same form that has been fixed by the Shari`ah to act upon or perform the subject matter.

**3. Examples**

Fast, prayer etc.

**4. Warning**

There are two ways of fixation of the subject matter.

- a. *Only one form is fixed for every person and every circumstance. The examples of it are the fast and the prayer for which only one form is fixed for every person and every circumstance.*
- b. *Though there may be many forms of the subject matter but for the person responsible a fixed form is required with regard to his circumstance.*

For example, if there is power to free a slave then to free a slave ,if there is no such power then to observe sixty fasts one after the other continuously and if it is also not possible then to feed sixty needy persons.

**(ii) Non-fixed or non-determined (*Mubham*) subject matter.****1. Definition**

A subject matter which circulates between a few forms and the Shariah has fixed those forms and given the option to act upon any one of such forms.

**2. Legal Effect**

The demand of the Shariah is fulfilled by acting upon any one form.

**3. Example**

Oath of expiation (*Kaffarah Qasam*).

The Shariah has mentioned three forms of expiation for breaking an oath and has given the option to act upon any one of the three.

- i. To feed ten needy persons; or
- ii. To provide clothing; or
- iii. To free a slave.

In case a person is unable to do any one of the three options stated above, he should observe fast for three days.

**(iv) With regard the fixation or non-fixation of limitation of the subject matter.**

There are two kinds of the subject matter with respect to the fixation or the non-fixation of its time and quantity, namely, limited and non-limited.

**Limited. (*Mahdud*)****1. Definition**

A Subject Matter for which the Shariah has the fixed a time or quantity.

**2. Legal Effect**

To perform the subject matter with out any addition or omission according to the limit fixed by the Shariah.

**3. Examples**

Prayer and fast.

Their quantity as well as the time of their performance is fixed by the Shariah and the Shariah desires that both should be observed without any addition or omission.

**Un-Limited. (*Ghayr Mahdud*)****1. Definition**

A subject matter the demand of performance of which is desired by the Shari`ah without the fixation of any time and quantity, that is, it is not stated by the Shari`ah up till what time it is to be done and to what extent it is to be done.



**2. Legal Effect**

To continue doing it according to the requirement of the place of doing without the fixation of any time or quantity till the objective is achieved.

**3. Examples**

**Jihad, Amr bil-ma'ruf, and Nahi 'anil-munkar.** For these acts neither any time is fixed nor any quantity is determined. According to the need and till the achievement of the objective for which the Shariah has commanded to perform these acts, the acts are to be performed.

**Kinds of Obligation (Aqsam Wujub)**

An imperative ('*amr*') proves an obligation (*wujub*).

An obligation is of two kinds.

1. *Obligation itself (nafs wujub) and*
2. *Obligation of Performance. (wujub ada')*

**Obligation itself (nafs wujub)****1. Definition**

A command being binding on a person.

**2. Source of Proof.**

The source of proof of obligation itself is the existence of cause.

**3. Requirement and consequent.**

By performance of an obligatory act, the obligation is discharged and drops. If it is not performed there is no demand of its performance nor there is command for its delayed performance.

**Examples**

For payment of Zakat a Muslim must possess the wealth or property equal to Nisab. In other words, the nisab of property is the cause of Nafs Wujub. If such a person pays the zakat, the zakat shall stand paid. But there is no demand for payment.

Likewise at the arrival of the prayer time the Nafs Wujub stands established but it is not ruled that the movement the time arrives and the prayer is not offered it becomes *Qada*.

**Obligation of Performance. (wujub ada')****1. Definition**

The performance of a command being binding is called an obligation of performance (*wujub ada'*)

**2. Source of Proof.**

The imperative (*amr*) that is the command and demand of doing an act. By the imperative the obligation itself is not proof. Rather the obligation of performance is proved. For example, the obligation itself of prayer is on account of time while the obligation itself of the zakat

is quantity of wealth equal to *nisab* but the demand for the performance of both the prayer and the zakat is through the Quranic Text.

### 3. Condition (Shart)

The person who is commanded to do an act must be capable to perform the act commanded.

### 4. Capacity is of two kinds.

- a. *Deficient capacity and*
- b. *Complete capacity*

#### (a) Deficient Capacity

The bare minimum capability to perform the act commanded.

#### 1. Requirement and consequent.

- (i). This capability is essential for the performance of every act commanded to be performed. Without it there is no demand for the performance of any act from a man.
- (ii). It is not necessary that this capability be actually found in a person rather its imaginary existence is also sufficient

#### 2. Examples

Where a person has got the capability of performance of a *fard* prayer at such portion of a prayer time that there is scope for reciting *takbir tahrimah*, he is demanded to offer prayer. For example, where a minor who becomes major at that time or a women becomes pure and clean from menstruation and child birth or a disbeliever embraces Islam, at such time, he or she shall be under that demand of offering the Fard prayer, even if there may not be so much scope of time to perform the whole prayer. It is so because though according to the habit and the general circumstances to perform the whole prayer during such short time is not possible, but there is definitely a possibility and imagination that by any means this short time becomes so much extended that the prayer is performed within the prescribed period for performance of prayer. The form of it prolongation of time as a miracle.

#### (b) Complete capability (qudrat kamilah)

##### 1. Definition

A complete capability is power and capacity to perform the act commanded to be performed with convenience.

##### 2. Legal Effect

- i. *For the survival and maintenance of the obligation, complete capability should also survive.*
- ii. *In most of the acts of worship that involve financial sacrifice, the demand of payment depends on it.*
- iii. *Its existence must be real and not fictitious or imaginary.*

### 3. Examples

In the matter of zakat, the nisab is the cause of its obligation itself. The property should be such that has the capacity to increase and grow and there should have passed one complete year in the matter of its possession and ownership, are the conditions for obligation of payment. Both these factors are of the kind of complete capability. Demand of payment of Zakat is made when the above said two attributes are really found in the nisab that is either the property should have actually increased or should possess such capability naturally i.e., its creation is for profit and increase like gold, silver and other coins and currencies. Allah Almighty has created them for earning wealth and property.

The whole affair of sale and purchase throughout the world basically relates to them.

The passing of an year is also essential. It means the wealth had remain existing in the hands of a person throughout the year even if it is less than the nisab but at the completion of the year it should be equal to nisab and not less than that.

If the wealth is not of growing nature i.e., neither it has the capability of increase naturally nor it is increased, the obligation of payment of zakat will not be there.

Further if on the completion of year the wealth is less than nisab there shall be no demand of payment of zakat. If on the completion of the year the wealth is equal to the nisab and the zakat is not paid despite demand and there after the whole wealth is destroyed, there shall remain no obligation for zakat. Rather it shall come to an end.

### Performance (Ada') in the matter of acts of worship ('Ibadat).

#### Definition

To do the act commanded is called performance (Ada').

#### Warning

This definition is keeping in view to the acts commanded generally which include the Muwaqqat as well as Mutlaq. In view of an act commanded being Muwaqqat the restriction of time will be applicable and it will be said: To do an act within its time."

Rather this definition also includes the non obligatory acts. If such acts are demanded and their demand is not of binding nature being Sunnah or Nafil yet their performance at their place and time is called their performance(ada'). Keeping in view the obligation the restriction of wajib shall be applicable.

#### Kinds

There are two kinds of performances, namely, Performance simpliciter (Ada' mahd) and Performance resembling delayed performance(Ada' mushabih qada').

**Performance simpliciter(Ada' Mahd)****1. Definition**

A performance in which there is no resemblance with delayed performance.

**2. Kinds**

It is of two kinds, namely, Complete performance (ada' kamil) and Deficient performance (Ada' Qasir).

**Complete Performance****1. Definition**

To do an act with complete legal attributes (Sifat Mashru'yyat) is called complete performance.

**2. Legal Effect(Hukm)**

Discharge of liability and dropping of demand.

**3. Example**

To offer the Fard prayer in congregation in time.

**Deficient Performance(Ada' Qasir)****1. Definition**

To do an act with some deficiency in its legal attributes is called deficient performance

**2. Legal Effect**

If deficiency in legal attributes can be made good, the same should be made good otherwise it will be treated as having been performed. In case there is intentional negligence it shall be a sin according to the rank of legality of attributes and also accountability

**3. Examples**

a) To offer prayer in time individually.

In such a case the loss is irreparable.

b) To offer prayer with negligence in the matter of legal attributes of prayer.

*For example to offer prayer without recitation of Surah al-Fatihah.*

In such a case the loss is reparable either by performance of Sajdah Sahw or by re-offering the prayer with recitation of Surah al-Fatihah.

c) Without taharat to perform the circumambulation of Ka'bah. In such a case the loss can be made good by slaughtering a sacrificial animal. If the negligence is committed intentionally, it is a sin and there shall be accountability for such intentional negligence.

**Performance resembling delayed performance (Ada' Mushabih Qada')****1. Definition**

Literally it is such form of performance which is in some meaning a performance (ada') and in some meaning a delayed performance(Qada').

*Technically, to perform an obligation in a manner opposite to the manner prescribed for its performance.*

**2. Legal Effect(Hukm)**

The state (kayfiyyat)that is made necessary does not remain in the form . However,the nature (nau'iyat) and quantity (miqdar) remains.

**3. Example**

The expired prayer of a person who joins in the congregation led by an Imam.

Such a person is called a lahiq. He joins the Imam in the prayer at the beginning of the prayer and intends to offer the prayer completely along with the Imam. Then he is confronted with the call of nature(hadath) and he is to perform the Wudu. At that time his standing behind the Imam and even some portion of the prayer is lost that he completes after the Imam comes out of prayer by saying Salam, individually. This he does in a state other than the state in which he had bound him to do, i.e. standing in the congregation behind the Imam.

This prayer is Ada in the sense that it has been offered in its prescribed time. It is qada in the sense that the state with which the person offering it had bound himself to offer did not remain intact,i.e. the iqtida of Imam and to stand behind him in prayer.

The advantage of its being ada is that the demand comes to an end after completion of the left over portion of the prayer.

The advantage of qada is that now the nature of the prayer cannot be changed,i.e. if the lahiq is a traveler and the Imam is also a traveller and at the time of completion of the left over portion the lahiq intends to stay (iqamat) even then hwe is to offer two rak`ats and not four. His prayer of musafirah (traveling) shall not change into the prayer of iqamat (Staying).

**Performance in the matter of dealings(Ada bi i'tibar Mu`amalat) or rights of men(Huquq al-'Ibad).****1. Definition**

To deliver the original subject matter of obligation(`ayn wajib) to the person entitled .

**2. Example of Complete performance**

To deliver back the thing extorted to the owner in its original state.

*Example of deficient performance*

To return an extorted slave to his original owner in a state when the right of some other person becomes a n obligation in him.

*Example of performance resembling delayed performance*

After settling to give the slave of another in Haq Mahr to purchase such slave and to give him to the wife is performance in the sense that the same slave has been delivered to her.

It is delayed performance in the sense that the time when its delivery was settled it belonged to another person and at the time of delivery it was in the ownership of the husband. Thus by the change of ownership as if the slave stood changed . It is so because the rule on the pint is that by the change of ownership the goods are considered as changed goods.

**Delayed performance(Qada')****1. Definition**

To do the like obligation is called delayed performance (qada').

**Note:**

This definition is with regard to the general commanded act.

Regardin a muwaqqat ma'mur bihi like the prayer the definition of Qada' is to perform a like obligation in a time other than the prescribed time(ada' mithl wajib fi ghayri waqti hi).

**2. Explanation**

The demand of like obligation is at a time when it is impossible to perform the original obligation intentionally or inadvertantly and even when the power to perform has remained or lost and the pwerformance was not made. Further the loss of power may be due to some legal obstacle like the menstruation in the matter of observation of fast or some reasonable obstacle like the sleep in the matter of pryer.

**3. Kinds**

It is of two kinds, namely, Qada Mahd and Qada Mushabih ada'.

**a. Qada' Mahd****1. Definition**

Performance of the like obligation in a manner that there may not be found any aspect of performance.

**2. Aqsam**

There are two kinds of Qada' Mahd ,namely, qada' bi mithl ma`qul and qada bi mithl ghayr ma`qul.

**Qada bi mithl ma`qul****1. DEFINITION**

To perform the obligation by such like that resemblance and harmony is reasonably understandable between the like and the original obligation.

**2. Source of Proof**

The texts that make the performance obligatory.

**3. Kinds of Mithl Ma`qul**

There are two kinds of Mith Ma`qul, namely, complete (Mithl Ma`qul Kamil) and Deficient( Mithl Ma`qul Qasir)

**Mithl Ma`qul Kamil**

A like which is like the wajib both in letter and spirit.

**Example**

A congregational prayer for congregational prayer.

**Mithl Ma`qul Qasir**

A like which is like the wajib in spirit but not in letter.

**Example**

A prayer offered individually in place of a prayer of congregation.

**Legal Effect**

The basic rule is that in the delayed performance (qada') the mithl ma`qul; kamil should be adopted.

It is better and preferable that the like to be adopted should be a like both in letter and spirit. Otherwise only a mithl ma`nawi shall suffice.

**Qada bi mithl ghayr ma`qul****Definition**

To perform wajib by means of such like that likeness between the like and the original is not understandable to reason. Rather the Law(Shari`ah ) had stated it a like(mithl).

**Source of Proof**

For its wujub a verse/text indication the wujub ada' is not sufficient. Rather another text is needed that tells the likeness legally between the wajib and the mithl.

**Legal Effect**

In the case of non performance of the obligation it will be adopted while according to the circumstances this alone is determined.

**Example**

Ransom in place of fast when the observance of fasts is not possible for a person he shall pay to the needy a particular quantity of foodgrain . Fast is a practical act of worship. Ransom is a valuable thing. One is

unable to understand merely by reason the likeness between the two but the same is the law established by the verses of the Holy Qur'an and the texts of the Sunnah.

### **Qada' Shibh Ada'**

#### **Definition**

To do an obligation in such a manner that in some sense it is delayed performance and in some sense it is performance.

#### **Requirement and circumstance (Hukm)**

This form shall suffice the performance.

#### **Example**

The qada of takbirat of 'Idayn . If a person is unable to say the takbirat in a state of standing he may say so while in a state of ruku' . This is qada' in the sense that those have not been said in their original place i.e. qiyam . This is ada' in the sense that a ruku' is equal to half of the qiyam. Hence , in other words, those have been said in a state of qiyam.

### **Qada bi i'tibar huquq al-'ibad**

#### **Definition**

To deliver the like of the obligation from ones own ownership an possession to the person who is entitled .

#### **Examples**

#### **Qada bi mithl ma`qul kamil;**

To give wheat for wheat.

#### **Qada bi mithl ma`qul qasir**

To give the price of a cloth as the price is considered as the like of a thing.

#### **Qada bi mithl ghayr ma`qul**

The payment of diyat in case of murder or the payment compensation in hurts.

Human body and its limbs have no likeness with the compensation in terms of money, goods or property according to the reason but the Law has so commanded.

### **Qada shibh ada'**

To pay the price of the slave settled to be given in Dower (*Haq Mahr*). This is Qada in the sense that it is the like of the original settlement. It is ada' in the sense that the slave is not determined. Hence if the slave is given it will be of average kind and in the matter of goods the categories are fixed on the basis of price. Hence the price is the real deciding factor. Therefore , the payment of the price is like the giving of the original thing.

### **Prohibition (Nahyi)**

#### **Definition of Nahyi**

Literally the word Nahyi means to prohibit, to forbid, to restrain.



Technically the word Nahyi means being in a higher authority necessarily demand not to do an act.

The higher authority may either be actually existing in the person making the demand or it may be fictitious and only the person demanding understands and feels it.

#### Source of Proof

The source of proof of a prohibition are those words by which necessarily a demand is made not to do an act. It has four forms.

- i. Verb of Prohibition (*fi'l nahyi*). i.e., those words and action which have been made for this meaning with regard to their shape.
- ii. Words and actions that indicate prohibitions (*kalimat nahyi*) i.e., those words and actions whose literal meaning is to prohibit and forbid.

For example, the words:

Naha (he forbade)

Mana`a (he forbade)

Harrama (he made it unlawful)

Similarly the words and actions which convey the sense of restraining oneself from doing an act.

For example, the words

Kaffa (he restrained himself)

Imtana`a (he restrained himself)

Utruk (you abandon it)

Zar (you leave it)

Da` (you leave it)

A sentence and a verb that have a predicate giving some information (*Jumlah Khabariyyah*).

For example,

*Hurrimat `alaykum ummahatukum*

(Prohibited to you are your mothers)

Literally, it does not mean to stop or restrain. Rather it is as a statement of a fact but here the sense is the same that is prohibition.

Negation and denial of lawfulness (*Hillat*) of any thing.

For example,

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرْهًا وَلَا تَعْضُلُوهُنَّ  
لِتَذْهَبُوا بِبَعْضِ مَا آتَيْنَهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبَيَّنَةٍ وَعَاشِرُوهُنَّ  
بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا  
كَثِيرًا (19)

*La yahillu lakum an tarithunnisa`a karhan*

(It is not permissible for you that you may become heirs of your women.)  
[IV:19]

#### Legal Effect

Basically and generally a *Nahyi* (prohibition) is a proof of permanent unlawfulness whether a prohibition regarding a thing is after its *wujub* or without *wujub*.

This unlawfulness sometimes is qua a *Fard* and sometimes qua a *Wujub*, that is, in the form of *Karahat Tahrimiyyah*.

The prohibition (*nahyi*) is also proof of *Karahat Tanzihiyyah*.

On the basis of circumstances (*Qara'in*). Prohibition is also used to convey other meanings.

A prohibition (*nahyi*) requires ugliness (*Qubh*) and dislike for the act prohibited (*manha`anhu* i.e., *amr mamnu*).

With regard to this ugliness (*Qubh*) the act prohibited (*manha`anhu*) is of two kinds, namely, ugly in itself (*qabih li`aynihi*) and ugly on account of the thing related to it (*qabih li`ghayrihi*)

#### **Ugly in itself (*qabih li`aynihi*)**

##### **Definition**

A prohibited act whose ugliness is due to its own attribute.

##### **Kinds**

It is of two kinds, namely, *qabih li`aynihi wad'an*. and *qabih li`aynihi shar'an*.

##### **Qabih li`aynihi wad'an:**

It is also called *qabih li`zatihi*. It is an act which is ugly in its own self and making. In other words, the reason requires its ugliness.

##### **Example:**

Kufr and shirk are ugly with regard to their very making. Hence their making is ingratitude to the doer of the favours. By this link it is for disobedience and ingratitude towards God. Hence the reason calls them ugly and bad.

##### **Qabih li`aynihi Shar'an:**

It is also called *Qabih li`wasfihi*.

##### **Definition**

It is an act which has been declared bad due to some of its attribute even if the reason does not consider it bad.

##### **Kinds:**

It has two kinds, namely, *Qabih bina'an`ala`adam ahliyyat* and *Qabih bina'an`ala`adam mahalliyat*.

##### **Qabih bina'an`ala`adam ahliyyat:**

An act that has been declared bad by the Shari`ah due to lacking capacity.

**Example:**

Prayer in a state of impurity. The prayer is a good act. Reason considers it good in every state as it is the offering of thanks to the Grantor of favours but in a state of impurity the Shari`ah has declared it bad and prohibited in the sense that an impure person (Muhdith) has been declared by the Shari`ah as lacking the legal capacity to perform the prayer.

**Qabih bina'an `ala `adam Mahalliyyat**

An act that has been declared bad by the Shari`ah due to not being the place of an action.

**Example**

To sell a free person. According to reason the sale is a good and permissible act but the Shari`ah has declared such sale as prohibited in the sense that it does not declare a free person the place of sale or purchase. Same is the sale and purchase of dead and the wine and the blood etc.

**Requirement and Legal Consequence (Hukm)**

All kinds of qabih li `ayni hi are prohibited in all circumstances and for everyone. Those are included in the category of the unlawful and their unlawfulness (hurmat) is not abrogated.

**Qabih li ghayri hi****Definition**

A prohibited act the evil of which is not due to some of its own personal attribute. Rather it is due to the related to it.

**Kinds**

It is of two kinds, namely, *Qabih li ghayri hi bi i'tibar wasf* and *Qabih li ghayri hi bi i'tibar jam`*.

**1. Qabih li ghayri hi bi i'tibar wasf****Definition**

An act the evil of which is due to adoption of some illegal attribute (ghayr mashru' wasf).

**Requirement and Legal Consequence (Hukm)**

Such an act is valid and legal with regard to its own self (*zat*) and origin (*asl*) and it is illegal with regard to its illegal attribute (*ghayr mashru' wasf*).

Hence such dealings should be ended. If those are not ended they will have their legal consequences but those will be sinful acts liable to accountability.

**Example**

Sale and purchase with such stipulation that has been forbidden by the Shari`ah is prohibited. Such a transaction should be brought to an end even if completed. If it is not brought to an end, it will have its legal consequence like benefit of ownership on both sides but due to

disregard of the prohibition by the Shari`ah, it will be a sin liable to accountability.

## **2. Qabih li ghayri hi bi i`tibar jam`**

### **Definition**

A prohibited act that has been declared bad by the Shari`ah due to being with some another act.

### **Requirementtr and Legal Consequence (Hukm)**

If such an act is done it is relied upon and has its Legal Consequences despite being prohibited by Shari`ah but it is bad due to disregard of the Shai`ah.

### **Example**

From the azan of Jumu`ah prayer to the end of the Jumu`ah prayer the sale and purchase of goods and all other engagements due to which one does not offer the Jumu`ah prayer are of the category of Qabi li ghayri hi bi i`tibar jam`.

All such acts are prohibited yet those are relied upon with their sinfulness. It is not the command to undo those act as the payment of the goods purchased is necessary.

### **Combined Legal Effect of both the categories:**

The prohibition in both the categories of these acts is that of Karahat tahrimiyyah. However in the first category there is karahat as well as fasad while in the second category it is only karahat. Hence the first category is called by the jurists as fasid and the second category as makruh and the forms of qabih li `aynihi are called batil.

### **The aforesaid kinds and the acts prohibited by the Shari`ah :**

The jurists have divided the acts into two kinds, namely, af`al hissiyyah and afa`al sha`iyyah.

### **Af`al hissiyyah:**

Those acts that existed prior to the coming of the Shari`ah and no change has been introduced by the Shari`ah in them in their form or meaning.

### **Example**

Qatl, zina, theft etc. existed even prior to the coming of the Shari`ah and no change has been introduced by the Shari`ah in them.

### **Af`al Shar`iyyah**

#### **Definition**

The acts whose present form and Legal Effect has been introduced by the Law (Shari`ah) whether those were existing prior to the coming of the Shari`ah and the Shari`ah has introduced some change in respect of them or their existence and knowledge would have been through the Shari`ah alone.

**Example**

To offer prayer with such attribute that the prayer itself and the duty is dropped and the said attribute causes sin as a prayer that is offered in a place that is extorted one (maghsb). The offering of the prayer in such a land is valid. The duty is also performed but there is the sin of Karahat tahrimi with it.

**Requirement and legal consequences**

The prohibition of af'al hissiyyah falls under the category of acts that are qabih li `aynihi. Hence such acts are not permissible for any one in any circumstance. In other words the prohibited af'al hissiyyah are unlawful (haram).

**2. Af'al Sha`iyyah**

The prohibition of Af'al Shar'iyyah falls under both the categories of qabih li ghayrihi. In other words the prohibited acts by the Shari'ah are Makruh, whether those are makruh tahrimi or makruh tanzih.

**Nahyi and fasad**

Sometimes the jurists declare the doing of an act in a prohibited manner as fasad and use the term sihhah in opposite to it.

Both these meanings are also used in acts of worship ('ibadat) as well as in acts of mutual dealings (mu'amalat). The jurists distinguish the meanings of both the words with regard to their reliance (i'tibar).

**Sihhat in the matter of acts of worship**

It means the doing of an act of worship in such a manner that the demand of it (i.e. the responsibility to perform it) is dropped.

**Fasad in the matter of acts of worship**

It means the doing of an act of worship in such a manner that the demand of it (i.e. the responsibility to perform it) is not dropped.

**Sihhat in the matter of mutual dealings**

To perform a deal in such a manner that the objective of the command is carried out.

**Fasad in the matter of mutual dealings**

It is of two kinds, namely, fasad mahd and butlan.

**Fasad mahd**

It is the doing of an act in a manner that it is executed (*mun'aqad*) with reference to its origin (*asl*) but it does not stand executed with reference to its attribute (*wasf*).

**Legal Effect**

Despite the qabahat (badness) and ma'siyyat (sinfulness) it has its Legal Consequence (mufid hukm).

**Example**

In the first two categories of qabih li ghayrihi this type of fasad is found present.

**Butlan****Definition**

To do an act in such a manner that it is not executed both with reference to its origin or with reference to its attribute.

**Legal Effect**

It is of no advantage with reference to anything. Rather it is sinful.

**Example**

The forms of *qabih li `aynihi* fall under this category. For example, the sale of a free man or the wine etc.

The jurists generally call the dealings of first kind as irregular (*fasid*) and the dealing of second kind as void (*batil*). Generally, they do not distinguish between the irregularity (*fasad*) and voidness (*butlan*) in the matter of marriage (*nikah*). Rather, they deny of any difference. The prayer being irregular or void and the *nikah* being irregular or void have the same sense.

Absolute (*mutlaq*) and restricted (*muqayyad*)

Absolute (*mutlaq*)

Literally absolute means free.

Technically absolute means that particular which indicates its real meaning without any restriction.

**Example**

Human being (*insan*),

Man (*rajul*),

Bird (*ta'ir*).

The above words signify their real meaning without any restriction.

**Restricted (*muqayyad*)**

Literally, a restricted (*muqayyad*) is a word that indicate its real meaning with the addition of some restriction.

By the word restriction (*qayd*) are meant all such thing on the basis of which an absolute (*mutlaq*) does not remain on its state and it has different forms, namely,

1. Adjective (*sifat*)
2. Condition (*shart*)
3. Adverb of time (*zaman*)
4. Adverb of place (*makan*)
5. Number (*`adad*)
6. State (*hal*)

**Legal Effects**

To keep the absolute on its application and to keep the restricted on its application. In other words, to act upon the absolute without any

restriction and to act upon the restricted with due regard to the restriction. Hence for acting upon an absolute it is sufficient to act upon any one individual command which is like the particular. Similarly to act upon the restricted such individual act will be needed in which the said restriction is found.

### Example

In the matter of both an oath (Qasam) and murder (qatl) the command is to free a slave as an expiation (kaffarah). However in the matter of expiation of oath the mention of a slave is without any restriction while in the matter of expiation of murder there is a restriction of believing along with the slave. Hence in expiation of oath any slave Muslim or non Muslim can be freed while in the expiation of murder only a Muslim slave can be freed.

Carrying an absolute to the restricted.

Some times it so happens that a thing that is mentioned or stated at some occasions. In the texts (nusus) relating to it both absoluteness and restriction are included. The question arises as upon which one should act, on absoluteness or restriction. As every such text in which some command is stated consists of two things. One thing is the command (hukm) and the other is the cause of hukm. The absoluteness and the restriction can be related to each one of the two.

There are four forms of absoluteness and restriction, namely,

1. Muttahad al-sabab Muttahad al-hukm
2. Muttahad al-sabab Mukhtalaf al-hukm
3. Mukhtalaf al-sabab Muttahad al-hukm
4. Mukhtalaf al-sabab Mukhtalaf al-hukm

In the above forms in the first category the absolute is carried to the restricted. In other words, in the first formation, the absolute is declared restricted while in the remaining three formations, it is not so.

There is only one formation of relationship of both with the Sabab (Reason).

#### a. **Muttahadd al-sabab muttahadd al-hukm**

Where the command and the cause relating to an object are the same. In such a case the absolute will be applied to the restricted. For example, among the unlawful things the blood is also mentioned in the holy Qur'an. In Surah al-Ma'idah it is mentioned absolutely while in surah al-An'am it is mentioned with the adjective "masfuh" (oozing). The law that is unlawfulness of the blood and its cause i.e, impurity and ugliness are one and the same. Hence the absolute will be declared as restricted. If it is known as to which provision of law was earlier in time of its promulgation than the other, the later text shall be declared as the abrogating the former text and the former text shall be declared as having been abrogated by the later text.

**b. Muttahid al -sabab mukhtalif al-Hukm**

Where the cause relating to a thing is one but the command is different. For example, the Wudu and Tayammum are the forms of cleanliness. Their cause is one i.e. the intention to offer prayer while the command is different.

The Wudu is related to four organs of body while the Tayammum is related to two organs of body. Hence one of them shall not be taken for the other. That is the absolute shall not be applied to the restricted nor restricted to the absolute.

**c. Mukhtalif al-sabab muttahiidd alHukm.**

Where the causes are multiple and different while the provision of law is the one. For example, in the matters of expiation of Qatl Khata and Qasam the law is one i.e., one slave is to be set free by the offender.

In the case of expiation of Qatl Khata there is a restriction that the slave must be a Muslim while in the case of expiation of breach of an oath there is no such restriction imposed in the relevant provision of law.

The causes are different i.e. the Qatl Khata and the breach of Qasam.

Here the absolute will not be declared restricted. In the matter of murder by mistake the restriction of the slave to be set free must be a Muslim is to be fully observed while in the matter of breach of oath, the slave to be set free as an expiation of the guilt may be any one, i.e. Muslim or non Muslim.

(e) Absoluteness and restriction along with causes the command is one.

In such a case also the absolute is not declared restricted. Rather both are acted upon. For example in the matter of cause of Sadaqah al-Fitr according to some ahadith the Sadaqah al Fitr is commanded on the basis of care and guardianship whether the slave is a Muslim or non-Muslim while in some ahadith the restriction of the slave being a Muslim is mentioned. Thus the absolute will not be declared as restricted and in case of every slave, be he Muslim or non Muslim payment of Sadaqah al-Fitr is an obligation upon the basis of care and guardianship.

**General (ʿAm)**

It is the second kind of the word with regard to the meaning for which it is made (maʿna mauduʿ la hu).

**Definition**

General is a word made once for unrestricted members of one meaning.

**Difference between General and Absolute**

The distinction between a general and an absolute word lies in it that a general is used for all its members at once while a absolute is applied to any one of its members that is not determined. Hence instead of one the other is understood as a substitute. For example in the phrase "tahriru raqabatin" (setting free of a slave), the word "raqabah"



is absolute as it means any one member. The word “riqab” is general as it means all the members.

#### **Words of General (alfaz `umum)**

- a) All those nouns to which “al” of encompassing (*lam* of *istighraq*) is prefixed whether it is any kind of plural and it is a noun plural, a noun of genus, or a noun singular.
- b) Plural common nouns.
- c) Nouns to which “al” of genus (*lam* of *jins*) is prefixed.
- d) Singular or plural which is relative towards proper noun and the relativity is for encompassing.
- e) Nouns of condition.
- f) Nouns of interrogation.
- g) Nouns of communion in whatever form or word while their use is not for determined individuals.
- h) Common noun under negation.
- i) Common noun under condition.
- j) Common noun whose attribute is some general attribute.
- k) Common noun under affirmation as for example the Holy Qur'an says : “*alimat nafsun ma ahdarat* ” which means “*alimat kullu nafsin ma ahdarat*”.
- l) Nouns to which there is relativity of the words “*kull*” (all) or “*jami*” (the whole) or such like other words.
- m) All those nouns which give the meaning of group or association for example:

Ma`sharun,

Ma`ashirun

`Ammatun

Kaffatun

Qatibatun

Rahtun

Qaumun

Jama`atun

Jam`un

Jami`un

#### **Kinds and requirements**

- a. One general rule of the general is that in respect of an act the generality of the word is relied upon and not the cause that has become the cause of statement of any law for that general word. Many verses of the Holy Qur'an containing injunctions were revealed on account of particular events in respect of particular persons but as their words are general, therefore, the law contained in those verses

has been declared general (in the matter of its application). for example the verse of amputation of hand was revealed in respect of a particular event but the law contained in it has been kept general (in the matter of its application). The reason is that the word is general.

b. There are two basic kinds of general.<sup>172</sup>

General conveying the sense of generality (*`am mahmul ala `amum*) and general conveying the sense of particularity (*`am mahmul `ala khasus*)

1. General conveying the sense of generality (*`am mahmul ala `amum*)

It has also two kinds.

General conveying the sense of generality absolutely. (*`am mahmul ala `amum qat'an*) and general absolute (*`am mutlaq*)

**General conveying the sense of generality absolutely. (*`am mahmul ala `amum qat'an*)**

#### Definition

A general word which conveys the sense of generality due to some circumstance becoming an obstacle in the way of particularity.

#### Example

The Holy Qur'an says :

انْظُرْ كَيْفَ فَضَّلْنَا بَعْضَهُمْ عَلَى بَعْضٍ وَلَآ خِرَةُ أَكْبَرُ دَرَجَاتٍ وَأَكْبَرُ تَفْضِيلًا (21)

"Ja'alna min al-ma'i kulla shay'in hayyin"

(We created from water every living thing.) [17:21]

In this glorious verse of the Holy Qur'an a general rule has been stated that We created every animate object by means of water.

Here the statement of general rule is due to the presence of a circumstance of obstacle from particularity.

**General absolute (*`am mutlaq*)**

#### Definition

A general conveying the sense of generality due to non- existence of any proof of particularity.

#### Example

The Holy Qur'an says:

إِنَّ رَبَّكَ يَعْلَمُ أَنَّكَ تَقُومُ أَدْنَىٰ مِنْ ثُلُثِي اللَّيْلِ وَنِصْفَهُ وَثُلُثَهُ وَطَائِفَةٌ مِّنَ الَّذِينَ مَعَكَ وَاللَّهُ يُقَدِّرُ اللَّيْلَ وَالنَّهَارَ عَلِمَ أَن لَّنْ نُّحْصُوهُ فَتَابَ عَلَيْكُمْ

<sup>172</sup> *Fawatih*, vol. I, p. 290; *Al-Taudih*, p. 129.

فَاقْرَأُوا مَا تيسَّرَ مِنَ الْقُرْآنِ عَلِمَ أَنْ سَيَكُونُ مِنْكُمْ مَرْضَى وَآخَرُونَ  
يَضْرِبُونَ فِي الْأَرْضِ يَبْتَغُونَ مِنْ فَضْلِ اللَّهِ وَآخَرُونَ يُقَاتِلُونَ فِي سَبِيلِ اللَّهِ  
فَاقْرَأُوا مَا تيسَّرَ مِنْهُ وَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ وَقَرِّضُوا اللَّهَ قَرْضاً  
حَسَناً وَمَا تَقَدَّمُوا لَأَنْفُسِكُمْ مِنْ خَيْرٍ تَجِدُوهُ عِنْدَ اللَّهِ هُوَ خَيْرٌ وَأَعْظَمُ  
أَجْراً وَاسْتَغْفِرُوا اللَّهَ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (20)

Faqr'u ma tayassara min al-Qur'ani

(Recite that much of the Holy Qur'an which is convenient for you to recite) [LXXIII: 20]

Here no proof of particularity exists as such the sense is general.

#### **Requirement and Legal Consequence of `am mahmul `ala `umum qat`an**

Both the above said two kinds of `am are like particular (khas) in the matter of belief (I'tiqad) and action (`amal).

Thus under the law in view of the example given so much of the Holy Qur'an may be recited in the prayer that can be termed as Qur'an.<sup>173</sup>

However, sometimes a general is contradictory to some particular. In such a case, if it is known which of the two is earlier and which of the two is later, then in case the particular is later in time than the general and is adjacent to the general, the general shall be declared particular, if it is not adjacent to the general. Rather, it is revealed after sometime then it will be declared as an abrogating law in respect of the particular. In case the general is later in time of revelation, it will be the abrogating law for the particular. In case the earlier or later is not known then the preferred (*rajih*) shall be acted upon. If it is not possible, then the quantity to the extent of contradiction shall not be acted upon.<sup>174</sup>

#### **General conveying the sense of particular (`am mahmul `ala khusus)**

##### **Definition**

A general whose some members are excluded from the application of the law on the basis of some proof.

##### **Forms**

It is of two forms:

1. General made particular on the basis of circumstance (`Am Makhsus bina'an `ala qarinah); and
2. General made particular on the basis of proof (`Am Makhsus bina'an `ala dalil).

<sup>173</sup> *Fawatih*, vol I, p. 265; *Kashf*, vol. I, pp. 304-6

<sup>174</sup> *Fawatih*, vol I, p. 145; *Al-Taudih*, vol. I, p. 41.

General made particular on the basis of circumstance ('Am Makhsus bina'an 'ala qarinah)

### Definition

A general whose some members are excluded from the applicability of the law on account of some circumstance (*qarinah*).<sup>175</sup>

Here the word *qarinah* does not refer to its literal sense. Rather, it refers to an omission or addition in the real sense of a word on the basis of intellect, sense, or habit etc.

### Legal Effect (hukm)

On the basis of circumstance, the members for which a word is made particular, it will be like the first kind of particular and general, i.e., to rely and act upon it with definitiveness is essential.

### Example

The Holy Qur'an says:

فِيهِ آيَاتٌ بَيِّنَاتٌ مَّقَامُ إِبْرَاهِيمَ وَمَنْ دَخَلَهُ كَانَ آمِنًا وَلِلَّهِ عَلَى النَّاسِ حِجُّ  
الْبَيْتِ مَنْ اسْتَطَاعَ إِلَيْهِ سَبِيلًا وَمَنْ كَفَرَ فَإِنَّ اللَّهَ غَنِيٌّ عَنِ الْعَالَمِينَ (97)

"Walillahi 'alannasi hijju'l-bayti manistata'a ilayhi sabila"

"And it is Allah's right on the people that those who have the capacity to go to the house, should perform hajj." [III:97]

Here the word *al-nas* is general. Its requirement is that it should be for all human being and at least for all Muslims, but due to the circumstance of intellect (*qarinah 'aqliyyah*) this word carries the sense of particularity. It refers to some individuals, i.e., adult and sane Muslims as there is no demand nor any duty cast on minors and insane persons.

### A general made particular on the basis of proof ('Am Makhsus bina'an 'ala Dalil)

### Definition

It is a general some of whose members are declared excluded from the application of the law on the basis of some proof (*dalil*).

### Legal Effect

Such a general is considered as not definitive (*zanmi*). The members that remain behind after those who are excluded from the applicability of the law on them on the basis of proof it is obligatory for them to act upon the law with the possibility that on the basis of some other proof some more members may be excluded. Thus if later on some such proof comes forward, some more members will be declared excluded.

### Example

The Holy Qur'an says:

<sup>175</sup> Nur al-Anwar, p. 70; Al-Talwih, p. 119.

وَالْمُخَصَّنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ كِتَابَ اللَّهِ عَلَيْكُمْ وَأُحِلَّ  
لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسَافِحِينَ فَمَا  
اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَاضَيْتُمْ  
بِهِ مِنْ بَعْدِ الْفَرِيضَةِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا (24)

Wa uhillal lakum ma wara'a zalikum

(And it is lawful for ye all such women who are besides those who have been made unlawful for ye) [IV: ]

There are other texts that tell that some other women are also prohibited for marriage. Thus the word "ma" in this glorious verse is general conveying the sense of particular the proof of which is available in the other texts.<sup>176</sup>

### Particularity (Takhsis)

#### Definition

To turn a general on the basis of some proof from its generality (the meaning for which such word was originally made) to particularity.<sup>177</sup>

#### Conditions (Shara'it)

There are two conditions for such change. It (*dalil mukhassis*) should be adjacent (*muttasil*) to the general (*'am*) to which it is declaring particular and the speech in which the general particular (*'am khass*) is mentioned, the proof of the particular (*dalil mukhassis*) should not be its part (*juz'*), i.e., whether it is not speech or if it is speech, it is in the form of permanent sentence (*mustaqil*) and is not in the status of a part in the sentence.

Rather, if the second sentence is not adjacent, it is called abrogation (*naskh*). And if it is adjacent but not *mustaqil*, then it is believed that the speaker has stated only this much that the thing should be delivered to Zaid and has not mentioned anyone at all.<sup>178</sup>

#### Example

Where a person says to another person:

"Do not deliver this thing to any person and deliver it to Zaid".

This statement has got two sentences. The first sentence is: "Do not deliver this thing to any person". Here the word "any" is in the general sense. The second sentence is adjacent to the first sentence as well as it is complete and independent in itself. It has made the general particular. By this sentence, Zaid has been excluded from the command. If the

<sup>176</sup> *Al-Taudih*, pp. 119, 121; *Kashf*, vol. I. p. 294; *Fawatih*, vol. I, p. 308.

<sup>177</sup> *Kashf*, vol. I, p. 306; *Al-Madkhal*, p. 198.

<sup>178</sup> *Al-Madkhal*, pp. 203-4; *Kashf al-Mubham Sharh Musallam*, Abdul Haq Khayrabadi, Kanpur, vol. I, p. 307; *Al-Taudih*, vol. I, pp. 42-3.

second sentence is uttered after some pause, this status of it will not remain with it. For example, if it is stated:

“Don’t give except to Zaid.”

This form of speech will also not termed as particularity (*takhsis*) literally. The reason is that the phrase “except to Zaid” is not a complete sentence.<sup>179</sup>

It should also be kept in mind that the individuals / members that are excluded from the application of law in respect of them are sometimes known and determined and sometimes those are unknown as in the aforesaid example, if it is stated as under:

“Do not give it to anyone and give it to a person of your community.”

Here, the man excluded is also unknown and undetermined. Had he been named as is the case in the first example, the excluded person / member / individual would have become known and determined.

### Warning

Both these conditions are for the first particularity and if in any general once a particularity is made on the basis of an exhaustive proof of both these conditions, then these conditions are not for later particularities.<sup>180</sup>

### Legal Effect (*hukm*)

The Legal Effect of a general particular (*`am makhsus*) have been described above, viz.,

- (a) If a general is declared particular due to a circumstance of reason (*qarinah `aqliyyah*), it remains definitive (*qat'i*) as the general is made applicable when it is not declared particular.
- (b) If a general is declared particular on the basis of some proof based on tradition (*dalil qauli*), it does not remain definitive (*qat'i*). Rather, it becomes not definitive (*zanni*).<sup>181</sup>

The particularity (*takhsis*) once made can be thereafter made twice and thrice, if the proofs (*dala'il*) are available to do so.

### Limit of Particularity (*hadd takhsis*)

As already stated the real nature of particularity is to declare some of the members of general as excluded from the applicability of the general provision of law. In respect of a general, on the basis of proofs, the process of *takhsis* (making particular) can take place several times. However, *takhsis* does not mean that it shall continue till no member remains under the general. The reason is that in such a case the word general shall not remain particular and would become abandoned (*matruk*). In other words, there will remain no form to act upon it. This is prohibited and disapproved that acting upon any command is totally abandoned. Hence, a limit is fixed for *takhsis*. The

<sup>179</sup> *Fawatih*, vol. I, pp. 349, 357.

<sup>180</sup> *Nur al-Anwar*, pp. 202-3.

<sup>181</sup> *Al-Taudih*, vol. I, p. 121.

said limit is that, the process of *takhsis* may continue till the text does not become abandoned in the matter of acting upon it (*matruk al-`amal*). In other words, there should remain, at least, one member behind for its applicability on it. If there is *takhsis* in the matter of the words which are plural common noun like *rijalun wa nisa'un* or plural words having the same meaning like *rahtun* or *qaumun* etc., there should remain behind, at least, three members so that the sense of plurality may be found in it.<sup>182</sup>

#### **Matters in which particularity is made (mukhassasat)**

They are the texts and statements of the Holy Qur'an and Ahadith.

#### **Matters that cause particularity (mukhassasat)**

They are:

1. The Holy Qur'an (â ¼šZ wò®šZ);
2. Hadith Mutawatar (®†ZÂ¥, î ¬š);
3. Hadith Mash-hur (eÂ ², î ¬š);
4. Khabar Wahid (¬šZy ®¤);
5. Ijma` Mutawatar; (®†ZÂ¥, n£ž%Z)
6. Ijma` Mash-hur; (eÂ ², n£ž%Z)
7. Ijma` Ahadi; (|c£šòn£ž%Z)
8. Fi'l Rasul (uÂ e á•);
9. Taqrir Rasul (uÂ e ® ®†);
10. Qaul Sahabi (ç...£© uÂ-);
11. Fi'l Sahabi (ç...£© á•);
12. Taqrir Sahabi (ç...£© e ®†);
13. `Urf `Amali (ç¼ž“ p®);
14. `Urf Qauli (çšÂ- p®);
15. `Aql wa **Qiyas** (قياس) (h£Ã-y áª).<sup>183</sup>

However, it should be borne in mind that these matters do not become the cause of particularity (*takhsis*) in every circumstance and for every general. Rather, some general is definitive (*qat'i*) and some general is not definitive (*zanni*).

A definitive (*qat'i*) is that which is in the Holy Qur'an or in a *Mash-hur* and *Mutawatar* Hadith in respect of which there had been no particularity.

A not-definitive (*zanni*) (çTÀG') is that which is according to any of the aforesaid forms and in which there had been particularity (*takhsis*) and also which has been mentioned in the ahadith as a general.

<sup>182</sup> *Fawatih*, vol. I. pp. 306-7; *Al-Taudih*, pp. 133-5; *Nur al-Anwar*, pp. 82-3.

<sup>183</sup> *Fawatih*, vol. I, pp. 345-60; *Al-Madkhal*, p. 217, 243.

For the first particularity of a definitive general, it is necessary that the matter causing particularity (*mukhassis*) must be definitive (*qat'i*). Hence, its particularity will only be made on the basis of another verse of the Holy Qur'an or *hadith mutawatar* or *hadith mash-hur* or *ijma' mutawatar* (عامة النسخة) or *ijma' mash-hur* (عامة النسخة). Further, it can be by means of sense (*hiss*) and intellect / reason (*'aql*) and custom (*'urf*).

Examples may be seen above under the examples of both kinds of a general conveying the sense of particular (*'am mahmul 'ala khusus*). *Takhsis* through *hiss* can be seen in the verse of the Holy Qur'an where it is stated about the Queen of Sheeba:

إِنِّي وَجَدْتُ امْرَأَةً تَمْلِكُهُمْ وَأُوتِيَتْ مِنْ كُلِّ شَيْءٍ وَلَهَا عَرْشٌ عَظِيمٌ (23)

“*Wa utiyat min kulli shay'in*”

“And she was given out of everything.”

[27:23]

Literally, the kingdom of Hadrat Sulayman (peace be upon him) was also included in the word *shay'in*, but it is evident that it was not. It is empirically negated.

For further particularities of definitive general and not-definitive general, it is not necessary that there should be a definitive proof (*dalil qat'i*). Hence, particularity can be made by means of all the aforesaid matters.<sup>184</sup>

#### **Distinction between particularity (*takhsis*) and restriction (*taqyid*)**

To remove the generality (*'umum*) of a word, one form is restriction (*taqyid*). The details have already been given under the headings Absolute and Restricted. The distinction between particularity and restriction is evident to the extent that the particularity relates to the general while the restriction relates to the absolute and there is distinction between general and absolute.

- (a) Particularity means to exercise control in the literal meaning of the word while restriction means the addition of any limit or meaning over the literal meaning. For example, the word *al-rajul* has a literal meaning. If a restriction of the adjective *al-ghani* or *al-faqir* is added to it, there would be addition of such meaning which the word *al-rajul* does not indicate. The form of particularity is that all such members that come under the word, some of them are excluded.

Even after particularity, the real meaning of the general remains reliable and usual while after restriction, the restriction of another meaning is added to the word.

- (b) The restricting (*muqayyid*) is also a speech while the word making particular (*mukhassis*) can be other than speech as is evident from the details of *mukhassis* given above.

<sup>184</sup> *Al-Madkhal*, p. 219; *Fawatih*, vol. I, p. 349, 357.



- (c) In case, a *mukhassis* is a speech, it must be a complete sentence (*jumlah*), while a *muqayyid* can be other than a speech.<sup>185</sup>

### SECTION III

#### COMMON (mushtarak)

##### Definition.

A common is that word which has been made for two or more meanings.

##### Distinction between general and common

- a) The meaning of general is one for which it is made while the meanings of common are more than one for which it is made.

A common indicates multiple meanings while a general indicates only one meaning. However, the meaning applies to multiple individuals.

- b) A general is made only once while a common is made mostly more than once for the meanings for which it is made.

The word "mostly" has been used as a restriction as in the making of a common there is no multiplicity. Rather the original meaning for which it is made being a common is used in multiple matters.

- c) There is multiplicity (*ta'addud*) of meaning in general but not encompassing (*hasr*) while the meaning of common being multiple is also encompassed.
- d) From general all members at a time that come within its meaning can be understood while out of the multiple meanings of common only one such meaning can be taken at one time.

##### Causes of being common (asbab ishtarak)

Those matters that become the cause of use of a word in multiple meanings are as follows:

- a) The maker being different with regard to the country and nation. As a word made by people or nation of a place for a meaning, is made by people and nation of other place for some other meaning.
- b) Use in different meanings one and the same word by the people of one and the same nation and place.
- c) Use of a word in technical sense instead of its real sense for which it was made. For example, the technical terms of the Shariah, arts and science.
- d) Use of a word in metaphorical sense instead of its real sense in a manner that the metaphorical meaning becomes like the real meaning.
- e) The existence of such propriety (*munasibat*) between the two meanings that has become the cause of use of such word for both the meaning and by the lapse of time both the meanings are understood as its original meanings.

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<sup>185</sup> ibid.

**KINDS OF COMMON (*aqsam mushtarak*)**

Common is of two kinds, namely, common in words (*mushtarak lafzi*) and common in meaning (*mushtarak ma`nawi*).

**i. Common in words (*mushtarak lafzi*)****Definition.**

A common which is made in many times to give name to different things and meanings.

**Example**

The word `ayn was made in many times for different things, such as, eye, spring, knee etc.

**ii. Common in meaning (*Mushtarak ma`nawi*)****Definition.**

A common which is made for such meaning and signification which is common between a few things and due to such propriety (*munasibat*) is used for each separately in a manner that it is understood that such word was made in the said meaning for each permanently.

**Example:**

The word *qar'un* was originally made to give the sense of every such time in which a work is found or done as habit. Keeping in view this propriety this word is used for,

1. Fever that comes consecutively.
2. Menstruation (*hayd*).
3. Purity/Cleanliness (*tuhr*).

The causes of Ishtirak consisting first four forms are called common in words while the cause of ishtirak consisting the fifth form is called common in meaning.

**LEGAL EFFECT**

At one time more than one meaning can not be taken. Rather only one meaning is taken of a common. Hence acting upon it will be deferred for a while till by means of ponderence and some circumstantial evidence (*qara'in*) a place for a single meaning is determined. When a single meaning is preferred, it will be acted upon accordingly.

**SOURCES OF PREFERENCE (*wasail rujhan*)**

There are some sources or means to give preference to a single meaning out of more than one meanings of a common.

Those are,

- i. The past portion of speech
- ii. The coming portion of speech
- iii. The occasion of speech. For example, a word which has got a particular meaning in the Shari`ah or any other art and science, will be given the same known meaning in the books of Shari`ah and such

art and science. However, if any circumstance exists for taking its literal meaning, the same will be taken.

- iv. The original meaning of the word and the demand of the propriety of the occasion.

### EXAMPLES

1. Common noun, such as, *`aynun* (an eye, a spring, a knee)
2. Common verb, such as, *`as`asa* (to go forward and to go backward)
3. Common preposition, such as, *min* [It is used as, *ibtida'* that is beginning, giving the sense of the English word "from"; *ji'tu min al-masjidi* (I came from the mosque).  
*tab'id* that is some of the things; *akhaztu min al-kutubi wa zahabtu ila al-masjidi* (I took some books and went to the mosque)  
*bayan* that is explaining a statement; *fajtanibu al-rijsa min a-authani* (So keep yourselves away from the impurity of the statues).  
*Za'idah* that is redundant; *kana min matarin* (It rained). *ma kana min matarin* (It did not rain).
- e) In the Holy Qur'an the *`iddat* of a *mutallaqah* is mentioned as three *quru'*. The word *qar'un* is used in two meanings, viz., menstruation (*hayd*) and purity (*tuhr*). The Ahnaf have declared its meaning as menstruation after much ponderance.

### Section IV

#### MU'AWWAL

##### Definition

A common whose anyone meaning is preferred on the basis of not definitive circumstances.

Not definitive circumstances refer to **Qiyas** (قياس), *khavar wahid*, and the sources of preference of a common.

##### Rule (hukm)

Acting upon it is necessary but with the possibility of error. It is so because there may be some other meaning which we could not gather.<sup>186</sup>

##### Example

As an example of *mushtarak* when single meaning of the word *qar'un* stood determined, i.e., menstruation, such word became *mu'awwal*.

Another name of *mushtarak mu'awwal* is *mufassar*. When out of several meanings of a *mushtarak*, a single meaning is preferred it is called *mufassar*.

<sup>186</sup> *Nur al-Anwar*, p. 85; *Al-Taudih*, p. 88; *Nizami*, p.6, *Umdah*, p. 13; *Hisami*, p. 7.

**Definition**

A *mushtarak* whose single meaning is determined by means of a definitive proof.

Under the definitive proof, besides the definitive proof of the Holy Qur'an and Hadith, the statement of the speaker is also included.

**Rule**

To act upon it is necessary without any doubt.<sup>187</sup>

**Example**

Where a person uses the word *`ayn* in his speech which has many meanings such as an eye, a spring, etc. and along with it says that he has meant from the said word an eye or a spy or a spring of water. In other words, with regard to the fixation of the single meaning, a common (*mushtarak*) is of two kinds:

1. If the fixation or determination of the meaning of a common is with non-definitive proof, it is called *mu'awwal*.
2. If the fixation or determination of a common is with definitive proof, it is called *mufassar*.

**CHAPTER 2****DIVISION II****with regard to the appearance of meaning**

There are four kinds of word with regard to the appearance of its meanings. In fact, these kinds are with reference to the ranks of appearance. They are:

1. Apparent / Manifest (*Zahir*)
2. Text (*Nass*)
3. Mufassar
4. Muhkam

These four kinds are not opposite to the four kinds already stated above. Rather, these four can be found with anyone of them.

**1. Apparent / Manifest (*Zahir*)****Definition**

A word the meaning of which are understood by the listener immediately on hearing without any further thinking about it.

**Rule**

To act upon it is obligatory. But with the possibility that there may be some *ta'wil* or *takhsis* or *mansukh* in such word.

**Example**

The Holy Qur'an says:

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<sup>187</sup> *'Usul*, p. 14; *Al-Taudih*, p. 88; *Nizami*, p. 6.

“*Ahallallahul bay`a wa harramarriba*”.

“Allah has made the sale lawful and the riba unlawful.” [ : ]

Everyone who listens this verse immediately understands that *bay`* is lawful and riba is unlawful. However, there is possibility of *ta`wil*, *takhsis*, or *naskh* in it.

## 2. Text (Nass)

### Definition

Literally, text means the statement of speech, explicit speech.

Technically, text means an apparent word which is also the objective of the speech. In other words, a word the meaning of which are understood by the listener and the speaker had spoken it to convey the same meaning.<sup>188</sup>

### Rule

To act upon it is obligatory with the possibility of *ta`wil* and *naskh*.

### Example

The same as given above in respect of apparent. By it, the lawfulness of sale and unlawfulness of usury has been stated and the object is to make the difference between the two understandable.

## 3. Apparent as to objective and free from *ta`wil* and *takhsis* but having the possibility of *naskh* (Mufassar)

### Definition

An apparent which is so clear along with its being the objective of the speech that there remains no possibility of any *ta`wil* or *takhsis*. Such explicitness may be due to the meaning of the word itself or due to the statement of Allah and the Messenger of Allah (peace and blessings of Allah be upon him) and the statement of the Messenger of Allah (peace and blessings of Allah be upon him) may be *qauli* or *fi`li*.

### Rule

To act upon it is obligatory, however, the possibility of *naskh* is there.

### Example

“*Fa qatilul mushrikina kaffatan*”.

“Fight with all the *mushrikin*”. [??? : ???]

The apparent meaning and fighting with the *mushrikin* being stated as a command, the addition of the word *kaffatan* as a restriction, it is free from the possibility of *takhsis* as such it is *mufassar*.

The Holy Qur`an says:

“*Aqimussalata wa atuzzakata*”.

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<sup>188</sup> *Fawatih*, vol. II, p. 19.

“Establish regular prayer and pay zakat.”

The words *salat* and *zakat* have been explained and fully stated by the Messenger of Allah (peace and blessings of Allah be upon him) as such they are free from any *ta'wil* as such they are *mufassar*.

#### **Mufassar is of two kinds:**

A mufassar which is free from any *ta'wil* or *takhsis* due to its own words and *sighah* like the numbers (of counting). There is no scope for any *ta'wil* or *takhsis* in their meaning. One is one, two is two and three is three etc.

A mufassar which has the possibility literally and such possibility is ruled out by some definitive explicitness and proof. Such a mufassar is technically called general (*'am*) in which the possibility of *takhsis* is removed. For example, the Holy Qur'an says:

“*Fa sajadal mala'ikatu kulluhum.*”

Here the word *mala'ikah* is general. By the addition of the restriction of *kulluhum*, the possibility of *takhsis* in it has been removed.

Sometimes, a mufassar is *mujmal* and it is made explicit and thereby the possibility of *ta'wil* is removed. For example, the Holy Qur'an says:

“*Fa sajadal mala'ikatu kulluhum ajma'un.*”

Here, by the addition of the restriction of *ajma'un*, the possibility of *ta'wil* that the angels prostrated individually or jointly has been removed and it has been determined by the word *ajma'un* that they all had prostrated jointly.<sup>189</sup>

#### **4. Apparent as to objective without the possibility of ta'wil, takhsis, and naskh (Muhkam)**

##### **Definition**

Literally, *muhkam* means strong and well-established.

Technically, *muhkam* means an apparent meaning which is the objective of the speech and is free from every *ta'wil*, *takhsis* and *naskh*.

##### **Rule**

To act upon it is obligatory without any doubt.

##### **Kinds**

1. Well-established in meaning in itself (*Muhkam li zatihi*);
2. Well-established due to there being no chance of abrogation by revelation (*Muhkam li ghayrihi*)
3. Well-established in meaning in itself (*Muhkam li zatihi*)

<sup>189</sup> *Kashf al-Mubham Sharh Musallam*, Maulana `Abdul Haqq Khayrabadi, vol. I, p. 50; *Nizami Sharh Hisami*, Nizamuddin Kayranwi, p. 8; *Usul al-Shashi*, Ishaq bin Ibrahim al-Shashi al-Khurasani, p. 14; *Umdatul Hawashi*, Maulana Fayzul Hasan Gangohi, p. 14.

**Definition**

A well-established (*muhkam*) that is free from attributes opposite to its well-establishment (*ihkam*) with regard to its own meaning.

It is of two forms.

- a) There exists some such word in the statement (*'ibarat*) that tells permanence / non abrogation at any time, place or state (*'abadiyyat*). For example, the Qur'anic verse:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَدْخُلُوا بُيُوتَ النَّبِيِّ إِلَّا أَنْ يُؤْذَنَ لَكُمْ إِلَى طَعَامٍ غَيْرٍ  
نَظِيرِينَ إِنَّهُ وَلَكِنْ إِذَا دُعِيتُمْ فَادْخُلُوا فَإِذَا طَعِمْتُمْ فَانْتَشِرُوا وَلَا مُسْتَأْنَسِينَ  
لِحَدِيثٍ إِنَّ ذَلِكَ كَانَ يُؤْذِي النَّبِيَّ فَيَسْتَحْيِي مِنْكُمْ وَاللَّهُ لَا يَسْتَحْيِي مَنْ  
الْحَقِّ وَإِذَا سَأَلْتُمُوهُنَّ مَتَاعًا فَاسْأَلُوهُنَّ مِنْ وَرَاءِ حِجَابٍ ذَلِكُمْ أَطْهَرُ  
لِقُلُوبِكُمْ وَقُلُوبِهِنَّ وَمَا كَانَ لَكُمْ أَنْ تُؤْذُوا رَسُولَ اللَّهِ وَلَا أَنْ تَنْكِحُوا  
أَزْوَاجَهُ مِنْ بَعْدِهِ أَبَدًا إِنَّ ذَلِكَ كَانَ عِنْدَ اللَّهِ عَظِيمًا (53)

"Wa ma kana lakum an tu'zu Rasulallahi wa la an tankihu azwajahu min  
ba'dihi abadan".

Inna zalikum kan `indallahi `aziman.

(Nor is it right for you

That ye should annoy

Allah's Messenger, or that

Ye should marry his widows

After him at any time.

Truly such a thing is

In Allah's sight an enormity.

[xxxiii: 53]

This command is for ever. The word '*abadan*' has left no doubt about the permanence of this command .

- b) The subject matter has no possibility of any abrogation . For example, it relates to the beliefs (*'aqa'id*) or morals (*akhlaq*) as the Holy Qur'an says:

Innallaha `ala kulli shay'in qadir

Verily, Allah hath power over all things.

[???:???]

**Muhkam li ghayrihi**

A apparent (*zahir*) which is not well-established (*muhkam*) with regard to its wording and meaning. That is , there is scope of its abrogation but

before the command of abrogation had come due to the death of the Holy Prophet (Peace and blessings of Allah be upon him) it had become secure from any abrogation and had been declared as permanent. Thus after the death of the Holy Prophet (Peace and blessings of Allah be upon him) the three aforesaid categories of word, viz. Apparent (*zahir*), text (*nass*) and explicit (*Mufassar*) are also well-established (*muhkam*) as against abrogation (*naskh*).

#### Inter- relation of the four kinds of word

Inter-relation between the aforesaid four kinds of the word is that in every succeeding kind full regard is given to the meaning of the preceding kind. Thus in the definition of text, the meaning of apparent and in the definition of explicit the meaning of apparent and text and in the definition of well-established (*muhkam*) the meanings of the foregoing three or their realities restriction is present. This is the reason that some times these four kinds are combined in one single statement. For example the Holy Qur'an says:

(وَإِذْ قُلْنَا لِلْمَلَائِكَةِ اسْجُدُوا لِآدَمَ فَسَجَدُوا إِلَّا إِبْلِيسَ أَبَىٰ وَاسْتَكْبَرَ وَكَانَ مِنَ الْكَافِرِينَ (34))

*Fasajadal-mala'ikatu kulluhum ajma'un.*

(Thus all the angels prostrated)

[2:34]

It is a apparent (*zahir*) as the meanings are clear.

It is a text (*nass*) keeping in view the object of telling the besides the Satan (Iblis) all the angels had prostrated.

It is an explicit (*mufassar*) as the word *kulluhum* (all of them) is telling that the whole assembly had prostrated while the word *ajma'un* (all) is telling that the prostration was performed by all the angels at one time.

It is a well-established (*muhkam*) as there is a statement of an event in which there is no question or possibility of any abrogation.

#### 6. Degrees of status of the four kinds of the word with regard to manifestation of its meaning.

The first kind is the lowest and the fourth is the highest. The benefit of it appears when there is some contradiction between the two categories or more than two categories regarding any thing. At that time the strongest is adopted and also acted upon. For example the Holy Qur'an says:

وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ كِتَابَ اللَّهِ عَلَيْكُمْ وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسَافِحِينَ فَمَا



اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً وَلَا جُنَاحَ عَلَيْكُمْ فِي مَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا (24)

*Uhilla lakum ma wara'a zalikum.*

(Besides them, other women are lawful for ye)

[IV: 24]

It is apparent (zahir) in the matter of keeping four wives.

وَإِنْ خِفْتُمْ أَلَّا تُفْسِدُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَذْنَىٰ أَلَّا تَعُولُوا (3)

*Fankihu ma taba lakum minannisa'i mathna wa thulatha ruba'a*

(Marry women of your choice ,

Two or three or four;)

[IV: 3]

It is a text (nass) in the matter of maximum limit of marrying women. Hence the text (nass) shall be given preference over the apparent (zahir).<sup>190</sup>

### Chapter III

#### Division 3

With regard to the meaning being hidden.

Kinds of word with regard to the meaning being hidden

1. Khafi (hidden)
2. Mushkil (difficult)
3. Mujmal (brief)
4. Mutashabih (resembling)

Khafi is opposite to zahir

Mushkal is opposite to nass

Mujmal is opposite to mufassar

Mutashabih is opposite to muhkam

#### 1. Khafi

Literally , khafi means hidden.

Technically, khafi is a word the meaning of which is clear as a word but there is some hidden meaning found in it for some other reason and such concealment becomes open after a little thinking. In other words,

<sup>190</sup> *Fawatih*, vol. II, pp. 19-20; *Kashf*, vol. I, p. 144; *Nur*, pp. 85-8; *Hisami*, pp. 7-8; *Al-Taudih*, pp. 90-2.

some other thing had covered its said meaning which requires a little thinking to uncover the hidden meaning in it.

### **Causes of concealment**

The members that are synonyms have some particular meaning. Hence in the meaning of this word some particular attribute is given regard.

In some members, there is some such addition or omission, that makes it distinct from other members, and due to such particular name or distinction the word is not included in those members in the matter of apparent application or use.

### **Rule**

To know the cause of concealment by thinking

or a little mental exercise. For example, concealment is due to an addition it would be included under the rules of the Apparent (zahir) otherwise it will remain excluded from those rules.

### **Example**

The word sariq has a particular reality and that is the taking away the property of another from a secure place (hirz) surreptitiously

This meaning is clear in respect of a thief but it is hidden in respect of a pick-pocket and a person who steals the burial cloth of a dead body. It is common value in all the three persons that they take away the property belonging to another without his consent but for two of them there are specific names due to which there is an addition in the act and attribute of a pick pocket as compared to a thief. A thief takes away the property of the owner while the owner is unaware even if he is present at the spot or if he is present he is sleeping while a pickpocket gets the advantage of the engagement of the owner despite being aware and conscious of his property

In the act of person who steals the burial cloth of a dead person there is an omission that such cloth is not secure, nor any one is taking guard of it. Hence a pickpocket is termed as a thief while a person stealing cloth of a dead person is excluded from such definition.

## **2. Mushkal**

A word the meaning of which by the very word itself is so hidden that even after much mental exercise the concealment is not removed.

### **Causes of *ishkal* (difficulty)**

1. Use of the word as a common or as a metaphor in multiple meaning and therefore its meaning at the place becoming ambiguous.
2. Metaphorical meaning being more famous than the original meaning.
3. A thing having two meanings in a manner that each meaning demands a different rule.
4. Contradiction with some other text (nass).

5. Use of a rare allegorical term (al-isti'arah al-nadira wa al-ghamidah).<sup>191</sup>

### Rule

By mental exercise by the aid of circumstantial evidence, the meaning should be made unambiguous and determined.

### Examples

The Holy Qur'an says:

نِسَاؤُكُمْ حَرْثٌ لَّكُمْ فَأَتُوا حَرْثَكُمْ أَنَّى شِئْتُمْ وَقَدِّمُوا لَأَنفُسِكُمْ وَاتَّقُوا اللَّهَ  
وَاعْلَمُوا أَنَّكُمْ مُلَاقُوهُ وَبَشِّرِ الْمُؤْمِنِينَ (223)

Fa'tu harthakum anna shi'tum

(You may enter your field as you wish) [II:223]

Here the word "anna" is common (mushtarak). It has multiple meanings. Hence there has occurred ikhfa' (concealment) in its meaning. By mental exercise and by the help and aid of the circumstantial evidence different scholars have given different meaning of this word. Some take it in the sense of kayfa (as), some others in the sense of mata (when) and still some others in the sense of 'ayna (where).

- 2) The Holy Qur'an says:

وَابْتَغُوا الْيَتَامَى حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا  
إِلَيْهِمْ أَمْوَالَهُمْ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَن يَكْبَرُوا وَمَن كَانَ غَنِيًّا  
فَلْيَسْتَعْفِفْ وَمَن كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ  
فَأَشْهَدُوا عَلَيْهِمْ وَكَفَىٰ بِاللَّهِ حَسِيبًا (6)

"Wa in kuntum junuban fattahharu"

(And if ye are impure, make yourselves pure by taking a bath) [V:6]

Here in the case of impurity on account of cohabitation it is commanded to wash the body thoroughly. t

There is consensus that the verse is clear in respect of the outer body hence the washing of the internal body stood dropped but still there is doubt about the mouth and the nostrils. These parts of the body have two sides, external and internal. Thus in respect of these two parts of the body other legal commands are:

By swallowing saliva the fast does not break.

If any thing from out goes into the mouth, the fast breaks.

In the matter of bath of sexual impurity (ghusl janabat) gargle is compulsory (fard). It is to be done thoroughly (mubalaghah).

<sup>191</sup> Mir'at, Vol.I, p.408; Nur, p.91; al-Taudih, p. 292; Nizami, p. 9.

The Holy Qur'an says:

مَا أَصَابَكَ مِنْ حَسَنَةٍ فَمِنَ اللَّهِ وَمَا أَصَابَكَ مِنْ سَيِّئَةٍ فَمِنْ نَفْسِكَ  
وَأَرْسَلْنَاكَ لِلنَّاسِ رَسُولًا وَكَفَى بِاللَّهِ شَهِيدًا (79)

*"Ma asabaka min hasanatin fa minallahi wa ma asabaka min sayyi'atin fa min nafsika"*

(The good that reaches you is from thy Lord and the evil that reaches you is due to your ownself) [IV:79]

The Holy Qur'an also says:

أَيْنَمَا تَكُونُوا يُدْرِكُكُمُ الْمَوْتُ وَلَوْ كُنْتُمْ فِي بُرُوجٍ مُشِيدَةٍ وَإِنْ تُصِبْهُمْ  
حَسَنَةٌ يَقُولُوا هَذِهِ مِنْ عِنْدِ اللَّهِ وَإِنْ تُصِبْهُمْ سَيِّئَةٌ يَقُولُوا هَذِهِ  
مِنْ عِنْدِكَ قُلْ كُلٌّ مِّنْ عِنْدِ اللَّهِ فَمَّا لِهَؤُلَاءِ الْقَوْمِ لَا يَكَادُونَ  
يَفْقَهُونَ حَدِيثًا (78)

*"Qul kullum min `indillahi"*

(Say, all is from Allah) [IV:78]

In both the above verses there appears to be contradiction with regard to the subject matter apparently. This contradiction has been removed by saying that in the former verse the actions have been told to be the outward cause while in the latter verse it is told that Allah Almighty is the Real creator of all causes and effects.

The quality of the crockery of Paradise has been mentioned in the Holy Qur'an as:

*"Qawarira min fiddatin"*

(Crystal-clear made of silver) [LXVI:16]

### 3. MUJMAL (ambiguous)

#### Definition

Literally, the word mujmal means ambiguous or not clear.

Technically, the word mujmal means a word the concealment of the meaning of which is not removed by mental exercise or any other means and the only source of removal of the said concealment is that the speaker himself removes it and makes its meaning clear.

#### Causes of ambiguity (wujuh ijmal) (u£%Z xÂ%.y)

There are seven causes due to which the meaning of a word remain hidden or concealed. Those are,--

### 1. **Gharabat**

When a word is unknown it is called gharib. For example the Holy Qur'an says:

إِنَّ الْإِنْسَانَ خُلِقَ هَلُوعًا (19)

Innal insana khuliqa halu`a

(Truly man was created

Very impatient).

[LXX: 19]

### 2. **Ishtibah Sarfi (Grammatical resemblance)**

Where there is grammatical resemblance the kind (nau'iyat) of the word is not known. For example, the `Arabic word: mukhtar may be a noun active (ism fa'il) having the meaning of authority or a noun passive (ism maf'ul) having the meaning of an authorised person.

### 3. **Ma`na jadid (New connotation)**

Where a word has a literal meaning which is well known to the people of language and the same word is used for conveying another sense. For example the words Salat, Zakat, Hajj, Riba etc. each one of them has its literal meaning in the Arabic diction but the Shari'ah has used it in its own technical sense.

### 4. **`Adam ta'ayyun marja` damir(non fixation of the source towards which the pronoun returns)**

The Holy Qur'an says:

وَإِنْ كُنْتُمْ فِي رَيْبٍ مِّمَّا نَزَّلْنَا عَلَىٰ عَبْدِنَا فَأْتُوا بِسُورَةٍ مِّثْلِهِ وَادْعُوا شُهَدَاءَكُمْ مِّنْ دُونِ اللَّهِ إِنْ كُنْتُمْ صَادِقِينَ (23)

fa'tu bi suratin min mithli hi

(Then produce a Surah

Like thereunto.)

[II :23)

Here the damir of mithlihi may be many things.

### 5. **Ishtirak(Common-ness)**

Where a word is common (mushtarak) and there exists no circumstance for the determination of any single meaning or for giving it preference over any other meaning.

### 6. **`adam ta'ayyun miqdar(Non fixation of the quantity in the command)**

Where the quantity of the thing concerning which the command has come is not determined by the command

For example the Holy Qur'an says:

*we huwallazi ansha'a jannatin ma`rushatin  
 wa ghayra ma`rushatin wannakhla  
 wazzar`a mukhtalifan ukuluhu wazzaytuna warrummana  
 mutashabihan wa ghayra mutashabihin;  
 kulu min thamarihi iza athmara  
 wa atu haqqa hu yauma hasadi hi  
 wa la tusrifu;  
 innahu la yuhibbul musrifin.  
 It is He who produceth  
 Gardens, with trellises  
 And without, and dated,  
 And tilth with produce  
 Of all kinds, and olives  
 And promegranates,  
 Similar (in kind)  
 And different (in variety):  
 Eat of their fruit  
 In their season, but render  
 The dues that are proper  
 On the day that the harvest  
 Is gathered. But was not  
 By excess: for Allah  
 Loveth not the wasters.  
 [VI: 141] ??????????*

Here rendering of the dues that are proper is commanded but what is the proper quantity that is not mentioned.

**7. Difficult construction due to which mutual link is not easily comprehended.**

For example, the Holy Qur'an says:

*Ya ayyuhallazina amanu shahadatu baynikum  
 iza hadara ahada kumul mautu  
 hinal wasiyyatithnani zawa `adlin minkum  
 au akhirani minghayrikum  
 in antum darabtum fil ardi  
 fa asabatkum musibatul mauti.  
 tahbisunahuma min ba`dissalati  
 fa yuqsimani billahi  
 inirtabtum la nashtari bi hi thamanan*

*wa lau kana za qurba*  
*wa la naktumu shahadatallahi*  
*inna izallaminal athimin.*  
*(O ye who believe !*  
*When death approaches*  
*Any of you (take) witnesses*  
*Among yourselves when making*  
*Bequests\_\_ two just men*  
*Of your own(brotherhood)*  
*Or others from outside*  
*If ye are journeying*  
*Through the earth.*  
*And the chance of death*  
*Befalls you (thus).*  
*If you doubt (their truth)*  
*Detain them both*  
*After prayer, and let them both*  
*Swear by Allah:*  
*"We wish no in this*  
*For any worldly gain.*  
*Even though the (beneficiary)*  
*Be our real relation:*  
*We shall hide not*  
*The evidence before Allah:*  
*If we do then behold !*  
*The sin be upon us !*  
*[V: 106 ] ??????????*  
*Fa in `uthira `ala annahumastahaqqa ithman*  
*fa akharani yaqumani maqamahuma*  
*minallazinasahaqqa `alayhimul awwalani*  
*fayuqsimani billah*  
*lashahadatuna ahaqqu min shahadatihima*  
*wa ma`tadayna*  
*inna izallaminazzalimina.*  
*(But if it gets known*  
*That these two were guilty*  
*Of the sin (of perjury),*

*Let two others stand forth  
 In their places - nearest  
 In kin from among those  
 Who claim a lawful right:  
 Let them swear by Allah;  
 "we affirm that our witness  
 Is truer than that  
 Of those two, and that we  
 Have not trespassed (beyond  
 The truth): if we did,  
 Behold! the wrong be  
 Upon us !"*  
 [V : 107 ] ??????????

### Rule (hukm)

To defer acting upon it till the meaning becomes clear, having the belief that the meaning is true.<sup>192</sup>

### Source of Clarity of meaning

As is evident from the limitations of definition, it is the speaker who is to state as to what he means by his speech, himself or on asking.

### Time of making clarity of meaning

Some times the statement making the meaning clear is just adjoining the ambiguity and sometimes it is after laps of some time. For example, the Holy Qur'an says:

إِنَّ الْإِنْسَانَ خُلِقَ هَلُوعًا (19)

*Innal Insana Khuliqa halu`an*

"Truly man was created

Very impatient."

[LXX : 19]

Here in the verse 19 of *Surah Al-Ma'arij* the meaning of the word *Halu`an* needed clarification and just after it, that is in the next two verses (20 and 21 of the said *Surah*) it was stated:-

إِذَا مَسَّهُ الشَّرُّ جَزُوعًا (20) وَإِذَا مَسَّهُ الْخَيْرُ مَنُوعًا (21)

*Iza massahushsharru jazu`an*

*wa iza massahul -khayru manu`an*

"Fretful when evil

<sup>192</sup> Nur, p.92; Hisami, p.89; Al-Usul, al-Sarakhsi, Vol.I, p.168.





Here the quantity of the head to be rubbed is not mentioned. Hence it is ambiguous (mujmal). Its clarification is available in a Hadith of the Messenger of Allah (peace and blessings of Allah be upon him) by his own action. The said Hadith states that the Messenger of Allah (peace and blessings of Allah be upon him) performed the ablution (Wudu) and rubbed his head equal to the forehead.<sup>193</sup>

### Statement of clarification

It is of two kinds

- (1) satisfactory ( bayan shafiy)
- (2) Not satisfactory (bayan ghayr shafiy)

A satisfactory statement is that whereby the meaning becomes clear to the extent that there remains no need for further questioning or research or mental exercise. It is also of two kinds, viz.

- (i) definitive (qat'i)
- (ii) not definitive (zanni) (çTÀG').

Where the statement is definitive, the mujmal becomes mufassar. For example, Salat , Zakat etc. the injunctions of Islam are mujmalat in the sense that the Shari'ah has fixed their meaning in the sense other than their literal meaning but there are satisfactory as well as definitive statements with respect to their meaning both in the Holy Qur'an and the Ahadith , hence those are all mufassar.

Secondly, a statement is satisfactory but is not definitive . In such a case a mujmal becomes mu'awwal after such statement. For example the rubbing of the head despite being fi'li is shafiy but it is not qat'i and is only zanni(çTÀG') as it is a Hadith whose authenticity is not qat'i. Hence , this mujmal has been declared as mu'awwal.

### 2. Bayan ghayr shafiy (A statement that is not satisfactory)

A statement whereby the intent of the speaker becomes clear but not to the extent that there remains no need for any further probe or mental exercise or questioning. Rather, this is still needed. In such a circumstance a mujmal is declared as mushkal and the rules of mushkal are applicable to it. In such a case , the research is conducted in respect of the literal meaning and usages and the meaning is fixed by mental exercise and keeping in view the circumstantial evidence(qara'in). For example, the word al-Riba is mujmal in the Qur'anic verses as its literal meaning is "increase" . It is evident that there is increase even in the matter of sale and purchase and yet the transactions of sale and purchase are not unlawful (haram). Hence, every increase is not meant by al-riba. Rather, it refers to a particular increase which has not been determined by the Holy Qur'an. The Messenger of Allah (peace and blessings of Allah be upon him) determined it in one of his sayings and said:

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<sup>193</sup> Sahih, Muslim,

“Sell gold for gold, silver for silver, wheat for wheat, barley for barley, date for date, salt for salt, equal for equal, hand to hand. To get more is Riba.”<sup>194</sup>

Here some of the places of al-Riba have become known but this statement is not satisfactory as there is no clarification (tasrih) in it that al-Riba is included only in the matter of only these six things or that things other than these six things are also included in it. Further, if other things are also included then what is the effective cause ('illat) of its prohibition on the basis of it its application may be generalised (ta'mim). Thus this verse came out of the limit of mujmal but is still considered mushkal and the jurists have with the help of mental exercise and the circumstantial evidence determined the effective cause and the places and given their details.<sup>195</sup>

Note:

The occasion of statement (bayan) of an ambiguous (mujmal) is till the period of the Messenger of Allah (peace and blessings of Allah be upon him) as it was during his lifetime a statement (bayan) was possible by means of the Holy Qur'an or Hadith. All such things that needed a statement (bayan) were so stated whether satisfactory or not satisfactory.<sup>196</sup>

Some jurists have classified the Mushkal, mujmal and mutashabih on the following basis.

If the knowledge of the intended meaning comes merely by means of intellect or reason i.e. by mental exercise it is called mushkal;

If the knowledge of the intended meaning comes only by means of hadith (naql) it is called mujmal ; and

If the knowledge of the intended meaning is not obtained by any means , it is called mutashabih.<sup>197</sup>

#### 4. MUTASHABIH

##### Definition

A mujmal whose meaning is not known. It is so because neither the speaker did not explain it at any occasion nor there exists any circumstance (qarinah) on the basis of which its meaning can be determined or fixed.

##### Rule

To observe silence keeping in heart the belief that its meaning is true.

##### Kinds & Examples

It is of two kinds.

<sup>194</sup> Sahih, Muslim,

<sup>195</sup> Nur, p. 92.

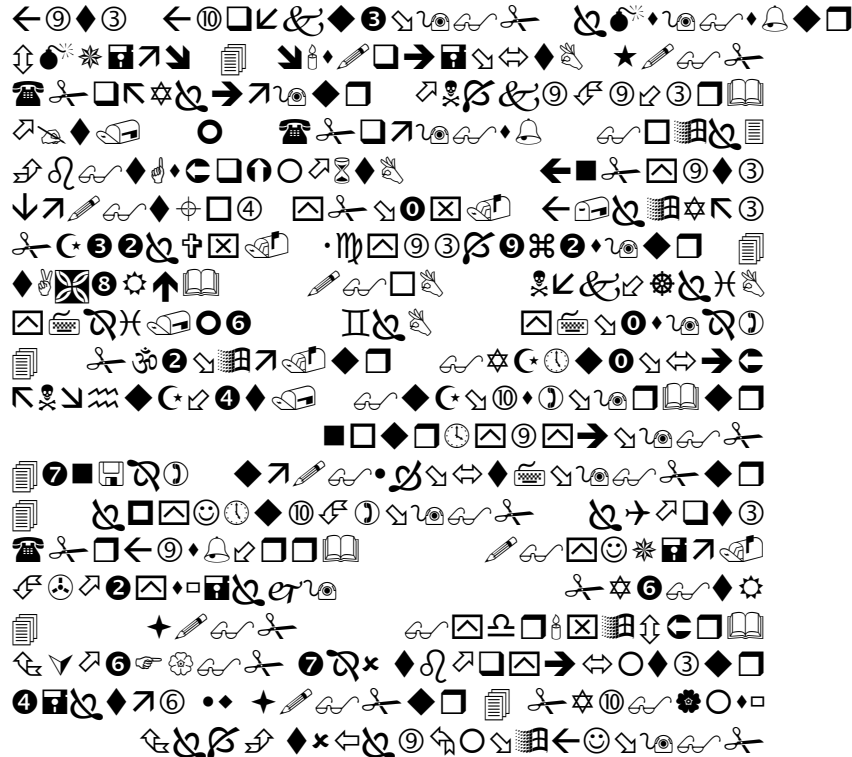
<sup>196</sup> Tafsir al-Nusus, Muhammad Adib Salih, Vol.I. pp. 292,294,299.

<sup>197</sup> Al-Taudih, p.292; Fawatih al-Rahmut, Vol II pp.20 and 24.

Firstly, a mutashabih the meaning of which are not known at all. For example the huruf muqatta'at (Abbreviated letters). In Arabic language those are alphabets and those are not used for any other meaning.

Secondly, a mutashabih the meaning of which are known from the diction but there is no explanation nor determination in the speech of God and to take its open apparent (zahir) meaning i.e. the well known sense is not permissible.

For example the following verse of the Holy Qur'an:



The Jews say: "Allâh's Hand is tied up (i.e. He does not give and spend of his Bounty)." be their hands tied up and be they accursed for what they uttered. Nay, both his hands are widely outstretched. He spends (of his Bounty) as He wills. Verily, the Revelation that has come to You from Allâh increases In Most of them their obstinate rebellion and disbelief. we have put enmity and Hatred amongst them till the Day of Resurrection. Every time they kindled the Fire of war, Allâh extinguished it; and they (ever) strive to make mischief on earth. and Allâh does not like the Mufsidûn (mischief-makers).

[5:64]

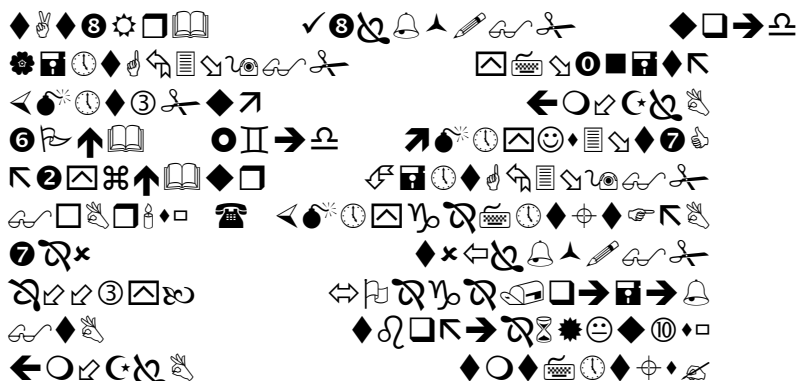
Here the words “yada<sup>hu</sup> mabsutatani” are such whose apparent and well known meaning are not permissible. Similarly, all such words that are related to the creations(makhl<sup>uq</sup>at) if used for Allah, like the word Hearing, seeing, speaking etc. though their literal meaning is well known but to take them in the literal sense is not permissible.

#### Note.

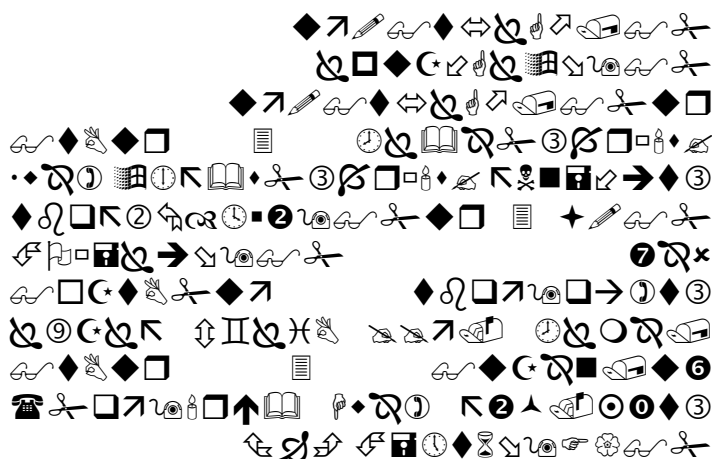
The above rule is applicable in this world and is for the individuals forming the Ummah. So far as the Messenger of Allah (peace and blessings of Allah be upon him) is concerned he was bestowed upon the full knowledge of such words by Allah Almighty. Thus he (the Messenger of Allah (peace and blessings of Allah be upon him) knew their meaning fully well. This is the way of thought (mazhab/مذهب) of all the Companions(Sahabah/صحابه), the successors (Tabi`in/تابعين), the followers of the successors (Tab`u tabi`in/تابع تابعين), and the earlier scholars and researchers. However, there has been difference of opinion by those who took the literal sense. But it is said that as most of the latter men of knowledge have explained the meanings of mutashabihat with the help of diction and also keeping in view the limits of Usul Al-Shar` (اصول الشريعة) for the purpose of understanding and conveying their import. For example, by the words:(yadullahi/يدالله) they take the meaning of “the Power (قدرت) of Allah” and by the words: (yadullahi/وجه الله) they take the meaning of “the Being (ذات) of Allah”.

Similarly some of the earlier scholars have explained these expressions.<sup>198</sup>

Those who have difference of opinion are some of the Companions (Sahabah/صحابه) and the successors (Tabi`in/تابعين) and Imam Shafi`i (رحمى الله تعالى عنه). The difference of opinion made by Imam Shafi`i (رحمى الله تعالى عنه) is based on the following verse of the Holy *Qur`an*:



<sup>198</sup> Nur p.93-94; `Umdah p.25; Hisami p.10; Kashf Vol I, p.55; al-Taudih pp.294-5; Fawatih Vol II, p.22.



It is He (Allah Almighty) who has sent down to you [O *Hadrat Muhammad* (صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ)] the Book (this Holy Qur'ân). In it are Verses that are entirely clear, they are the foundations of the Book [and those are the Verses of Al-Ahkâm (commandments, etc.), Al-Farâ'id (obligatory duties) and Al-Hudud (legal laws for the punishment of thieves, adulterers, etc.)]; and others not entirely clear. So as for those in whose hearts there is a deviation (from the truth) they follow that which is not entirely clear thereof, seeking Al-Fitnah (polytheism and trials, etc.), and seeking for its hidden meanings, but none knows its hidden meanings save Allâh. And those who are firmly grounded in knowledge say: "We believe in it; the whole of it (clear and unclear verses) are from Our Lord." And none receive admonition except men of understanding. (Tafsir At-Tabarî).

[III: 7]

According to Imam Shafi'i (رَضِيَ اللهُ تَعَالَى عَنْهُ): There is a pause (waqf/وقف) after the words (fil-'ilm/فى العلم). Hence the meaning is that those who possess depth of knowledge, they know their meanings. The argument of the other side is that the pause (waqf/وقف) is after the words ('illallah/إِلَّا اللهُ). Hence Allah Almighty has kept its knowledge limited with His own Being or at the most with the being of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ). But those who have discussed this subject thoroughly they have made it clear that the opinion of the earlier men of knowledge (mutaqaddimin) is more encompassing (ahwat/أَحْوْط). They have also made it clear that this conflict of opinion is not real in its nature. The party who has denied, the denial is about definitive determination and explanation. And the party who has stated any thing, it is not as a definitive explanation. Rather, it is by the way of understanding (tafhim/تَفْهِيم) and example (tamthil/تَمْثِيل). The most clear argument of it is that it is transmitted on the authority of *Hadrat Ibn 'Abbas* (Allah's pleasure be on him) that there is pause (waqf/وقف) after the words "arrasikhuna fil-'ilm/الراسخون فى العلم" and that he is one

of those who have been blessed with the depth of knowledge (al-rasikhun).

There are many transmissions regarding the interpretation of the abbreviated letters (huruf muqatti'at/حُرُوف مُقَطَّعَات).

It is also transmitted on the authority of Ibn `Abbas (Allah's pleasure be on him) that there is pause (waqf/وقف) after the words ('illallah/إِلَّا لِلَّهِ) and the next portion of the verse with the words *Wayaqulurrasikhuna fil-'ilm*. Thus there remains no scope for any doubt that he was one of those who stated that he had knowledge of the meaning of Mutashabihat.<sup>199</sup>

### Occasion

Although the Mutashabihat are present both in the Holy Qur'an and Sunnah but those are not related to the Ahkam Taklifiyyah and Fiqhiyyah. There is no phrase or word relating to them, the meaning of which is not available at least in the category of Probable non-definitive (zann ghalib/ظَنٌّ غَالِبٌ). Rather the (Mutashabihat/مُتَشَابِهَات) relate to the Beliefs ('aqaid/عَقَائِد), the object of which is to accept them as from Allah and to believe in them as from Allah. They do not relate to action ('amal).<sup>200</sup>

### Rank & Sequence (Maratib) of the Qur'anic words:

The Mutashabih is at the top and the Khafi is at the bottom and in between are Mushkal and Mujmal.<sup>201</sup>

### Mutual Relation

The meaning of the first in sequence is found in the second in sequence and the meaning of the first and second in sequence is found in the third in sequence and the meaning of the first three in sequence is found in the last in sequence. This is evident from their definitions also.

For example in the definition of Mushkal which is number two in sequence two things have been mentioned, namely, demand and search of meaning and the determination of meaning by means of mental exercise. Similarly in the definition of Mujmal, the things needed in Khafi and Mushkal have been mentioned.

<sup>199</sup> Tafsir, Ibn Kathir, Isa al-Babi Halabi, Egypt. Vol I, p.347.; Tafsir, Tabari. Ibn Jarir.

<sup>200</sup> Tafsir al-Nass, Vol I, p.312-3 & 318.

<sup>201</sup> Nizami Sharh Hisami, Nizamuddin Kayranwi, Rahimiyyah, Deoband, p.10 and Qamar al-Aqmar Hashiyyah Nur al-Anwar Maulana Abdul Hakim Lakhnawi, Qayyumi Kanpur. p.89.

**CHAPTER IV****DIVISION IV****WITH REGARD TO THE USE OF A WORD**

In our conversation some times we use the words and phrases to express the same meaning for which they are made and some times we use them for a meaning other than the meaning for which such words or phrases are made. In view of this use of a word it has two kinds, namely, real and metaphor. Each one of this kind is further divided into two sub kinds, namely, explicit and allegorical. All these four kinds relate to the general as well as the special.

**Real****Literal Definition**

The Arabic word “*haqiqatun*” is derived from the word “*Haqqun*” which means “*Thabitun*” i.e. established/proved true. Originally the word is “*Haqiqun*” and the round “*ta*” is suffixed to it according to the rule of the Grammar of Arabic language that where a word is used as a noun despite being an adjective the round *ta* is suffixed to that word. For example: *الحقيق* is an adjective or attributive noun and it is to be used as a noun. by the application of this grammatical rule it will become *حقيقة*.

**Technical Definition.**

A word that is used to convey the meaning for which it was originally made is called a real. Whether such making was for the purpose of being literal or Shar'i..or Customary or technical. Out of the four if the word is used in the same sense for which it was made it will be called real. e.g. , the word *Salat* has a literal sense i.e. the supplication and a Shar'i sense , that is the prayer. According to the diction the first is real and the second is metaphor. According to the Shari'ah the second is real while the first is metaphor.

Real and metaphor are in fact the deficiencies of the words. Extendingly these are called the kinds of words.

**Rule**

The reliability will be of the same meaning for which a word is originally made.

**Example**

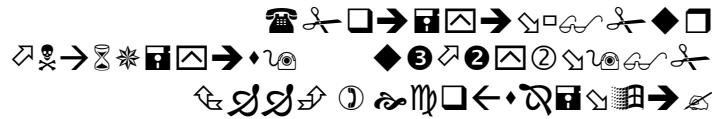
The Holy Qur'an says:

*Ya ayyuhallazina amanu'rka`u wa'sjudu.*

(O ye who believe! Bow and prostrate).







O You who believe! bow down, and prostrate yourselves, and Worship Your Lord and do good that You may be successful.

[22:77]

In this verse the real sense is to command to bow and prostrate.

## 2. Metaphor

### Definition

A word that is used for the meaning for which it was not originally made due to some circumstance or fitness is called a metaphor.

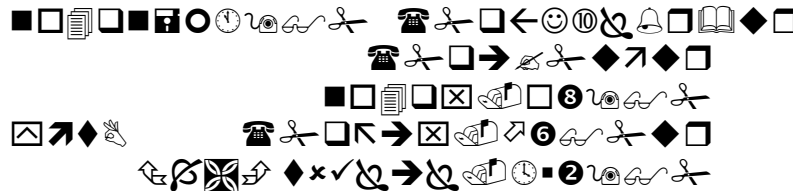
### Conditions

There are two conditions for using a word in the meaning for which it was not originally made. They are:

- (i) the circumstance that demands using the word in the sense other than that for which it was originally made; and
- (ii) the fitness, propriety or relationship of using the word in that sense.

### Example

The Holy Qur'an says:



And perform As-Salât (Iqâmat-as-Salât), and give Zakât, and Irka' (i.e. bow down or submit yourselves with obedience to Allâh) along with Ar-Raki'ûn.

[11:43]

According to one interpretation here the word “*ruku*” is in the sense of offering the prayer. The circumstance is “*ma`ar raki'in*”. The object is to command the offering of the prayer in congregation and not to form an assembly and then to merely bow. The relationship is that the *ruku`* is a part of the prayer and it is common practice that by mentioning a part of a thing the whole is meant.

### Rule

The meaning for which the word is not made shall have reliability and the same shall be meant.

Carrying both the real and the metaphorical meaning by a word.

Where a word carries both the meanings, real as well as metaphorical, the preference shall be given to the real meaning. It is so because the original is the real. However, if a person while speaking such a word intends to convey the metaphorical sense, then only the metaphorical sense will be meant by such word. If there is possibility of the metaphor alone, then the metaphorical meaning shall hold the field. For instance a man says to his wife: *Harrartuki*/حَرَّرْتُكِ (I made you free). Here both the real as well as metaphorical meaning can be taken. Real meaning that she is made free from doing any work and the metaphorical meaning that she is set free from the wedlock. Hence the intention of the speaker will be seen. If he intends the metaphorical sense it would convey the same. If a person says to a free woman: "Make me master of yourself" The sense will be metaphorical. It is so because here giving the real sense is impossible as a free person can neither be owned by any one nor can go so.

### **Combination of the real and the metaphor**

It is not permissible to take both the meanings of a word at one and the same time. For example, from the word lion to take the meaning of a brave person and also the beast.

### **Futility of both the real and the metaphor**

There are some occasions when neither the real nor the metaphor can be taken. At such an occasion the speech becomes meaningless and futile. For example, the age of the wife of a person be such as that of his daughter and the parentage and family of such wife is well known. If the husband calls such wife as his daughter, neither the real meaning can be taken nor metaphorical. It is so because the real is not possible as her father and family are well known and the metaphor is not possible as she is the wife of the speaker.

### **General Metaphor**

Normally, the real and the metaphorical meanings cannot be taken at one and the same time but there is one situation well known to combine them and it is called general metaphor (*`umum majaz*).

#### **Definition**

A word whose metaphorical meaning is so general that the real is also included in its members it is called general metaphor (*`umum majaz*).

#### **Rule**

From such a word this general sense will be meant and the same sense will be relied upon.

#### **Example**

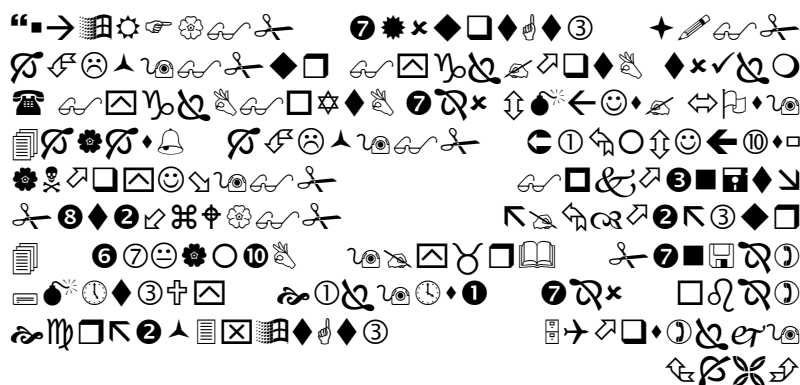
To step into the house of any one metaphorically means to enter into ones house whereby all forms of stepping in are included. Real, such as keeping the foot bare into the house and metaphorical, such as to keep the foot wearing the shoe or by means of a ride. However, when

any particular form is intended by the speaker, then only that sense will be meant.

### Example from the Holy Qur'an:

The Holy Qur'an says:

*Allahu yatawaffa al-anfusa mauti ha wa allati lam tamut fi manami ha fa yumsiku allati qada `alay ha al- mauta wa yursilu al-'ukhra `ila `ajalin musamma `inna fi zalika la `ayatin li qaumin yatafakkaruna*



It is Allâh who takes away the souls at the time of their death, and those that die not during their sleep. He (Allah Almighty) keeps those (souls) for which He (Allah Almighty) has ordained death and sends the rest for a term appointed. Verily, In this are signs for a people who think deeply.

[39: 42].

Here the word used is “Yatawaffa”. Its literal meaning is to completely take into control any one.

This tawaffa is of two kinds.

One kind means to control the soul forever.

The other kind means to control the soul temporarily or for some time.

In the first kind it would mean “death” and in the second kind it would mean “sleep”. This is `Umum Majaz (general metaphor).<sup>202</sup>

### Sources of knowledge (zara'i' `ilm/نرائع علم)

Real is known from the people of language as it is they who determine as to convey what sense which word has been made. So far as the metaphor is concerned any person can use a word in the sense other than the sense for which it was originally made by way of considering upon the fitness or relationship to such occasion.

### Note:

When a word is used in a sense for which there is no relationship or fitness it is called “murtajal/مرتجل”.

<sup>202</sup> Zia-ul-Qur'an, Justice Pir Karam Shah, Volume IV, p. 273

When a word is used in a way that it conveys no sense it is called "hazl".

### **Circumstance (CIRCUMSTANTIAL EVIDENCE (QARINAH) قرينة)**

#### **Definition**

A fact that indicates the reference to the meaning of a word other than the meaning for which it is made is called a circumstance (qarinah).

#### **Kinds**

A circumstance is of two kinds, namely, literal and implied.

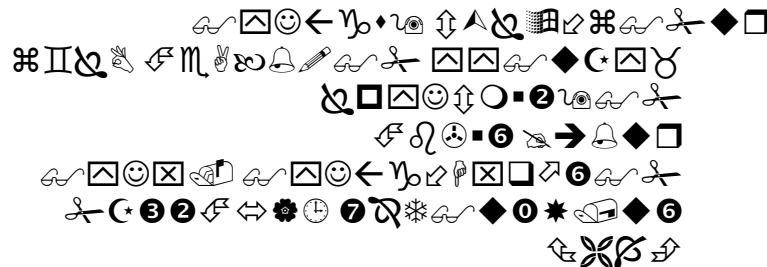
#### **(i) Literal Circumstance (qarinah lafzi)**

##### **Definition**

A word that indicates the metaphor instead of the real.

##### **Example:**

The Holy Qur'an says:-



And lower unto them the wing of submission and humility through Mercy, and say: "My Lord! bestow on them Your Mercy as they did bring Me up when I was small."

[17:24]

Here the word al-zulli is a circumstance that the khafd janah is not in its real sense and has been used in its metaphorical sense.

#### **Implied Circumstance (qarinah ma`nawi)**

##### **Definition**

An implied fact that indicates the metaphorical sense instead of the real sense of the word used in the speech by a person.

##### **Example**

Custom and usage etc. is that by stepping into is implied to enter into.

##### **Forms**

There are five forms of both the above kinds of circumstance which are generally mentioned under the title: Circumstances requiring the discarding of the real sense of a word". They are:

Place or occasion of speech;

Object of speech;  
Reference to the context;  
Speech itself; and  
Custom and usage.

### 1. Place or occasion of speech (Mahall kalam).

#### Definition

Non acceptance of the real by the place and occasion of the speech.

#### Example

A man who says about a slave of whose age his son cannot be that he is his son or about a slave whose father and family is well known he says that he is his son. Such a speech will be taken in its metaphorical sense due to the overage of the slave and due to the well known fact about the father and family of the slave.

### 2. Object of the speech (Ghard kalam)

#### Definition

Non acceptance of the real meaning of the object of the speech and the speaker.

#### Example

A person invites another person to a dinner and the said person denies swearing "By God, I shall never eat." Although these are general words the apparent meaning of which is that the said person shall never eat but keeping in view the object it refers to the specific meal ,that is, the meal for which he was invited.

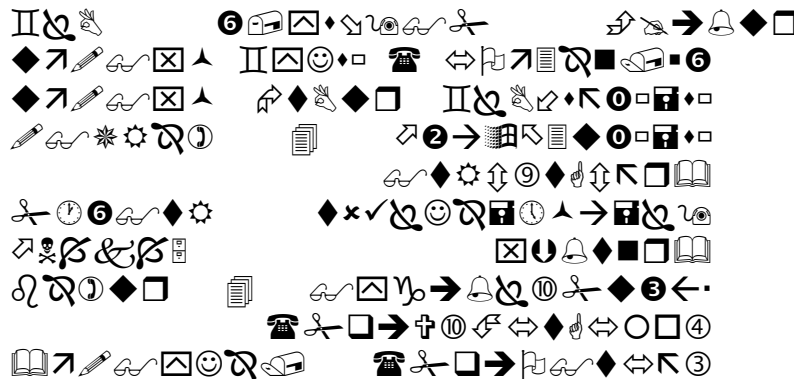
### 3. Reference to the Context (Siyah kalam)

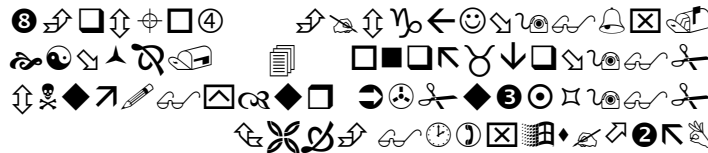
#### Definition

Non-acceptance of the real meaning by the reference to the context. That is the speech before and after the context.

#### Example

Allah Almighty says :





And say: "The Truth is from Your Lord." Then Whosoever wills, let Him believe, and Whosoever wills, let Him disbelieve. Verily, we have prepared for the Zâlimûn (polytheists and wrong-doers, etc.), a Fire whose walls will be surrounding them (disbelievers In the Oneness of Allâh). and if they ask for help (relief, water, etc.) they will be granted water like boiling oil, that will scald their faces. terrible the drink, and an evil Murtafaqâ (dwelling, resting place, etc.)!

[18:29]

From the above verse prima facie one understands that there is option of believing or disbelieving but just after the above verse Allah Almighty says :

"Inna a`tadna lizzalimina naran."

(Surely, We have prepared for the iniquitous a fire) [XVIII:29]

It shows that the above speech is a warning and admonishing.

#### 4. Speech itself (Nafs kalam)

Non acceptance of the real meaning of the word by the speech itself whether it is due to some restriction mentioned in the speech or due to the very meaning of the word itself.

##### Example

"Wakhfid la huma janahazzulli"

(And bow down before both of them the shoulders with all humility).

[17:24]

Here the restriction of the word Zull is a bar to take the real meaning of Janah.

Where a person says: All my slaves (mamluk) are free. This statement shall not include a slave who ransoms himself or herself with the permission of the owner (mukatab). It is so because in the meaning of the word mamluk, a mukatab is not included. A mamluk is he who is in full and complete ownership and control of a person. This is not so in the case of a mukatab.

#### 5. Custom and usage or idioms ('Urf wa`adat 'au muhawarah kalam)

##### Definition

The relationship of the speaker and the custom and usage of the speech being such that it does not accept the real meaning of a word.

##### Example

To step in means to enter.

To eat the tree means to eat the fruit of the tree.

Of them the reference to the context (siyaq kalam) and the text itself (nafs kalam)

### **Fitness or propriety (Munasabat)**

#### **Literal Definition**

Joining of two things in an attribute.

#### **Technical Definition**

Joining of the real (the meaning for which a word is originally made) and the metaphor (the meaning for which a word is not originally made) in an attribute.

In other words, an attribute that creates a relationship or link between the meaning for which a word is originally made (ma`na maudu` lahu) and the meaning for which a word is not originally made (ma`na ghay maudu` lahu)<sup>203</sup>.

### **Forms of relationship (Suwar al- munasabat)**

There are 25 forms of relationship. They are:

- (i) Application of cause on effect;
- (ii) Application of effect on cause;
- (iii) Application of the whole on the part;
- (iv) Application of the part on the whole;
- (v) Application of general on particular;
- (vi) Application of particular on general;
- (vii) Application of the state on the place;
- (viii) Application of the place on the state;
- (ix) Application of the possessive on the possessed;
- (x) Application of the possessed on the possessive;
- (xi) Application of lazim on the malzum;
- (xii) Application of malzum on lazim;
- (xiii) Application of unrestricted on restricted;
- (xiv) Application of restricted on unrestricted;
- (xv) Application of the consequent on present;
- (xvi) Application of the past on the present and future;
- (xvii) Application of a thing to a another which is adjacent and close to it;
- (xviii) Application of the means or instrument of a thing on the thing itself;
- (xix) Application of an opposite to an opposite;
- (xx) Application of a substitute on the substituted;
- (xxi) Application of a common noun under affirmative for general;

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<sup>203</sup> See margin of al-Mukhtasar, p.169.

- (xxii) Application of a noun made definite by the article "The" (al) meaning as a single person;
- (xxiii) Omission;
- (xxiv) Addition; and
- (xxv) Simile.<sup>204</sup>

### 3. Technical terms (Istilahat)

The men of knowledge have divided the above 25 forms into two categories for their technical meaning.

The 'Ulama' of Balaghat have used the following technical terms for the said two categories:

- (i) Majaz Mursal; and
- (ii) Isti'arah.

The 'Ulama' of 'Usul have used the following technical terms for the said two categories:

- (i) Ittisal suwari; and
- (ii) Ittisal ma'nawi.

According to them the meaning of the technical terms Mujaz Mursal and Isti'arah is the same, i.e., to take such meaning of a word for which it was not made due to the existence of some relationship, irrespective of any of the form of relationship.

#### Ittisal suwari

##### Definition

Mutual relationship between the real (the meaning for which a word is originally made) and the metaphor (the meaning for which a word is not originally made).

##### Example

1. Mutual relationship between the means and the end. (Sabab and Musabbab); and
2. Mutual relationship between the effective cause and the effect. ('Illat and Ma'lul).

#### Ittisal Ma'nawi

##### Definition

Joining of the real and the metaphor in an attribute other than their real sense. The People of Balaghat call it Wajh Shibh. It is so because it is a form of Similitude (tashbih).

##### Example

Joining of two things in the form of lawfulness or unlawfulness and for this reason there being conformity and relationship in the rules. For

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<sup>204</sup> Fawatih, vol. 1, p. 203; Nizami, p. 11.



example, the unlawfulness of any other thing being an intoxicant like the wine.

In the above definition the word attribute (Wasf/وصف) and in the example the word effective cause (Wajh/وجه) have the same meaning. The same is called Wajh Shibh/وجه شبه by the people of Balaghāt in the form of similitude and the jurists call it the "Illat Hukm" (Effective cause of the rule).

### Explanation of the examples of ittisal suwari

It has been stated above that the 'Usuliyyin give two examples of Ittisal, viz.,

- (i) relationship of the sabab and the musabbab; and
- (ii) relationship of the 'illat and the ma'lul.<sup>205</sup>

### Means and End

#### (Sabab and Musabbab)

The real and the metaphor being sabab and musabbab. In such form a sabab can validly taken to mean a Musabbab but a Musabbab cannot be validly taken as a Sabab. For example, a man has two sorts of ownership in respect of a woman. One is the ownership of the right of sex which is obtained by the wedlock and the other is the ownership that he may have in respect of a slave woman and this ownership with special conditions becomes the source of ownership of right of sex and in this form the means to obtain the ownership of the raqabah becomes the sabab and the ownership of benefit of sex is termed as musabbab. There is relationship of sabab and musabbab in both of them. Hence by the words that become the source to obtain the milk raqabah can mean the obtaining of the milk mut'ah. That is the words of purchase and sale, gift and tamlik can be used for Nikah which is the source to obtain milk mut'ah. Like wise the words whereby the milk raqabah is determined can be used for determining the milk mut'ah. For example by the word freedom it is meant that Divorce is being pronounced whereby the relationship of Nikah come to an end. But its opposite is not valid. For example the word that become the source of obtaining the milk mut'ah, like nikah, tazawwuj cannot be used to mean the attainment of milk raqabah. Similarly, the words used for the end of milk mut'ah like talaq etc. cannot be taken to mean the end of the milk raqabah.

#### Cause and Caused (Illat and ma'lul):

The real and the metaphor being 'illat and ma'lul. In this form one can be taken to mean the other. For example, purchase is the source to get ownership. Purchase is illat while the ownership is the ma'lul. One can mean the other. That is purchase can mean ownership and the ownership can mean purchase except when there is some Shar'i bar. At that moment it will not be valid to take such meaning.

<sup>205</sup> Fawatih vol.1, pp223-4; Al-Taudih p.201; Nur p.104-6 Hisami pp.11-12.

**Kinds of Real**

With reference to use real is of three kinds,viz.,

- (i) Muta`azzarah;
- (ii) Mahjurah; and
- (iii) Musta`malah.

**Difficult (Muta`zzarah)**

Literally, muta`azzarah means difficult.

Technically, muta`zzarah means the adoption of which is either impossible or if possible, then it is with great difficulty.

**Rule**

The reference is to metaphorical sense and neither the real meaning is meant nor acted upon.

**Example**

Some one takes an oath and says:

- (i) I shall not eat this cattle.
- (ii) I shall not eat this tree.

In the first statement to take the real meaning is impossible hence it would mean the thing boiled in the cattle and if by any way he eats the cattle itself, he will not be held guilty for breach of his oath.

In the second statement although it is possible to eat the tree itself but it is against the usual habit and can be eaten with great difficulty. Hence the reference will be to the eating of its fruit or leaves or the thing that is eaten of such tree or its price or the thing obtained by payment of that price. Thus in such circumstance also the maker of the statement shall not be held guilty of breach of his oath, if he actually did not eat the very whole tree.

It should be noted that this rule is applicable in the case of those trees that are not eaten. The trees, plants etc. that are eaten, in their case the eating shall refer to their eating. Likewise where a cattle is made of such a substance which is eaten, then it will mean the eating of the cattle itself. For example, it is made of sugar or ice cream.

**Discarded (Mahjurah)**

*Literally*, mahjurah means discarded, abandoned, left over.

*Technically*, mahjurah means that real which is discarded although to act upon it is possible. Such abandonment may be due to the custom, habit or usage or there has been prohibition by the Shari`at to believe and to act upon it.

**Rule**

The reference is taken to the metaphorical meaning and there is no reliance on its real meaning.

**Example**

To put the step is in usage taken to mean to enter into and not merely to put the step. Hence if a person takes an oath that he shall not put his step in the house of a certain person it would only result in the breach of his oath when he enters into his house and not merely putting his step inside the house and keeping his body outside. There must be actual entrance to bring the Legal Consequence.

**Prevalent in use (Musta`malah)**

It is a real whose use and reliability is prevalent.

**Kinds**

A (Haqiqat Musta`malah/حَقِيقَتِ مُسْتَعْمَلَةٍ) is of two kinds, viz.,

1. (Majaz Muta`arif/مَجَاز مُتَعَارِف), and
2. (Majaz ghayr muta`arif).

**Well-known Metaphor (Majaz Muta`arif)**

A metaphor whose use is common. Both the common and the special are aware of it on account of its use more than the real.

**Rule**

According to Imam A`zam Imam Abu Hanifah (Allah's Mercy be on him) the real meaning will be acted upon while according to the Sahibayn (Imam Muhammad and Imam Abu Yusuf) the metaphorical meaning will be acted upon.

**Example**

A person took the oath and said: I shall not eat wheat. His normal routine is to take bread of wheat.

According to Imam Abu Hanifah, if he eats wheat, only then the oath will break.

According to the Sahibayn, if he eats wheat or wheat bread or any thing made of wheat flour except "sattu" the oath shall break.

**Unknown Metaphor (Majaz ghayr muta`arif)**

It is a metaphor, the use of which is not well known and prevalent. That is all the people are not aware of it.

**Rule**

Real meaning shall be acted upon.

**Kinds of Real**

With reference to intention the real is of two kinds, namely,

1. Haqiqat Kamilah, and
2. Haqiqat Qasirah.

**Haqiqat Kamilah (Perfect Real)**

A real whose all the members are meant is called a perfect real.

**Haqiqat Qasirah(Imperfect Real)**

A real who's all the members are not meant is called an imperfect real.

**Rule**

It is not necessary that the real is to be taken as a perfect real. Rather it can be taken also as imperfect real.

**Example**

If from the word egg, the eggs of all the animals are meant, it will be a perfect real. If from the word egg, the eggs of some animals are meant, it will be an imperfect real. Often on account of custom and usage and habit the imperfect real is meant except when the intention is for the perfect real.

For example when we say an egg, it means the egg of an animal which is eaten. Same is the case with the word meat.<sup>206</sup>

**Explicit (Sarih) and Implicit (Kinayah)**

Explicit (Sarih) is a word the meaning of which is apparent. By mere listening to such a word its meaning is understood and known and there is no need to know the intention of the speaker.

**Rule**

The effect is given to the apparent meaning. The intention is neither needed nor relied upon. However, if the word has the scope of reliance on the intention regarding the matter between the speaker and God, the Mufti while giving an opinion, but not in the court of law can rely it upon.

**Example**

In real to use a word in its real meaning. For example, using a word indicating divorce explicitly, the utterance of which result in the occurrence of divorce, irrespective of the intention of giving or not giving the divorce.

In metaphor to use a word in its well known metaphorical sense.

**Implicit (Kinayah)**

A word whose meaning is not apparent. In other words its meaning is not understood or known by the mere hearing of such a word.

**Rule**

To wait till the meaning become apparent.

**Sources to know the meaning**

For the appearing of the meaning there are two sources, namely, the conversation of the place and occasion of speech and the intention of the speaker.<sup>207</sup> For example, where the conversation is about the divorce to use the word of divorce implicitly. Similarly, to utter an implicit word of divorce with the intention to give divorce when the discussion is not going on in respect of divorce.

<sup>206</sup> Usul and `Umdah p.25.

<sup>207</sup> `Umdah p.20;Fawatih vol1 p. 226.

These sources of appearing of the meaning of implicit word are also called the Circumstances of the Implicit (qara'in kinayah). In other words, the circumstances are relied upon in the matter of implicit (kinayah) as the circumstances are relied upon in the matter of metaphor (majaz).

These circumstances (qara'in) are in letters (lafzi) as well as in spirit (ma'nawi).

Thus the conversation of the place of occurrence is a circumstance of letter (qarinah lafzi) while the intention is a circumstance of spirit (qarinah ma'nawi). However, the difference between a qarinah majaz (circumstance of metaphor) and qarinah kinayah (circumstance of implicit) lies in it that the former is needed for taking the meaning other than the real meaning while the later is needed for the determination and appearance of the meaning.

### Example

A conversation is going on in respect of a person. He comes. It is said to each other that he has come. This is the example of real.

A person says to his wife: l'taddi (I make you a woman observing `iddat) This word is both implicit (kinayah) as well as metaphor (majaz). It is Kinayah (Implicit) as the word "l'tadda" means to count any thing. Here there is no mention of any thing. Hence, the mere word does not make the meaning apparent. Hence it is implicit (Kinayah). The speaker has determined with his intention that by the use of the word "count" he means: "She should count the days of her `iddat."

It is metaphor as the sense taken is "divorce" as it is the divorce that is the cause of counting the days of `iddat.<sup>208</sup>

The meaning of implicit words being not apparent, they do not prove the significant

Ahkam such as the Hudud. It is so because despite determination of the intention of the speaker and the occasion or place of speech there is possibility of meanings other than the intended. The matter of imposition of Hudud is a matter of great care and caution. Thus where an accused person makes a confession by using implicit word, he will not be punished for the offence of theft.

A common whose any one meaning is well known when used to convey that meaning,

A well known metaphor (majaz muta'araf),

A metaphor (majaz) that has a circumstance (qarinah) alongwith it,

A real in usage (haqiqat musta'malah), and

Various kinds of appearance (aqsam zahur) all come under the Explicit (Sarih).

Use of common in an unknown meaning

<sup>208</sup> Fawatih, vol.1 p. 226; al-Taudih p.189; Nur p. 142-3; Hisami and Nizami p.18

Use of a metaphor prior to its becoming a well-known metaphor,  
 Taking the hidden meaning of a real (haqiqat mahjurah),  
 All the four kinds of Khifa'(Khafi, Mushkil, Mujmal, and mutashabih), come  
 under the Implicit(kinayah).<sup>209</sup>

## Chapter V

### Division 5

#### Ways to know the intention of the speaker

There are four ways to know the intention of the speaker, namely,

1. `Ibarah al-Nass/إِبراه النص (Explicit meaning),
2. Isharah al-Nass/إِشَارَة النص (Alluded meaning),
3. Dalalah al-Nass/دَلَالَة النص (Inferred meaning), and
4. Iqtida' al-Nass/اِقْتِضَاء النص (Required meaning).

#### 1. **`Ibarah al-Nass (Explicit meaning)**

*Literally*, `Ibarah means to state, and al-nass means the text.

Thus `Ibarah al-nass means to state the text, to explain the text.

*Technically*, `Ibarah al-Nass means the meaning and import for which a word is used in the speech or the telling of the meaning by the word without any consideration for which it is used there.

It makes no difference, whether the word used is actually for that purpose or incidentally but the said meaning is also understood without any hesitation or consideration.<sup>210</sup>

#### Difference between Nass and `Ibarah al-Nass

It is common between the two that the word is used to mean some thing.

The difference lies in it that in the nass the word is used actually to convey that sense which is understood from it and the same meaning is the object of the speaker. In the `Ibarah al-Nass there is no such restriction. Rather, the meaning obtained incidentally, the word can be reliably brought for that meaning as well.<sup>211</sup>

#### Example

The Holy Qur'an says:

<sup>209</sup> Fawatih vl.1 p.226; Nur p.43; al-Taudih p. 189; Usul p.20.

<sup>210</sup> Hisami, p. 20; Nur, p.146; Tafsir, vol. I, p. 469; Fawath, vol. I, p. 406; Kashf, vol. I, p. 68.

<sup>211</sup> Tafsir, vol. I, p. 471. The madlul of `Ibarah al-Nass(ÖÀšXe£¤) is called mantuq which is the meaning for which the word is originally made (ma`na maudu` lahu).



And if You fear that You shall not be Able to deal justly with the orphan-girls, Then marry (other) women of Your choice, two or three, or four but if You fear that You shall not be Able to deal justly (with them), Then Only one or (the captives and the slaves) that Your Right hands possess. that is nearer to prevent You from doing injustice.

[4:3].

This verse is stating three commandments of Allah, the Most High. They are:-

1. Permissibility of the *Nikah*.
2. Permissibility of marrying more than one and upto four woman;
3. If there is apprehension that a man marrying more than one woman will not be able to do justice among them, then the obligation to marry only one woman.

Here the last two commandments are actually the object while the first is incidentally the object.

This is an example of *'Ibarah al-Nass* with respect to all the three commandments and an example of text (*nass*) with respect to the last two verses.

#### **Alluded Meaning (*Isharah al-Nass*)**

The meaning of a word that is understood of it by a little thinking according to the diction, in the sense that neither the word is spoken for that meaning nor the same be the object of the speech. In other words the indication of a commandment that is neither the object of the speech nor the speech is made for that object nor it is fully apparent and clear.

All the allusions (*isharat*) are not of equal degree. There is difference of degree on the basis of manifestation (*zuhur*) and concealment (*ikhfa*). Some become known by a little exercise of mind while others need deep thinking. This is the reason that in the matter of understanding

the meaning of Allusions (*ishara*) the difference of mental power and intelligence is much wider as is well known in *fihiyyat* (the science of law). It is said on the basis of Concealment of the meaning (*khifa*) of Allusion (*isharah*) that the link between Explicit meaning (*'ibarah*) and Alluded meaning (*isharah*) is the same that is between the Implicit (*kinayah*) and the Explicit (*tasrih*) and the Difficult (*mushkil*) and the Text (*nass*).

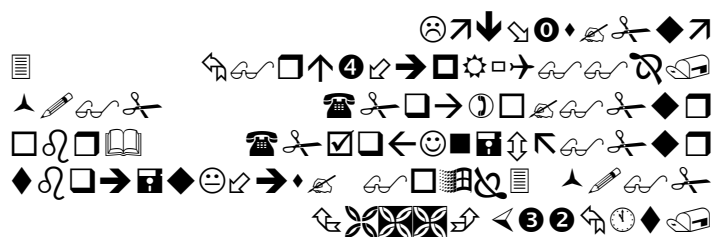
#### Rule

It is necessary to act upon both.<sup>212</sup>



<sup>212</sup> *Al-Taudih*, p. 301.





The mothers shall give suck to their Children for two whole years, (that is) for those (parents) who desire to complete the term of suckling, but the father of the child shall bear the cost of the mother's food and clothing on a reasonable basis. no person shall have a burden laid on Him greater than He can bear. no mother shall be treated unfairly on account of her child, nor father on account of his child. and on the (father's) heir is incumbent the like of that (which was incumbent on the father). if they both decide on weaning, by mutual consent, and after due consultation, there is no sin on them. and if You decide on a foster suckling-mother for Your children, there is no sin on you, provided You pay (the mother) what You agreed (to give her) on reasonable basis. and fear Allâh and know that Allâh is All-Seer of what You do.

[II:233]

This is the example of both *isharah al-nass* and *`ibarah al-nass*.

So far as *ibarah al-nass* is concerned the object is to state the obligation of maintenance of the suckling women, which is understandable from the statement itself without any mental exercise. And so far as *isharah al-nass* is concerned, it is understandable by a little mental exercise that the paternity is proved from the side of their fathers, hence the child has been attributed to the father although neither it is the object of the statement nor the speech has been brought for it nor it is fully apparent that every one may know and understand this meaning. This is the meaning of *isharah al-nass*.

### ***Dalalah al-nass* (Inferred Meaning)**

#### **Definition**

The meaning which are understood literally in the statement as an effective cause in the said commandment. In other words, in a speech the indication of such effective cause of the said commandment which can be understood by every one of the people of the language.

It means the proof of the truth (*misdaq*) of *dalalah al-nass* is the effective cause (*`illah*) of the said command but to understand it like the common effective causes and to deduce it from the statement is not by personal judgment (*ijtihad*) but it is understood by the requirements of the language from the same commandment in which it is mentioned.

### Difference between *dalah al-nass* (Inferred Meaning) and *Qiyas* (قياس) (Analogical Deduction)

From the above explanation it is manifest that *dalah al-nass* (Inferred meaning) and (*Qiyas* /قياس) i.e. Analogical deduction have common features in certain aspects and are quite distinct in other aspects.

The common aspects are that by both the effective cause of the commandment is known.

And it is understood that both are to be excluded from the statement.

The difference is that the basis of *dalah al-nass* (Analogical deduction) is the language while the basis of *Qiyas* (قياس) (Analogical deduction) is the personal judgment (*ijtihad*) and deduction (*istinbat*). For this reason, every one of the people of the language deserves to know the former while only a *Mujtahid* or an expert in deduction of rules is competent to know the later. Further, in the matter of the former the acting upon by the masses of the 'Ummah is relied upon while regarding the later there is dissenting opinion of a group.

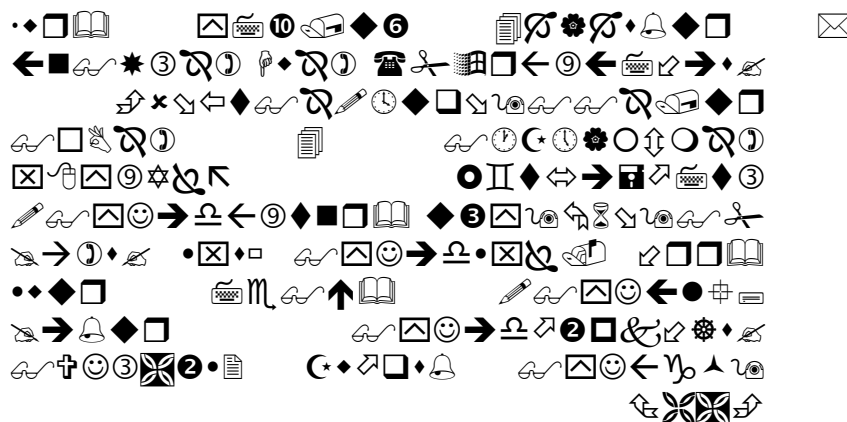
#### Rule

The generality of the command on the basis of generality of the effective cause. In other words, wherever the effective cause is found the command will have its issuance there in the sense that this command will apply including all such occasions and matters.

Here generality ('*umum*') is not used in its technical sense. Rather it means comprising and inclusive of all such occasions and matters where such effective cause exists.

#### Example

The Holy Qur'an says:



23. and Your Lord has decreed that You Worship none but Him. and that You be dutiful to Your parents. if one of them or both of them attain old age In Your life, Say not to them a word of disrespect, nor shout at them but address them In terms of honour.

[17:23]

The Holy Qur'an has used only the word "uffin". But every person from among the people of the language knows that the object is not limited to restrain the use of this word. Rather the object is to restrain from causing any injury to the parents, whatever may be its form. The reason is that to say them in Arabic "uffin" which means in English "Fie" is to cause them injury. Hence every source and form that caused them injury is prohibited whether it is by words of mouth or by conduct of the children.

Both *dalalah al-nass* (Inferred Meaning) and *lqtida' al-Nass* (Required Meaning) relate to the necessary meaning of a statement. However, the difference between the two is that the *madlul* (meaning) of *lqtida' al-nass* (Required Meaning) is *lazim muqaddam* (prior necessarily) in the sense that the validity of the statement stands on it. While the *madlul* (meaning) of *dalalah al-nass* is such a *lazim* (necessary) on which the validity and correctness of the statement does not depend. Rather, it is the *'illat* (effective cause) of the *manuq* (meaning) and *maudu' lahu* (meaning for which a word is made) of the word.

### ***Dalalah al-lqtida'* (Required Meaning)**

*Literally*, the word *lqtida'* means to require. *Muqtada'* is that thing of which a requirement is made.

*Technically*, the word means that meaning and sense which is external to the words of the statement and that is relied upon for the validity of the speech according to the Law (*Shari'ah*) or the reason (*'aql*). In other words, the giving of the sense by the speech over and above its own words on which according to the Law (*Shari'ah*) or reason (*'aql*) the truth and validity of the speech depends.

Thus, the proof of the required meaning is not the meaning of a word of a statement but for the truth and validity of the statement this meaning is taken along with the original meaning of the statement.

### **Rule**

According to the need to rely and act upon the additional meaning. The term according to the need means the acceptance of the minimum additional meaning whereby the truth (*sidq*) and validity (*sihhat*) of the speech (*kalam*) is proved. Thus, reliance on only that much is permissible and not on more than that.

### **Examples**

It is stated in the definition above that legally (*Shar'an*) or reasonably (*'aqlan*) for the correctness or the truthfulness of the speech "required meaning" are needed. Therefore, it has two modes.

Firstly, such required meaning are needed to be reliable for truthfulness.

Secondly, such required meaning are needed to be reliable for correctness. The second form or modes has further two kinds.

Firstly, the reliance of which is for correctness according to law.

Secondly, the reliance of which is for correctness according to the reason.

### 1. Form of Truthfulness according to Law

It means that in case if this meaning is not accepted then the truth will not be proved according to the Law (*Shari`ah*). For example, it is in a *Mash-hur* Hadith of the Messenger of Allah (peace and blessings of Allah be upon him):

*Innallaaha wada`a `an `Ummati al-khata`a wa'l-nisyaana*  
(Allah has removed the mistake and forgetfulness from my Ummah).

It is evident that this does not mean that error and forgetfulness shall never occur from the ummah nor does it mean that if an act is committed under mistake or due to forgetfulness, the said act can be undone after its performance. The reason is that the Ummah is constantly involved in both the circumstances and whatever act comes into existence it cannot be made non-existent. Here the speech is of the Last Messenger of Allah (peace be upon him) regarding which there is no possibility of being false or being not true. Hence, it is to be accepted that there is some word prior to the words "*al-khata`a wa'l-nisyaana*" that makes it according to the actual and factual circumstance and that word is either "*ithm*" or "*hukm*". Thus, it would mean that the sin or the Legal Consequence of the command is removed from the 'Ummah.

### 2. Form of validity according to reason

It means that in case the additional meanings are not relied upon, the speech is not valid according to the reason. For example, Allah Almighty says:

*Was'alil-qaryata* (Ask the Town).

It is evident that according to reason, a thing is asked for from a person rather conversation can only take place with a human being. It cannot take place with an animal nor with the stones, towns or villages. Hence, outwardly the speech would not be correct unless some word is accepted as hidden before the word "*al-qaryata*" and that word is used to mean human beings. For example, the words "*ahl*" or "*ashab*", etc.

### 3. Form of Validity according to the Law

It means that in case the additional meaning is not relied upon, the speech is not valid according to the Law (*Shari`ah*). For example, in the Holy Qur'an, at various places the command is "*tahriru raqabatin*" (to free the neck).

Evidently, it does not mean to free the neck of a man who is not slave as he is already free and there is no question of his freedom. Similarly, it does not mean to get hold the slave of another person and to free him. The reason is that no one has the control over the ownership of another person nor exercise of such control by him is relied upon. Hence, in view of these legal rules (*ahkam shar'i*), the words "*mamlukatun lah*" shall have to be read. In other words, the command to free a neck is regarding that person who is in the ownership of the person who is

going to free him irrespective of the time of ownership being a moment before the grant of freedom or earlier than that.<sup>213</sup>

For the validity of any speech or statement, the additional meaning or words that is relied upon are given three names, viz.,

1. *Muqtada*/مقتضى.
2. *Muqaddar*/مقدر, and
3. *Mahzuf*/محذوف.

What is the relation between these three technically and what is the definition of each one of them?

There are different views. Some scholars define them separately while others define them jointly. For example, the author of *Umdah* defines the three words separately:

- ❖ *Muqtada* is that additional meaning which is relied upon in the matter of validity of the speech according to the Law (*Shari`ah*) or the reason (*`aql*).
- ❖ *Muqaddar* is that additional meaning which is relied upon in the matter of validity of speech according to the Diction (*lughah*), the Law (*Shari`ah*) or the Reason (*`aql*).
- ❖ *Mahzuf* is that additional meaning which is relied upon according to the diction.<sup>214</sup>

Some scholars have given the same definition of *Muqtada* as that of *Muqaddar*.<sup>215</sup> However, this view is more popular that the proof of which is according to the *Shari`ah* it is *Muqtada* and the proof of which is according to the diction and the reason that is *Mahdhuf*.<sup>216</sup>

*Mahdhuf* is also called *Mudmar* and *Muqaddar*, without making any difference between and *Mahzuf* and *Muqaddar*. However, there is technical difference between *Muqtada* and *Mahdhuf* is the view of all the later *Ahnaf*. Rather, the author of *Fawatih al-Rahmut* has stated that it is the view of the generality of the *Ahnaf*.<sup>217</sup> But as explained with details by the author of *Tafsir*, the earlier *Ahnaf* like *Abu Zayd Dabbusi*, etc., were almost all declared both as one and the same like the other jurists.<sup>218</sup>

Those who are convinced of the difference between the two, that the proof of *Muqtada* is according to the Law (*Shari`ah*) and the proof of

<sup>213</sup> *Tafsir*, vol. I, pp. 548-9.

<sup>214</sup> *Umdah al-Hawashi*, Maulana Faizul Hasan Gangohi, Delhi: Rashidiyah, p. 31.

<sup>215</sup> *Shami*.

<sup>216</sup> *Husami*, p. 22; *Nur*, p. 151; *Fawatih*, vol. I, p. 412; *Kashf*, vol. I, pp. 75-76; *Usul Sarj*, vol. I, p. 251; *Al-Taudih*, vol. I, p. 127.

<sup>217</sup> *Fawatih al-Rahmut Sharh Musallam al-Thabut*, `Abdul `Ali Bahr al-`Ulum Lakhnavi, Bairut: Dar Ihya al-Turath al-`Arabi, vol. I, p. 412.

<sup>218</sup> *Taqwim al-`Adillah*, Abu Zayd al-Dabbusi, Manuscript, p. 244; *Tafsir*, vol. I, p. 550.

*Mahzûf* is according to the Diction (*Lughah*), have mentioned generally a reason that by the acceptance of *Muqtada* the sequence and *i`rab* of the statement do not change while by believing *Mahzûf*, the sequence and *i`rab* are changed. However, at many occasions, the opposite of it is also established, hence, that reason of distinction has been rejected.<sup>219</sup>

The author of *Fawatih* has made it specific with certain forms<sup>220</sup>, but he has not appreciated it.<sup>221</sup>

The difference between *Mahzûf* and *Muqaddar* is stated that *Muqaddar* is like the aforesaid, that is despite being not present in the words of the statement, its operational effect is present and believed in the words of the statement, while the omission (*haza*) of *Mahzûf* has no operational effect.<sup>222</sup> However, this distinction is not regarded at every occasion. Rather, often for the non-mentioned the word *Mahdûf* is brought.

#### D. Multiplicity of *Muqtada* (*Ta`addud Muqtada*)

Sometimes it so happens that in a statement there is possibility of coming of many words as *Muqtada* with different meanings. At that time, such a speech is declared from the category of *Mushtarak* and the *Muqtada* is determined by exercise of personal judgement (*ijtihad*) and in such circumstance, due to the difference of taste in the thinking of the Mujtahidin and their following of different schools of thought, there occur difference in the *Muqtada* as well. For example, there is a hadith:

*`Ala al-yadi ma akhazat* (On hand is that which it takes.)

Here, before the word "*ma*" there is a necessity to believe some *muqaddar* (hidden word) which can be either *hifz* or *daman*. If it is accepted that the hidden word is *hifz*, then it would mean that the thing which has been taken its protection is binding. In case, the hidden word is believed to be *daman*, then the hadith would mean that whatever has been taken its compensation shall have to be paid back. Some others have stated that the protection of the goods taken is binding and in case of wastage, there is no *daman* or penalty. Still some others have stated that if the thing taken is lost, payment of its *daman* and penalty shall be binding.<sup>223</sup>

#### E. Sources of Determination of *Muqtada* (Required meaning of the Text)

There are two sources of Determination of *Muqtada*. They are:-

<sup>219</sup> *Hisami and Nizami*, p. 22; *Nur and Qamar*, p. 15; *Kashf al-Asrar*, `Abdul `Aziz Bukhari, Maktab al-Sana'i, 1307AH, Istanbul, vol. II, pp. 564-5; *Al-Taudih wa'l-Talwih* with marginal notes, Sadr al-Shari'ah Sa'd Taftazani, Amir `Ali, Nolkashor Press, Lukhnow, vol. I, p. 141.

<sup>220</sup> *Fawatih*, vol. I, p. 412.

<sup>221</sup> *Tafsir*, vol. I, pp. 555-9.

<sup>222</sup> *Kafiyah Sa'idiah*, Maulana Muhammad Hayat Sanbhali, Maktaba Majidi, Kanpur, p. 64.

<sup>223</sup> *Usul al-Tashri`*, p. 230; *Tafsir*, vol. I, p. 561.

1. *Dala'il* (Evidences / Arguments / Indications); and
  2. *Qara'in* (Circumstantial Evidence).<sup>224</sup>
  4. **Relation of the said kinds with general and specific:**
    1. Both 'Ibarah al-Nass and Isharah al-Nass may be related to the general and the specific.<sup>225</sup>
    2. The misdaq of dalalah al-nass covers all such occasions where there is its existence but the sense of 'shamul in the sense of 'umum is not technical. Hence there cannot be specification in it. It is so because the general and the specific are the attributes of the words while the relation of Dalalah al-Nass is with the requirements of maudu' la hu.
    3. In iqtida' al-nass the muqtada' can be a specific word as well as a general word. However, as the reliability of muqtada' will be to the extent of the need for the validity and truthfulness of the speech. Hence in case Muqtada' is a general word it shall not be carried to generality as in the case of example of truthfulness the Hadith referred to has the word "ithm" and in case the said word "ithm" is considered as muqtada', it will be specific(khass) and if the word "hukm" is considered as muqtada, it will be general('am) . But whereas by taking the meaning of the word "hukm" as "hukm ukhrawi" the speech proves true. Hence, by making it general, there is no need to take the meaning of "hukm dunyawī". The Hadith would then give the meaning that in these matters there shall be no Legal Consequence in the Hereafter i.e. there shall be neither any sin nor any accountability. As the reference is not to the "hukm dunyawī" the Legal Consequence will be of "hukm ukhrawī". For example: The prayer will become "fasid"(irregular) by talking inadvertently while pronouncement of divorce will become effective even if it is pronounced inadvertently.
- Further, in the case of muqtada being general, it cannot be made specific. The reason is that specification is made in a word uttered by the tongue. For example: A person swears by God that he will not eat and did not mention in it as to what thing he will not eat, then it is evident that reference is to an eatable thing, thus all eatables will come under it. If at the time of taking such oath he intends some specific thing, the intention will not be reliable. By eating any thing he will be guilty of breach of his oath. The reason is that he did not utter from his tongue any word having the meaning of eatable.<sup>226</sup>
- Qat' iyyat (قَاتِئِيَّة) and Zanniyat(زَنَّيَّة) of Madlulat of the above mentioned kinds:**
- a) the madlul of 'ibarah al-nass is in all circumstances 'qat'i ;

<sup>224</sup> Hisami, p. 22.

<sup>225</sup> Hisami, p.22.

<sup>226</sup> Fawatih Vol.I,p.412; Nur p.152; Hisami and Nizami p.22, Tafsir Vol I, pp. 562-65.

- b) the madlul of isharah al-nass is sometimes qat'i and sometimes zanni (q̣TĀG');<sup>227</sup>
- c) the madlul of dalalah al-nass is also sometimes qat'i and some times zanni (q̣TĀG'),<sup>227</sup>
- d) Muqtada becomes qat'i after its determination. And for this reason it has precedence over **Qiyas** (قياس).<sup>228</sup>

### Maratib

There is difference among all the four with regard to their sequence of mention.

The first is 'ibarah al-nass which is the highest in level or rank while the last or the fourth is iqtida' al-nass which is the lowest in level or rank. This difference of levels is apparent when their madlulat are mutually contradictory. Thus whichever is stronger, that is given precedence over the weaker than it. That is the first has the precedence over the second. The second has the precedence over the third. The third has the precedence over the fourth.

For example, in an Hadith the minimum period of menstruation has been mentioned as three days and the maximum as ten days. In an other Hadith it is mentioned that the women pass half the period of their lives in the houses without prayer and fast. This gives the isharah that the maximum period comes to fifteen days, as the half of each month is fifteen days and by this account the half the period of life is completed. Thus there occurs a contradiction between the two madlulat. Hence the madlul of 'ibarah is given precedence and the maximum period has been declared as ten days.<sup>229</sup>

### An Exhaustive Example:

The last verse of the Fourth Part of the Holy Qu'an is:

*Hurrimat `alaykum ummahatukum.*

In the above verse the women of prohibited degrees are mentioned with whom marriage of a person is unlawful. This verse is exhaustive of all the four kinds.

The mothers and all those women mentioned in the words of the verse are unlawful according to the 'ibarah al-nass.

The unlawfulness of a foster sister of the mother is proved by the isharah al-nass as the foster women have been called as mother. Hence his sister shall be the sister of the foster-mother.

<sup>227</sup> Nur and Qamar p.147 and 148; Kashf Vol. I pp.70-73, Fawatih Vol.I p. 409; Tafsir Vo. I pp. 494 and 526. The proof of qat'iyyat of Ishaṛah({eŁ Z) and dalalah(ăšêc) is by the qara'in. As against *dalalah al-nass* (ŌĂŠZăšêc) is *qiyas zanni*(q̣Ā'hĒĀ—), as it 'illah(effective cause) is often deduced one(mustanbitah) and if the 'illah(effective cause) is textual(mansusah) the 'illah is qat'i but the hukm based on it is zanni.

<sup>228</sup> Hisami and Nizami p.21; Nur p. 149 and Qamar p.151.

<sup>229</sup> Hisami and Nizami pp.20-21; Nur pp.147,148 and 151.



By the unlawfulness of the sister of father and sister of mother, the unlawfulness of paternal grandmother and maternal grandmother is also understandable by the dalalah al-nass as the effective cause is common and that is the qurb of qarabat. Rather the paternal grandmother and maternal grandmother have precedence as their proximity is only by means of one link i.e. by the link of the mother or the father. The unlawfulness of mother's sister and father's sister, the mother and father and their parents become the link. The words of "Hurrimat `alaykum" come under the iqtida'. That is the object is not to tell the unlawfulness of the beings (zawat) of these women. Rather the objective is to tell the unlawfulness of marrying them. Hence the `ibarah shall be like this: Hurrima `alaykum al-tazawwaju bil-mazkurat.<sup>230</sup>

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<sup>230</sup> ibid.

## Supplement Mafhum

### Dalalat

#### Definition

1. *Literal and customary*: Telling of one thing by another thing.
2. *Technical*<sup>231</sup>: Telling its own meaning by a word.

#### Kinds of Dalalat:

1. Dalalat Mantuq; and
2. Dalalat Mafhum.

By the word mantuq the reference is to its original meaning for which such word is made (ma`na maudu` lahu). Opposite to this in original, comes the word maskut `anhu which refers to the meaning in accord (ma`na mutabiqi) or the meaning taken impliedly (tadammuni) or the meaning necessarily attached to it (ma`na iltizami;<sup>232</sup>) for which such a word is used. The word is in no way includes such meaning according to the diction but definitely, it is understood by those meanings that are called mantuq, irrespective of its meaning in accordance with the mantuq or opposed to the mantuq. Technically, this is called Mafhum. Hence, the second kind of Dalalat has been mentioned as Dalalat Mafhum.<sup>233</sup>

### Dalalat Mantuq

#### Definition

Dalalat of a word to its kamil maudu` lahu or to its part or to its lazim.

#### Kinds

It has two kinds, namely, Dalalat Mantuq Sarih and Dalalat Mantuq Ghayr Sarih.

<sup>231</sup> With regard to Usul Fiqh and not Mantiq.

<sup>232</sup> Ma`na Mutabiqi is the kamil maudu` lahu of a word; ma`na tadammuni is a part of the Maudu` lahu and ma`na iltizami is the lazim of maudu` lahu.

<sup>233</sup> Under the heading Mafhum almost this type of details are given that are found Division V of this book. The difference is only of ta`bir and of it that the former details have been opted and are prevalent among the Ahnaf....The details coming under it are prevalent among Shawafi` and according to the explanation of some `ulama those are prevalent among the mutakallimin. There is consensus of Ahnaf and Shawafi` to some extent concerning these details with the difference of ta`birat, and there is also difference of opinion among them to some extent. Whereas in the matters in which there is conflict of opinions, there comes under it the discussion of mafhum mukhalif, which is one of the important discussions of Usul Fiqh and an important basic thing of Usul Ikhtilaf, hence this discussion has got significance. For this reason in the books of Hanafi Usul Fiqh this discussion is found in one way or the other. Fawatih, Vol. I, p. 413; Nur, pp. 153-157.

### 1. Dalalat Mantuq Sarih

#### Definition:

Indication of a word to its complete and full or to a part of the meaning for which it is made.

#### Example:

The word Zayd, refers to mean the being or person of Zayd or any part of body of Zayd. According to Ahnaf it is called `Ibarah al-nass.

### Dalalat Mantuq Ghayr Sarih

#### Definition

Indication of a word to its lazim.

#### Example

To take the meaning of bravery by using the word lion.

#### Forms:

It has two forms, namely, a dalalat which is the objective of the word; and a dalalat which is not the objective of the word.

Dalalat ghayr sarih maqsud is again of two forms.

Firstly, an indication on which depends the truth or validity of speech according to the Shariah or the reason. It is called Dalalat Iqtida'.

According to the Ahnaf, this is termed as Iqtida' al-nass.

Secondly, the hukm mentioned in the speech is mixed with any such attribute, that in case the said attribute is not considered an effective cause (علة/illah), its joining (اتصال/ittisal) and its coming at such occasion becomes futile. It is called Dalalat Tanbih/التنبيه and Dalalat دلالة الايماء/'Ima'.

For Example, in the Qur'anic verse:

*Al-Sariqu wa al-Sariqatu faqta`u aidiyahuma*

[ V:38]

after the word "fa" the command of amputation of hand indicates that the effective cause of amputation of hand is the commission of theft.

According to Ahnaf this form in some level comes under Dalalah al-nass (دلالة النص), otherwise originally according to the division of Shawafi` the mafhum muwafiq/مفهوم موافق stands for dalalah al-nass (دلالة النص).

### Dalalat Ghayr Sarih Ghayr Maqsud

The ghayr Sarih dalalat of the mantuq which is not the objective. Ghayr Sarih refers to an indication to lazim/لازم. It is called Dalalat al-Isharah/دلالة الإشارة.

According to the Ahnaf this is the Isharah al-nass/إشارة النص.<sup>234</sup>

<sup>234</sup> Fawatih, Vol. I pp.413-4; Tafsir Vol. I pp. 591 and onward till end of the subject pp. 606-619. It is already mentioned that under the Div.V the details

**Dalalat Mafhum/ دلالة مفهوم****Definition**

Indication of such a meaning by a word which is not included in the mantuq.<sup>235</sup>

In other words, a meaning which is neither the Full meaning for which the word was coined originally, nor partial meaning nor necessary meaning. Rather, on account of some relationship it is so considered as having link with any one of them.

**Kinds**

It is of two kinds, viz., *Dalalat Mafhum Muwafiq* and *Dalalat Mafhum Ghayr Muwafiq*.

adopted by the Ahnaf and the details mentioned above there is a link. Thus this link has also been explained under the above mentioned details that according to the details of the Shawafi` the misdaq of Dalalat Mantuq Sarih is `Ibarah al-nass (إبراه النص) (Explicit Meaning) ; the misdaq of Dalalat Isharah (إشارة النص) (Alluded meaning); the misdaq of Dalalat Iqtida' (إقتداء النص) (Required Meaning). The mention of the original link (asl munasib) is coming under the title "mafhum", though in some degree, Dalalat Tanbih and 'Ima' has also a link with it. Thus some jurists have written about the four kinds of Ahnaf that in case the proof of meaning is by the word itself (nafs lafz/ نفس لفظ) and the objective is that the speech has been brought for it, it will be called `Ibarah al-nass (إبراه النص) (Explicit Meaning). But in case there is relation with the word but it is not the objective then it is called Isharah al-nass (إشارة النص) (Alluded meaning). In case the proof of the meaning is not by the word and it is considered, then if it is so considered according to the diction it is called Dalalah al-nass (دلالة النص) (Inferred Meaning) and if it is so considered according to the Shari'ah it is called Iqtida' al-nass (إقتداء النص) (Required Meaning).

The mafhum that is understood under the second kind of Dalalat Ghayr Sarih Maqsud, it is so understood according to the diction (lughat). For this reason it is mentioned that to some degree it falls under Dalalah al-nass (دلالة النص) (Inferred Meaning). It should also be borne in mind that as it is clear from our explanation under the Dalalat Ghayr Sarih Maqsud that the misdaq of the terminology of both the parties is not exactly the one and the same. This fact has come to light under the discussion of Mantuq that the definition of Mantuq is exactly the same as that of `Ibarah al-nass (إبراه النص) (Explicit Meaning) as per the author of al-Taudih. Thereafter, the mantuq is divided into two categories, viz., Mantuq Sarih and Mantuq Ghayr Sarih. The Mantuq Ghayr Sarih which refers to the lazmi ma'na, under it come Dalalat Iqtida' and Dalalat Isharah (إشارة). Under Mantuq Sarih come Full meaning for which a word is coined in the beginning (Kamil ma'na maudu` lahu) and its part (juz'). We have mentioned it as `Ibarah al-nass (إبراه النص) (Explicit Meaning). But by our above mentioned detail it is clear that `Ibarah al-nass (إبراه النص) (Explicit Meaning) is not exactly misdaq of Mantuq Sarih.

<sup>235</sup> Tafsir, Vol.1, p.592.

*Dalalat Mafhum Muwafiq* means telling of a word the proof of the ruling of mantuq exactly in favour of Maskut `anhu.

The *Ahnaf* call it Dalalah al-nass/دلالة النص (Inferred Meaning) and for it, with some details, other titles are used like,

*Fahwa* al-Khitab/فحوى الخطاب;

*Lahn* al-Khitab/لحن الخطاب;

*Mafhum* al-Khitab/مفهوم الخطاب etc.<sup>236</sup>

### **Dalalat Mafhum Mukhalif**

#### **Definition**

For the ruling of the mantuq when none of the aforesaid restrictions are existing indication of the word of the proof of the opposite of the ruling of mantuq in favour of maskut `anhu.<sup>237</sup>

The *Ahnaf* also use the statement (ta`bir) of "Makhsus bi al-Zikr" and also "Dalil al-Khitab". The net result of it is the proof of opposite of the ruling of Mantuq for an affair or aspect which is not mentioned in the mantuq.<sup>238</sup>

### **Kinds of Mafhum Mukhalif**

The kinds of Mafhum Mukhalif are as many as the restrictions that do not exist in the speech. However, the well known are the following five kinds:

1. Mafhum Laqab;
2. Mafhum Hasr;
3. Mafhum Wasf;
4. Mafhum Shart; and
5. Mafhum Ghayat.<sup>239</sup>

#### **1. Mafhum Laqab**

##### **Definition**

Indication of a speech qualified by a specific name opposite to the ruling in favour of a maskut `anhu.

<sup>236</sup> Fawatih Vol I p. 414; Tafsir Vol I, p. 607.

<sup>237</sup> Fawatih Vol.I p. 414; Al-Tahrir Vol I, p. 115; Tafsir Vol.I. p. 609.

<sup>238</sup> Kash Vol. 2, p.375; Tafsir vol.I pp. 610,668.

<sup>239</sup> The remaining kinds of Mafhum Mukhalif are:

6. Mafhum `Adad;
7. Mafhum Hal;
8. Mafhum Zaman;
9. Mafhum Makan; and
10. Mafhum `Illat. Some jurists have declared Mafhum Wasf and Nos. 6 to 9 as one and the same while others have declared 4 to 10 as one and the same.

**Ruling**

Such a meaning is not worthy of becoming a decisive argument and is also not reliable.<sup>240</sup>

**Example**

Zaydun Qa'imun (Zayd is standing).

Relationship of standing of Zayd does not indicate standing of a person other than Zayd.

**2. Mafhum Haṣr****Definition**

The indication of speech on the opposite of the mentioned ruling in favour of those persons which are other than those encompassed in the speech.

**Ruling**

It is worthy to be considered as decisive argument and also reliable. It is for this reason that the aforesaid ruling is not relied upon in the case of the individuals not encompassed.<sup>241</sup>

**Example :**

*Innama al-Ta'atu fi al-ma'rufi.*<sup>242</sup>

[Verily, the obedience is in the matter of known good].

In other words, there is no obedience in the matter of sin.

**3. Mafhum Wasf****Definition**

Indication of the proof of opposite of the mentioned ruling in favour of the individuals who lack the attribute / quality (wasf) mentioned in the speech.

By the attribute the reference is not to the adjective used in grammar. Rather it refers to all those things that produce an attribute (wasf) even if they may be in any form grammatically. For Example, Mausuf and Sifat; Zu al-Hal and Hal; Mausul and Silah; Mumayyaz and Tamiz; Zarf and Mazruf.<sup>243</sup>

**4. Mafhum Shart****Definition**

Indication of proof of opposite of the ruling mentioned in favour of the individuals lacking the condition mentioned in the speech.

**Examples**

The Holy Qur'an says:

<sup>240</sup> Fawatih Vol.I. p.432; Al-Taudih, p.314; Nur p. 153.

<sup>241</sup> Fawatih, Vol I, p. 434; Ibn Hammam and the author of Musallam have declared it from the category of Mantuq ,p.435.

<sup>242</sup> Sahih, Bukhari.

<sup>243</sup> `Umdah p. 69.

*“Wa man lam yastati` minkum taulan an yankiha'l-muhsinati'l-mu'minati  
famin ma malakat aimanukum min fatayatikumul-mu'minati.”*  
[IV:24]

In the above verse *“wa man lam yastati”* is the shart (condition) and in the phrase *“min fatayatikumul-mu'minati”* the word *“al-mu'minat”* is wasf which is mafhum mukhalif of the first. That is, a person who is not in a position to marry a free woman, it is not permissible for him to marry a slave woman, and seconly, i.e., the mafhum mukhalif of the wasf is this that a slave woman who is not a Muslim, to marry her is not permissible.<sup>244</sup>

## 5. Mafhum Ghayat

### Definition

Indication of proof of opposite of the ruling mentioned in case of the existence of the last limit of a thing mentioned in the speech.

### Example

The Holy Qur'an says:

*“Fa in tallaqaha fala tahillu lahu min ba`du hatta tankiha zaujan  
ghayruhu.”*

[II : 230 ].

In this verse it has been stated that a woman on whom there had been three pronouncements of Divorce, the last limit of her unlawfulness for the first husband is marriage with the second husband and sexual intercourse. When this last limit is found, the unlawfulness will come to an end and the ruling of lawfulness will apply.<sup>245</sup>

### Rulings of the above said three kinds

With regard to the rulings these three kinds are of two forms:

1. That act can be performed without the restriction i.e. the restriction is not mentioned for the purpose of action. Rather it is for any other reason. In such a circumstance, there is agreement of all the jurists that the mafhum is of no reliance.

Reasons for non reliance of mafhum (Wujuh `adam i`tibar mafhum):

The following may be the reasons for unreliability of mafhum mukhalif:

1. To express obligation;
2. To show indulgence on account of some event or general circumstance;
3. To show indulgence on account of some habit/usage/custom;
4. Stress;
5. Answer;
6. Ignorance of the meaning or ruling;

<sup>244</sup> Fawatih, Vol I, p.414; Tafsir Vol.I, pp.610-13.

<sup>245</sup> Fawatih, Vol I, p.432; Tafsir Vol.I, p.615.

7. Apprehension of some misunderstanding;
8. Presence of a proof/argument in favour of maskut `anhu;
9. To excite towards anything;
10. To create a terror about anything or to create a hatred in respect of anything;
11. To express the greatness of anything;
12. Mention of a restriction incidentally or casually;
13. Appreciation;
14. and condemnation .<sup>246</sup>

Secondly, that besides acting upon the mafhum, there is no other use of restriction. That is the restriction is brought for the purpose of action.

In this circumstance according to Ahnaf there is no reliability of the mafhum.

The things which are not mentioned in the words of the statement such things shall remain as such till there does not exist some permanent proof in there favour, no ruling will prove for them against the mantuq. Thus under the mafhum shart for a person who is capable to marry with a free woman, the unlawfulness of marriage with a slave woman and under the mafhum wasf the unlawfulness of marriage with a slave woman of People of the Book shall not proved; and under the mafhum ghayat the proof of end of unlawfulness of remarrying the first husband is not specifically due to the mafhum mukhalif of the verse. Rather it is due to the other texts.<sup>247</sup>

#### **Agreed upon rulings about the mafhum mukhalif**

1. Ruling of the mafhum laqab, that is, non existence of reliance is agreed upon ( ittifaqi )<sup>248</sup>;
2. Ruling of the mafhum hasr, that is, reliance is agreed upon<sup>249</sup>;
3. Ruling of the first form of the mafhum wasf, mafhum shart and mafhum ghayat is agreed upon ( ittifaqi )<sup>250</sup>;
4. Ruling of the mafhum `adad is reliable as considered by some of the Ahnaf<sup>251</sup>;
5. Reliance of mafhum mukhalif in favour of punishments ( `aqubat ) is agreed upon<sup>252</sup>;
6. Besides the Holy Qur'an and the Hadith, in every speech, weather it is of the specific or of the general and weather it is of the companions or statement of any book, the reliance of mafhum mukhalif of all is

<sup>246</sup> Fawatih, Vol I, p.414; Al-Taudih p.316; Tafsir Vol I, pp.673,675.

<sup>247</sup> Kashf, Vol.3,p.3 and 5; Al-Tahrir, Vol.1,p.115; Tafsir, Vol.1, pp,667,668,728.

<sup>248</sup> Usul Al-khalaf p.155.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid.

<sup>251</sup> Fawatih, Vol.1, p. 432 like Tahawi and Jassas.

<sup>252</sup> Hashiyah Rasm Al-Mufti.



agreed upon. In other words the ikhtilaf is in respect of the Holy Qur'an and Hadith, and in respect of the matters other than punishments<sup>253</sup>.

## BAYAN

### Definition

*Literally*, bayan means to express, to explain, to state.

*Technically*, bayan means a matter through which the sense of the speaker becomes clear.

### Sources of bayan

There are many sources of bayan such as:

1. writing;
2. sign;
3. ijtiḥad and **Qiyas** (قياس) ;
4. qaul;
5. fi'l;

Mostly the last two are used as the sources and among both of them the qaul is most common. Hence the Asuliyyun discuss with qaul the most and whatever kinds are mentioned by them those relate to the qaul.

### Example of bayan fi'l

Regarding the offering of prayer the Messenger of Allah (peace and blessings of Allah be upon him) said:

*"Sallu kama ra'aytumuni usalli."*

[Offer prayer as you see me offering the prayer.]

Here the offering of prayer has been stated by means of action.

### Kinds of bayan qauli

There are five kinds of bayan qauli:

1. bayan taqrir;
2. bayan tafsir;
3. bayan taghyir;
4. bayan **darurat** ; and
5. bayan tabdil .

### Bayan Taqrir/بيان تقرير

#### Definition

To stress the former speech with such words that the possibility of intention of metaphor and specification remains no more.

An other name of bayan taqrir is bayan takid.

<sup>253</sup> Hashiyah Hamawi on Al-Ashbah p.15; Al-Tahrir, Vol.1, p. 177; Nur p.154; Tafsir, Vol.1, p.687 Rasm al- Mufti p.52 ; Usul al-Khilaf p.155

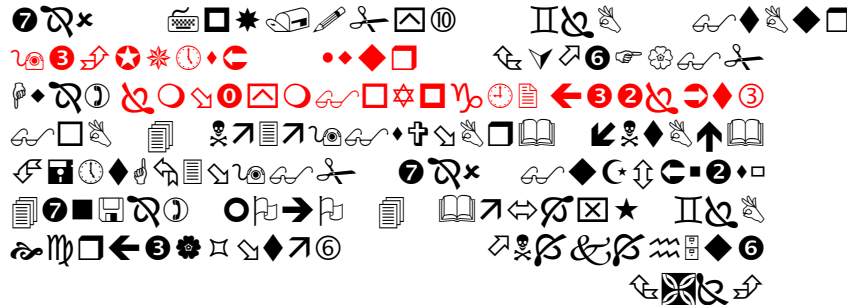
**Ruling**

It is reliable in all circumstances even if the words are joint or separate from the former speech.

**Examples**

A) In respect of removal of possibility of metaphor.

Allah Almighty says:



There is not a moving (living) creature on earth, nor a bird that flies with its two wings, but are communities like you. We have neglected nothing in the Book, Then unto their Lord they (all) shall be gathered.

[ VI: 38 ]

In the word "ta'ir" there was possibility of metaphor hence by qualification/restriction of "yatu bijanahayhi", the same has been removed, as it determined that here by the word ta'ir (bird) a bird is meant.

B) In respect of removal of possibility of specific:

Allah Almighty says:



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28. and (remember) when Your Lord said to the angels: "I am going to create a man (Adam) from sounding clay of altered black smooth mud.
29. "So, when I have fashioned Him completely and breathed into Him (Adam) the soul which I created for him, Then fall (you) down prostrating yourselves unto him."
30. **So, the angels prostrated themselves, all of them together.**
31. except Iblīs (Satan), - He refused to be among the prostrators.
32. (Allāh) said: "O Iblīs (Satan)! What is your reason for not being among the prostrators?"
33. [Iblīs (Satan)] said: "I am not the one to prostrate myself to a human being, whom You created from sounding clay of altered black smooth mud."
34. (Allāh) said: "Then, get out from here, for verily, you are Rajīm (an outcast or a cursed one)." [Tafsīr At-Tabarī]
35. "And verily, the Curse shall be upon you till the Day of Recompense (i.e. the Day of Resurrection)."
36. [Iblīs (Satan)] said: "O My Lord! Give me then respite till the Day they (the dead) will be resurrected."
37. Allāh said: "Then, verily, you are of those reprieved,
38. "Till the Day of the time appointed."
39. [Iblīs (Satan)] said: "O My Lord! Because you misled me, I shall indeed adorn the Path of error for them (mankind) on the earth, and I shall mislead them all.
40. "Except Your chosen, (guided) servants among them."
41. (Allāh) said: "This is the Way which will lead straight to Me."
42. "Certainly, You shall have no authority over My servants, except those who follow You of the Ghāwīn (Mushrikūn and those who Go astray, criminals, polytheists, and evil-doers, etc.).
43. "And surely, Hell is the promised place for them all.
44. "It (Hell) has seven gates, for each of those gates is a (special) class (of sinners) assigned.

[15:28 to44]

There was possibility ('ihtimal/احتمال) that the said prostration (*sajdah*/سجده) might have been made by some individuals from among the angels or that they had prostrated separately. The addition of the words: all of them (*kulluhum*/كلهم) removed the possibility of some and the addition of word together (*ajma'un*/اجمعون) removed the possibility of prostration (*sajdah*/سجده) by the angels separately.

#### **B) Bayan tafsir/بيان تفسير**

##### **Definition**

To make clear the meaning of former unclear speech.

### Occasion

Mujmal/مجمال, the meaning of which is made clear and muhtarak/محترك the meaning of which is determined and mushkil/مشكل, Hidden (khafiyy/خفي)/ and kinayah/كنايه etc the meaning of which is told. The explanation and determination of the meaning of the said matters is called bayan tafsir/بيان تفسير.

### Ruling

It is reliable in both joining and separation from the former speech.

### Examples

a) Prayer, zakat etc. are the matters which have been mentioned in the Holy Qur'an as Mujmal. The Messenger of Allah (peace and blessings of Allah be upon him) removed this ijmāl (uḡ%Z) by his words and action and explained and clarified the meaning of these terms fully.

b) Allah Almighty says:

*"Wal mutallaqatu yatarabbasna bi anfusiinna thalathata quru'in."*

[The divorced women shall restrain them for three menstruations.]

[II:228]

The Messenger of Allah (peace and blessings of Allah be upon him) determined its meaning by his saying that here the reference is to hayd (menses) and not to tuhr (purity) when he (peace be upon him) said:

Talaqul-'amati tatliqatani wa `iddatuha haydatani/ طلاق الامة تطليقتان و عنها حیضتان  
the divorce of a slave woman is by two pronouncements of divorce and her `iddat is two hayd.

### C ) Bayan Taghyir / بیان تغییر

#### Definition

To change the ruling in the matter of preceding speech.

#### Ruling

It is reliable with respect to the joining. It is not reliable with respect to separation.

#### Examples

To mention the condition, exception or the maximum limit of the ruling contained in the speech.

#### Condition

After saying to a slave: anta hurrun (You are a free person) to say in dakhaltaddara (if you enter the house.)

#### Exception

After saying Li fulanin `alayya alfa dirhamin (I owe one thousand dirhams of such and such person) to say Illa mi'atin (except one hundred).

Here if the word {In dakhaltaddara} and {Illa mi'atin} are stated jointly the condition and the exception will be reliable and in case slave enters

the house he will become free and the amount of 100 dirhams will be considered minus from the one thousands dirhams otherwise not.

#### Ghayat/غاية

Allah Almighty says :

*Wa la taqrabuhunna hatta ya'hurna*

And do not go near to them till they become pure. [II:221]

The imposition of the restriction of [till they become pure] with the command [do not go near to them], made the preceding command not applicable in the case of there purity. in other words going near to them in a state of purity is permissible .

#### D) Bayan Darurat/بيان ضرورت

##### Definition

To make external speech the means for clarification of the speech mentioned on account of need.

##### Ruling

As this kind of not as the category of speech as such in respect of it without the detail of joining or separation there shall be reliance as well as action.

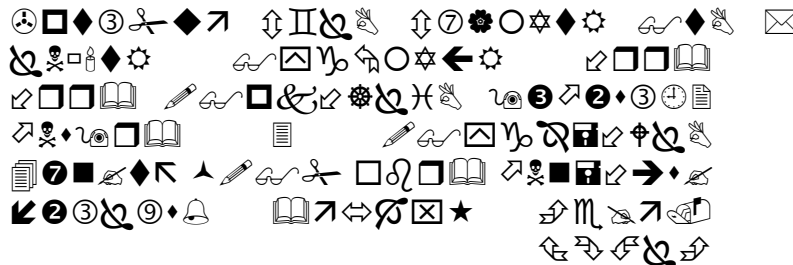
##### Example

A person who has the status of an authority in the matter of statement of Shariah Rulings and it becomes necessary for him to speak on account of some uncalled for word or action coming to his knowledge or happening before him, the silence of such a person at such an occasion on account of his status as authority in law, is counted as a support from him and is declared as a statement of ruling by him with his tongue. Technically, it is called tacit or implied approval (Taqrir/تقرير).

#### E). Bayan Tabdil/بيان تبديل

Another name bayan tabdil/بيان تبديل is naskh/نسخ (abrogation) which is more well known. Some people even don't declare it under the kinds of bayan. In the Holy Qur'an it has been used with both the titles that is naskh and tabdil.

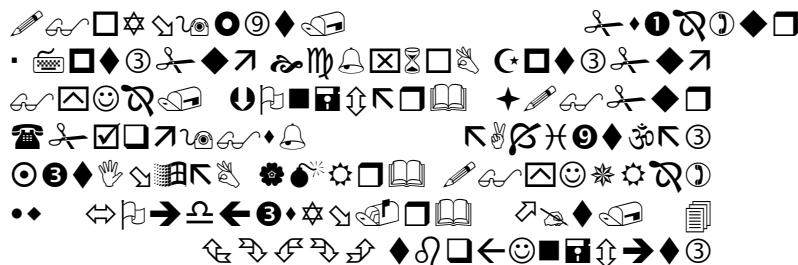
About naskh Allah Almighty says, "Ma nansakh"



106. Whatever a verse (revelation) do We abrogate or cause to be forgotten, We bring a better one or similar to it. Know you not that Allāh is Able to do All things?

[2:106]

About tabdil Allah Almighty also says, “*Wa iza baddalna*”



101. And when We change a verse [of the Qur'ān, i.e. cancel (abrogate) its order] in place of another, and Allāh knows the best of what He sends down, they (the disbelievers) say: "You [(O *Muhammad* (صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ))] are but a Muftari (forger, liar)." Nay, but most of them know not.

[16:101]

The details of this kind are being mentioned under the independent well-known title naskh.

### **Naskh/نسخ (Abrogation)**

#### **Definition**

Literally to remove a thing and in his place make and bring another thing. In other words the literal meaning of the word naskh has got two parts.

- i. To remove and erase; and
- ii. to make and bring.

Sometimes it conveys both the meanings and some times it conveys any one meaning that is only remove and erase or only to make and bring.

*Technically* to end any former Shari`ah ruling (hukm) by a later Shari`ah proof (dalil).

### **2. Reality of abrogation. (Haqiqat al-Naskh/حقیقت النسخ)**

Under the abrogation change of ruling takes place with regard to the knowledge of the servants other wise such thing is always in the knowledge of Allah as to which ruling is upto what period. On coming of that period such ruling is ended. As a physician diagnoses the disease of a patient and along with it prescribes medicines for the last circumstances of the patient but he advises the patient regarding the taking of the medicines gradually. The patient considers as if the physician is changing the medicine otherwise actually the physician is stopping the use of the medicine after the time of its use come to an end.

#### **Reason behind abrogation.**

The expediencies and requirements of servants go on changing with the changing circumstances and the foundation of all Shariah Rulings is kept on the welfare and wellbeing (expediencies) of the servants. This is a very important reason.

#### **Time of abrogation**

The period of revelation that is the life time of the Prophet (peace and blessings of Allah be upon him).

#### **Occasion of abrogation**

The occasion or place of abrogation are the branch rulings that is there is no abrogation in the matter of *Usul Din and Aqa'id*.

#### **Essential Elements of Abrogation**

There are two essential elements of abrogation, namely, *Nasikh* (abrogating) and *Mansukh* (abrogated).

*Nasikh* is a later ruling or proof whereby the former ruling is terminated.

*Mansukh* is the former ruling which is terminated.

It is not necessary that *nasikh* and *mansukh* should be a word (qaul). An action (*Fi'l*) can also be a *nasikh* and *mansukh*.

#### **Conditions of Abrogation**

- i. *Mansukh* must be a *Shari'ah* (legal) ruling.
- i. It should be from among *Fru'at*.
- ii. *Mansukh* should carry both legality and illegality and any one of it should not be determined in respect of it as *mashru'iyat* (legality) is determined in the case of faith and illegality is determined in the case of disbelieve.
- iii. There must be some proof of abrogation by way of word or action.
- iv. The abrogating must be separate and later in time to the abrogated.



- v. The abrogating and the abrogated both must be equal in the matter of force or the abrogating must be stronger than the abrogating.
- vi. The requirement of each must be different.
- vii. The abrogated must have come in the knowledge of the person responsible not with standing the time of acting upon it has come or not and any individual have acted upon it or a group had acted upon it.
- viii. The abrogated should not be restricted with time that is there should be no time limit affix to it.
- ix. The abrogated should not be permanent whether clearly such as there may be existing a word in the statement of law indicating perpetuity or by inference as all those rulings that have been left in any circumstance by the Messenger of Allah (peace and blessings of Allah be upon him) before his departure.

## 8. Ruling of Abrogation

The former ruling terminates and the later ruling is to be acted upon.

## 9. Substitution of the abrogated

It is not necessary that there should have been necessarily some other ruling is given in place of the abrogated ruling. Generally a ruling which is abrogated is replaced by another ruling but some times it so happens that only the earlier ruling is terminated. For example the earlier Quranic ruling was that if any one wanted to talk with the Messenger of Allah (peace and blessings of Allah be upon him) in seclusion he should first give some charity to the poor. This ruling was abrogating without any substitute.

## 10. Forms of Abrogation.

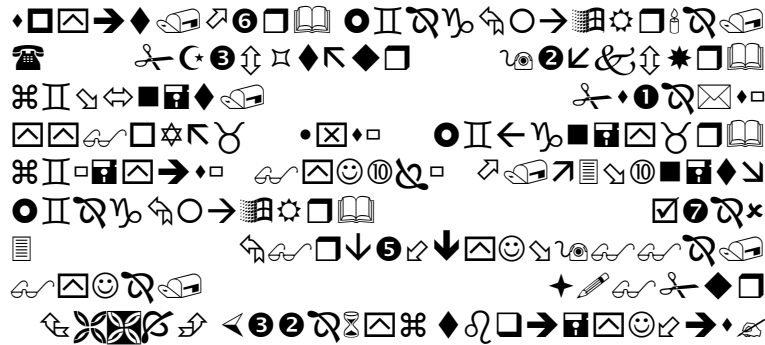
There are four forms of abrogation.

- i. Abrogation of the Holy Qur'an by the Holy Qur'an.
- ii. Abrogation of the Holy Qur'an by the Hadith.
- iii. Abrogation of the Hadith by the Holy Qur'an.
- iv. Abrogation of the Hadith by the Hadith.

## Examples

Abrogation of the Holy Qur'an by the Holy Qur'an is the case of the lady whose husband dies had to observe one year as *iddat* then the command came that her *iddat* is four month and ten days.



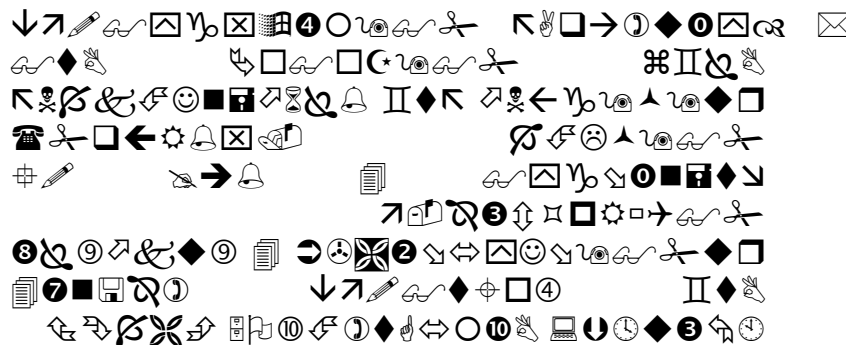


234. and those of You who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days, Then when they have fulfilled their term, there is no sin on You if they (the wives) dispose of themselves In a just and honourable manner (i.e. they can marry). and Allāh is Well-Acquainted with what You do.

[2:234]

Abrogation of the Holy Qur'an by the Hadith is the case of unlawfulness of marriage for the Messenger of Allah (peace and blessings of Allah be upon him) with any other women in the presence of the existing wives. There is a [Hadith](#) of `A'ishah in which its lawfulness is mentioned.

Abrogation of the [Hadith](#) by the Holy Qur'an is the case that offering of prayer facing Baitul Maqdas was under the command of the Messenger of Allah (peace and blessings of Allah be upon him) which was abrogated by the Holy Qur'an in the verses of *Sayaqul*.



142. the fools (pagans, hypocrites, and Jews) among the people will say, "What has turned them (Muslims) from their Qiblah [prayer direction (towards Jerusalem)] to which they were used to face In prayer." say, (O Muhammad ) "To Allāh belong both, east and the west. He guides whom He wills to a Straight Way."

[2:142]

Abrogation of the Hadith by the Hadith is the case of prohibition of visiting the graves by the Messenger of Allah (peace and blessings of Allah be upon him) and later on to allow to do so by the Messenger of Allah (peace and blessings of Allah be upon him).

However it should be both in mind that the abrogation of any ruling of the Holy Qur'an by the Hadith is permissible only when such hadith is in its authenticity is equal to the authenticity of the verse of the Holy Qur'an that is it should be *Mutawatir* or *Mash-hur* further a hadith which is equal in its authenticity. Like the verse of Holy Qur'an its abrogation is permissible with the verse of the Holy Qur'an or another hadith of equal authenticity. General Ahadith which are termed as Akhbar Ahad cannot abrogate such hadith. However they can abrogate each other for example they can be abrogated by the Holy Qur'an, the *Hadith* Mutawatir and the *Hadith* Mash-hur.

### 11. Kinds of Abrogation

There are four kind of abrogation.

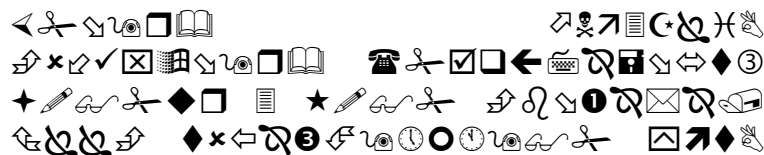
- Where the ruling as well as the recitation are abrogated. It is in the traditions that Surah al-Ahzab was equal to Surah al-Baqarah but most of it was raised up.
- Ruling is abrogated but recitation is not abrogated. The example is the verse of one year's *iddat*. Rather all those abrogated verses which are existing in the Holy Qur'an but there recitation is made.
- Recitation is abrogated but ruling is not abrogated for example according to Mash-hur Qaul the verse telling the punishment of Zina as stoning to death is such verse that its recitation is abrogated but its ruling is in tact.
- Some attribute of ruling is abrogated. The example is the wiping of the socks instead of the naked feet while one is wearing leather socks (Khuffayn).

### 12. Means of knowing abrogating / repealing law

There are six means to know the Nasikh (Abrogating ruling).

- Such words that tell which of the two verses regarding the same ruling has the precedence over the other.





For example, the Holy Qur'an says:

66. Now Allâh has lightened Your (task), for He knows that there is weakness in you. so if there are of You a hundred steadfast persons, they shall overcome two hundred, and if there are a thousand of you, they shall overcome two thousand with the leave of Allâh. and Allâh is with As-Sâbirin (the patient ones, etc.).

[8:66]

After this verse now as against two disbelievers, one believer must stand firmly and it is not necessary for one believer to stand firmly before ten disbelievers.

- ii. The Messenger of Allah (peace and blessings of Allah be upon him) said, "I had prohibited you to visit the graves. Listen, do visit the graves."
- iii. The Messenger of Allah (peace and blessings of Allah be upon him) said, There shall be stripes as well as stoning to death and then after saying so Ma'iz was not stripe after he was stone to death.
- iv. The consensus and agreement by words or conduct of the companions as against a ruling contained in an Hadith as with respect to the companion such consensus is a proof of there knowledge of some other transmission that abrogates the earlier ruling.
- v. The statement of a companion (Allah's pleasure be on him) that such and such narration is earlier in time and such an such narration later in time.
- vi. Where there are two rulings one is accordance with custom and the other in accordance with the Shari'ah, the Shari'ah ruling shall be declared as abrogating (Nasikh).

### 13. The abrogated verses in the Holy Qur'an

The people have considered a large number of verses as abrogated. However, Qadi Ibn `Arabi Maliki and Jalal al-Din Suyuti have stated that 20 verses are abrogated ones. Shah Waliyyullah Muhaddith Dahlawi has stated that the abrogated verses are only five.

## The Second Basis Sunnah

### 1. Definition

*Literally*, Sunnah means path (*tariqah*), habit (*adat*), and statement (*bayan*).

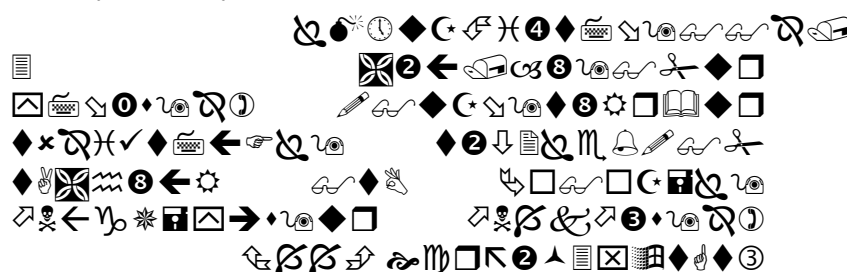
*Technically*, Sunnah means the words (*aqwal*), actions (*af'al*), and tacit approval, i.e., supporting a conduct by observing silence (*taqrir*).

Sunnah is also popularly called as *Hadith*. The words *khavar*, *athar*, and *riwayat* are also used to mention it. Among the jurists, technically, the word Sunnah is commonly used.

### 2. Status and Significance of Sunnah

Actually, Sunnah is a statement and explanation of the Holy Qur'an as the Holy Qur'an itself has referred to it at many places.

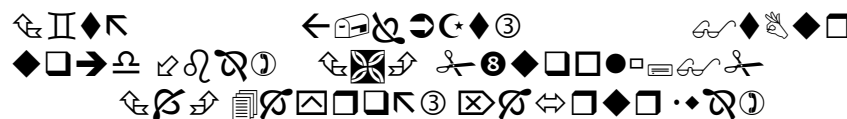
The Holy Qur'an says:



44. With clear signs and Books (We sent the Messengers). And we have also sent down unto You (O Muhammad ) the Reminder and the advice (the Qur'an), that You may explain clearly to men what is sent down to them, and that they may give thought.

[16:44]

This explanation or clarification (*taudih*) is not by personal judgement. Rather, it was also inspired in the heart by Allah Almighty Himself. The Holy Qur'an says:



3. Nor does He speak of (his own) desire.

4. It is Only an Inspiration that is inspired.

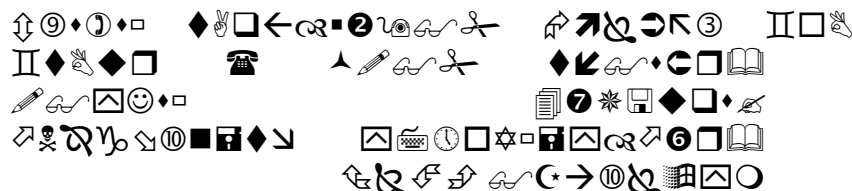
[53:3 and 4]

Similarly, in the Holy Qur'an the word *Al-Kitab* has been used along with the word *Al-Hikmah*. The researchers have declared it equivalent to

Sunnah Nabawiyyah. The the Messenger of Allah (peace and blessings of Allah be upon him) also said: "I have been granted along with the Holy Qur'an another thing like it."

It is manifest that it is his Sunnah. It is on account of this relationship (*nisbat*) that the command of the Messenger of Allah (peace and blessings of Allah be upon him) is not a command separate from the command of Allah Almighty.

Allah Almighty says:



80. He who obeys the Messenger (Muhammad), has indeed obeyed Allâh, but He who turns away, Then we have not sent You (O Muhammad ) as a watcher over them.

[4:80]

The Messenger of Allah (peace and blessings of Allah be upon him) said: The things made unlawful by the Messenger of Allah (peace and blessings of Allah be upon him) are just like the things made unlawful by Allah Almighty.

### 3. Decisiveness of Sunnah

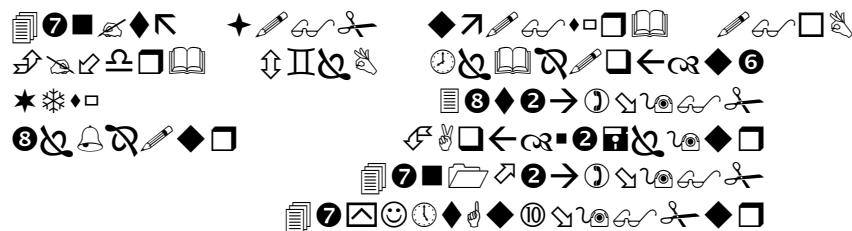
It means the ability of Sunnah to become a proof for Shari'ah Ruling. This is apparent from the details given above. Further, in the Holy Qur'an at many occasions the commandment of obeying the Messenger of Allah (peace and blessings of Allah be upon him) refers to act upon the Sunnah of the Messenger of Allah (peace and blessings of Allah be upon him).

At one occasion, it has been clearly stated in the Holy Qur'an:

*"Ma atakumurrasulu fakhuzuhu wa ma nahakum `anhu fantahu."*

"Whatever the Messenger of Allah (peace and blessings of Allah be upon him) gives you, take it; and from whatever he forbids you, restrain yourselves from doing so."

In it are included all the words, conducts, silence and supports.





7. What Allâh gave as booty (Fai') to his Messenger [Muhammad (ﷺ)] from the people of the townships, - it is for Allâh, his Messenger [Muhammad (ﷺ)], the kindred (of Messenger [Muhammad (ﷺ)]), the orphans, Al-Masâkin (the poor), and the wayfarer, In order that it may not become a fortune used by the rich among you. and whatsoever the Messenger [Muhammad (ﷺ)] gives you, take it, and whatsoever He forbids you, abstain (from it) , and fear Allâh. Verily, Allâh is Severe In punishment.

[59:7]

The Messenger of Allah (peace and blessings of Allah be upon him) himself said: I am leaving behind between you two things. You shall not go astray till you hold them fast. The one is the Book of Allah, and the other is the Sunnah of the Messenger of Allah (peace and blessings of Allah be upon him).<sup>254</sup>

#### 4. Basic forms of explanation of the Holy Qur'an through the Sunnah

- (a) Ramification or division into branches (tafri') by the Sunnah of any basic or fundamental statement of law by the Holy Qur'an.

For example the basic law given by the Holy Qur'an is:



<sup>254</sup> Muwatta Imam Malik.



29. O You who believe! eat not up Your property among yourselves unjustly except it be a trade amongst you, by mutual consent. and do not kill yourselves (nor kill one another). surely, Allâh is Most Merciful to you.

[4:29]

- (b) Detail of any Basic (Kulliyah) or Summary (Mujmal) injunction of the Holy Qur'an

**Example:**

The ahadith containing the details of Prayer, Zakat, Fasting, Hajj etc.

- (c) Formation or constitution of any legal principle keeping in view the Qur'anic injunctions on the happening of any particular event.

**Examples:**

The Messenger of Allah (peace and blessings of Allah be upon him) said: *La darara wa la dirara fi'l-Islam*/لا ضرر ولا ضرار في الاسلام (Damage and retaliation by damage is not allowed in Islam).

This *Hadith* is a basic principle and it is based on so many verses of the Holy Qur'an that forbid to cause damage to others.<sup>255</sup>

**3. Forms of Proof of Sunnah**

The words and forms of stating the Sunnah by the Companions are of many forms.

- (a) Explicit words of a companion about the hearing of the very words of the Messenger of Allah (peace and blessings of Allah be upon him) or observing any act performed by the Messenger of Allah (peace and blessings of Allah be upon him) or telling any thing to the narrator companion himself by the Messenger of Allah (peace and blessings of Allah be upon him).
- (b) Such words regarding which there are both the possibilities of having been heard or not heard from the Messenger of Allah (peace and blessings of Allah be upon him) but the determination of either is possible on account of circumstance (qara'in)
- (c) Statement of the Companion that the Messenger of Allah (peace and blessings of Allah be upon him) had commanded to do a certain thing or the Messenger of Allah (peace and blessings of Allah be upon him) did not prohibit the doing of a certain thing.
- (d) The statement of the companion: "He commanded us"; or " He forbade us" without specifically mentioning the name, the title or the designation of the authority who commanded or forbade. Evidently,

<sup>255</sup> Al-Madkhal p.33; Al-Sunnah wa makanati ha fi al-tashri` al-Islami ,p. 386-391.



this authority could not be any one else than the Messenger of Allah (peace and blessings of Allah be upon him).

- (e) The statement of a companion: Such and such affair is from among the practices of the Messenger of Allah (صَلَّى اللهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ) [Min al-Sunnah kadha/مِنْ السُّنَّةِ كَذَا].
- (f) The statement of a companion :  
 “We people used to do this during the period of the Messenger of Allah (peace and blessings of Allah be upon him)”; or  
 “The people used to do this during the period of the Messenger of Allah (peace and blessings of Allah be upon him)”.<sup>256</sup>

#### Forms of acceptance of some forms of Sunnah

- (a) Where the transmitter is a companion whether he is a jurist (*faqih*/فقيه) or non-jurist (ghayr-*faqih*/غير فقيه), male or female, minor or major.
- (b) Where the transmitter is not well-known (ghayr ma'ruf/غير معروف) i.e. only one or two transmissions have been reported by him but the learned in Hadith have declare him reliable (mu'tabar/معتبر) or they have not condemned him in any way or despite conflict the relied upon transmitters had transmitted on his authority.
- (c) The particulars of the transmitter are totally hidden i.e. it is not known whether he was a good or bad person but the learned in Hadith had neither confirmed nor rejected him.

#### 7. Some forms of non-acceptance of the transmission of a transmitter about the Sunnah

- (a) Minor, mad, insane, a person who mostly behaves negligently and the learned in *Hadith* have object to his conduct a transgressor, a disbeliever or a person who invites to the acts that are against the Sunnah or is himself an innovator are not reliable in the matter of transmission of a Sunnah.
- (b) Where the very word or conduct of the transmitter is against the transmission made by him regarding any Sunnah or the Jurist-Companions and the leading Jurists and leading men who are learned in Hadith oppose such transmission on the ground that such hadith should have been generally in practice and well known in view of the subject it deals with;

Where a Shaykh denies the attribution of any transmission on his authority, then such a transmission shall not remain worthy to be acted upon. In the first case it will be taken as abrogated (naskh) ; in the second case it will be taken as not proved ( `adam thubut) and not valid

<sup>256</sup> Fawatih .Vol.2,pp161-62.

(`adam sihhat); and in the third case it will be taken that the command or prohibition mentioned in it was taken back or recalled(ruju`)<sup>257</sup>.

## 8. Parts of Sunnah with regard to its transmission.

Every transmission has two parts, viz., the Chain of authorities (al- Sanad) and the Text (al- Matn).

### (a) Al-Sanad (The Chain of authorities)

The part of the transmission that contains the names of the transmitters, whatever may be their number is called al-Sanad (pl. al-Asnad). The statement of the Sunnah with the mention of the name of the transmitter (naqil/ناقل) is called "Isnad/اسناد". The transmitter is called "Musnid/مسند" and the transmission (Hadith/حديث) stated along with the names of the persons who transmitted it is called " Musnad/مسند".

Generally, the Muhaddithin call a "Hadith Marfu` Muttasil" as Musnad.<sup>258</sup>

### (b) al-Matn/المتن (The Text)

Its plural in Arabic language is al-Mutun.<sup>259</sup> The text containing, the word (qaul) or the action (fi'l) or the mention of observance of silence (sukut) by the Messenger of Allah (peace and blessings of Allah be upon him) over a word uttered or act done by a Companion in the presence of the Messenger of Allah (peace and blessings of Allah be upon him). Such silence was taken a declaration of approval of such word or act and it is technically called taqrir.

### (c) Rawi/راوي (a transmitter)

The transmitter of a Sunnah is called Rawi (transmitter). Its plural is "Ruwat". The Sunnah which is transmitted is called "Riwayat" and "Marwiyy"(transmission).

## 9. Kinds of Sunnah with regard to its Chain of authorities

The Sunnah is of two kinds with regard to its Chain of authorities (sanad) , namely, Musnad and Mursal.

### (a) Musnad:

#### 1. Definition

A Sunnah of which no transmitter is missing. In other words, the name of each narrator is mentioned one after the other in sequence.

#### 2. Kinds of Musnad:

<sup>257</sup> Fawatih vo.2, pp .140-50 under discussion on al-Sunnah; Taudih p. 468 ; Hisami and Nizami pp.71-77. These are a few forms of acceptability or rejection of a Hadith.

<sup>258</sup> Marfu` is a Hadith attributed to the Messenger of Allah (peace and blessings of Allah be upon him) .Muttasil is that Hadith whose chain is complete.

<sup>259</sup> Taysir p.115.....

A Musnad is of three kinds, viz., Mutawatir, Mash-hur and Khabar Wahid.

**(a) Mutawatir:**

**1. Definition**

*Literally*, a mutawatir is a thing that comes or happens one after the other.

*Technically*, It is a hadith whose transmitters in every period of transmission are so much in number that reason and custom is compelled to believe it true. In other words, the reason and custom declare it impossible that such number of transmitters can all agree on falsehood.<sup>260</sup>

**2. Conditions of multiplicity of transmitters**

There are four conditions:

- (a) The multiplicity of transmitters or the maximum number of transmitters regarding which the consensus is that such transmitters should more than three. There is conflict about the minimum number. It has been considered better that the number should be such on which the heart feels satisfied that they shall never agree on falsehood;
- (b) This multiplicity should be found from the first period to the last period. That is in no period the number should reduce than three transmitters;
- (c) The reason and the custom should declare it impossible the agreement of transmitters on falsehood keeping in view the number and circumstances of the transmitters; and
- (d) The subject matter of the transmission should be empirical (hissi) that is it should be a matter that can be seen or heard and not a matter which is intellectual ('aqli) and imaginary (**Qiyas** (قياس)).<sup>261</sup>

**3. Ruling**

It is definitive (qat'i) in the matter of proof like the verses of the Holy Qur'an. A ruling proved by it is definitive (qat'i), certain (yaqini) and evident (badihi). In other words, a ruling proved by a Hadith Mutawatir is such that it is accepted by every one and its denial amounts to committing an act of infidelity and by means of it addition to the subjects of the Holy Qur'an is permissible.<sup>262</sup>

**4. Examples**

- (a) The Messenger of Allah (peace and blessings of Allah be upon him) said: "man kazaba `alayya mut`ammidan falyatabawwa' maq`adahu

<sup>260</sup> *Taysir Mustalih al-Hadith*, Dr. Mahmud al-Tahhan, Dar al-Qur'an, Beirut, Ed. lind, p.76. The restrictions added to the definition by the general Usuliyyin like the differences of the countries and justness of the character ('adalat) are not reliable in the eye of Muhaqqiqin.

<sup>261</sup> *Nuzha al-Nazar*, p. 21.

<sup>262</sup> *Fawatih*, vol. II, p. 114; *Hisami and Nizami*, vol. 68-9; *Usul*, p. 74.

minannari (Who so ever intentionally speaks a lie in respect of me he should make his abode in the Hell). This Hadith has been transmitted by over seventy companions.

- (b) The Hadith of wiping over the leather socks (Khuffayn) has been transmitted by nearly seventy companions.
- (c) The Hadith of Haud Kauthar has been transmitted by over fifty companions.<sup>263</sup>

## (B) *Mash-hur*

### 1. Definition:

A Sunnah the number transmitters of which did not reach to the extent of *tawatur* during the period of the companions but after the period of companions the number of transmitters reached the extent of *twatur*.

### 2. Ruling:

It is a little lower than the Sunnah Mutawatirah in the matter of its strenght (quwwat) and definitiveness (qat'iyyat). Hence the knowledge attained through it is worthy of satisfaction and by means of it addition can be made on the quranic rulings and meanings and its denial amounts to going astray.<sup>264</sup>

### 3. Example:

The Hadith is *mash-hur* hadith<sup>265</sup> that imposes the condition of sexual intercourse along with the second nikah in the matter of lawfulness of the nikah of the woman with his former husband in case of divorce by the second husband. Hence the cohabitation by the second husband has been declared a must. The Holy Qur'an says:

*Fa in tallaqaha fala tuhilla lahu mim ba'du hatta tunkihu zaujan ghayrahu. Fa in tallaqaha fala junaha 'alayhima an yataraja'a in zanna an yuqima hududallahi. Wa tilka hududullahi yubayyinuha li qaumin ya'lamuna.*

[And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorces her, it is no sin for both of them that they come together again if they consider that they are able on the authority of observe the limits of Allah. These are the limits of Allah. He manifesteth them for people who have knowledge.] [IV: 230].

Many Jurists take the argument of cohabitation as a necessary condition from the verse itself.<sup>266</sup>

## (C) *Khabar Wahid*

<sup>263</sup> *Tadrib al-Rawi*, Suyuti, Dar al-Kutub al-Haditha, 2<sup>nd</sup> Ed., vol. II, pp. 177-9.

<sup>264</sup> *Fawatih*, vol. II, pp. 111-2; *Hisami and Nizami*, pp. 69-70.

<sup>265</sup> *Fawatih*, vol. II, pp. 113.

<sup>266</sup> *Ruh al-Ma'ani*, Sayyid Muhammad 'Alusi Baghdadi, Mustafa'i Deoband, vol. II, p. 141

### 1. Definition

A sunnah which is transmitted by one or two or a few transmitters but it does not reach the extent of a Sunnah Mash-hurah. It is either due to the fact that the number of its transmitters have been less in all the periods or their number was less during the period of the companions and successors of the companions but in later periods the number had increased or it may be otherwise i.e. number was more during the period of companions but in the later periods it reduced.

### 2. Ruling:

With a few conditions it is worthy of reliance and decisive argument. It is worth non-definitive proof and to act upon it is wajib (obligatory of the second degree).<sup>267</sup>

### 3. Example:

Most of the ahadith fall in this category.

### 4. Conditions for acting upon a Khabar Wahid:

The matters mentioned under the heading Acceptance (qubuliyat) and Rejection (mardudiyat) of Hadith are in fact the conditions for the Khabar Wahid. They are also applied to the other kinds of hadith. Basically, these matters are eight matters. Four relate to the transmitter and four relate to the transmission.

#### Four conditions relating to the Rawi are:

1. He should be a Muslim;
2. He should be a sane adult;
3. He should be just, pious and respected person; and
4. He should possess good hearing faculty, able to understand the object of the speaker and thereafter able to bear and preserve the same in his heart or by way of writing it down and safely transmit it to the others.

#### Four conditions relating to the Riwayat are:

1. The Riwayat should not be against the Holy Qur'an ;
2. The Riwayat should not be against any Hadith Mutawatir or Hadith Mash-hur;
3. The Riwayat should not relate to a problem confronted by the common and the special people and the circumstances require that it should be in the knowledge of all;

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<sup>267</sup> *Fawatih*, vol. II, pp. 131-2; *Taudih*, p. 466; *Hisami and Nizami*, pp. 70, 71, 76; *Nur*, pp. 177, 178, 181; *Usul*, p. 174.

4. The Riwayat should be such that the companions had used it as an argument at the time of mutual disagreement.<sup>268</sup>

**5. The above-mentioned kinds of Musnad and the Companions:**

The above-mentioned kinds of Musnad and its rulings relate to non-companions and to those companions who were not present at the relevant time before the Messenger of Allah (peace and blessings of Allah be upon him). The persons who had seen any matter themselves or heard it themselves or they were present at the spot, every hadith has the status of definitive proof (*dalil qat'i*). The reason is that as they were present at the spot, hence, they had no doubt about its proof. The others who were not present at the spot and had received the hadith through a transmitter were in need of their satisfaction. This need was there and was considered to be necessary.<sup>269</sup>

**6. Aforesaid kinds and the rulings of Shari'ah**

- a. All sorts of ahkam are proved by a mutawatar and mashhur as is evident from their ahkam.
- b. As a khabar wahid gives the benefit of zann ghalib, hence those basic rules and beliefs are not proved on which the belief and infidelity of a person depends. However, those details relating to them, the denial of which brings a person under the allegation of committing bid'ah and violating the sunnah are proved like the proof of other ahkam. So much so that even the proof of punishment prescribed by shari'ah is also accepted (through them).

**b. Mursal**

That is the second division of sunnah according to the sanad.

**1. Definition**

*Literally*, it means left over.

*Technically*, it means the sunnah some of whose transmitters are left (or missed) irrespective of their number and irrespective of their missing in the beginning, in the middle, or at the end of the chain of transmitters.

**2. Kinds**

- a. Mursal Sahabi; مرسل صحابی
- b. Mursal Tabi'i; مرسل تابعی
- c. Mursal Tab'u Tabi'i; مرسل تبع تابعی and
- d. Mursal Ghayr. مرسل غیر

<sup>268</sup> *Fawatih*, vol. II, Discussion under the title "Al-Sunnah", pp. 126, 128, 138, 142, 143; *Taudih*, pp. 473, 474, 480; *Nur*, pp. 180-6; *Hisami* and *Nizami*, pp. 70-1.

<sup>269</sup> *Fawatih*, vol. II, p. 100; *Taudih*, p. 495.

**a. Mursal Sahabi** مرسل صحابي**1. Definition**

The sunnah, the transmitting sahabi (صحابي) of which has not mentioned the name of his teacher.

**2. Hukm**

It is considered reliable and worthy to be acted upon in the degree of the sunnah transmitted by a **Companion** (sahabi/صحابي) who heard and observed it directly.

**b. Mursal Tabi'i****1. Definition**

The sunnah, the transmitting tabi'i of which does not mention the name of his teacher.

**c. Mursal Taba` Tabi'in****1. Definition**

The sunnah, the transmitting taba` tabi'i of which does not mention the tabi'i teacher or the **Companion** (sahabi/صحابي) teacher of the teacher.

**2. Rule**

Both these kinds are reliable and worthy to be acted upon. So much so that some (jurists) have declared them above the musnad.

**d. Mursal Ghayr****1. Definition**

The Sunnah, the transmitters of which after the taba` tabi'i transmitter, have not mentioned an individual in the upper chain.

**2. Rule**

- a. If according to the muhaddithin, those who had made 'irsa/ were the people of higher degree reliance, then it is reliable and worthy to be acted upon.
- b. If according to the muhaddithin, those who had made 'irsa/ were the people of lower degree of reliance, then there is conflict of opinion. If by any means reliability is achieved, then in all circumstances it will be reliable and worthy to be acted upon and its status will be that of a *khbar wahid*.

**10. Sunnat Fi`liyyah**

Three things have been mentioned in the definition of a Sunnah, viz., the sayings, the acts and the approval by the silence of the Messenger of Allah (peace and blessings of Allah be upon him) which are called *taqrir*.

A *taqrir* being in the category of statement is attached to *aqwal* and the major portion of the sunnah is *qauli*.

The acts of the Messenger of Allah (peace and blessings of Allah be upon him) which include the telling of a thing by indication are of two kinds:

Firstly, acts special with the Messenger of Allah (peace and blessings of Allah be upon him) like wedding more than four women. To adopt and to act upon such acts is not permissible.

Secondly, acts regarding which there is no knowledge of their being special with the Messenger of Allah (peace and blessings of Allah be upon him), any act regarding which it comes to knowledge that he was acting upon it as *wujub* or *istihbab* or *ibahat* or the status of which is determined according to the principle of jurisprudence, we shall be bound to follow those acts accordingly.<sup>270</sup> Thus if the Messenger of Allah (peace and blessings of Allah be upon him) had resolved to do an act with much preparation but due to some apprehension had left it then the rule about it shall be according to such resolution (*`azm*). For instance, the prayer of tarawih which is reported to have been practiced by him for only three days but due to the apprehension that it may not become compulsory, it was left. Hence it is a *sunnat mu`akkadah*.<sup>271</sup>

### 11. Number of *Riwayat Ahkam*

According to some, the number of the transmissions that contain the various injunctions are three thousands and according to some others those are five lacs.<sup>272</sup>

### 12. *Ijtihadat* of the Messenger of Allah (peace and blessings of Allah be upon him)

A word or act of the Messenger of Allah (peace and blessings of Allah be upon him) in respect of any matter regarding which there was no revelation, is also included in the *Sunnah* and has got the same ruling provided that there is no *nakir* concerning it from God.<sup>273</sup>

### 13. Past *Shari`ats*

Whatever injunctions of the past *shari`as* have come in the Holy Qur'an and *Sunnah* and there is no mention of their repeal in the Holy Qur'an and *Sunnah*, they are under the same ruling as mentioned in the Holy Qur'an and the *Sunnah*.<sup>274</sup>

### 14. Warning

The aforesaid discussions regarding *Sunnah* are specific to it and the other portion relating to discussions is that that has been mentioned under the first basis (i.e., the Holy Qur'an). In other words, the discussions mentioned in the first basis are generally those which are common

<sup>270</sup> Hisami and Nizami, pp. 91-92; *Nur*, pp. 213-4; *Fawatih*, vol. II, pp. 180, 183; *Taudih*, p. 481.

<sup>271</sup> *Fath al-Qadir*, vol. I, p. 407.

<sup>272</sup> Hisami, p. 92; *Nur*, pp. 214-5, *Taudih*, p. 491.

<sup>273</sup> *Fawatih*, vol. II, p. 363; *Nur*, p. 6; *Umdah*, p. 5.

<sup>274</sup> Hisami, p. 192; *Nur*, p. 216; *Taudih*, p. 493; *Fawatih*, vol. II, pp. 183-5.



among the Book and the Sunnah<sup>275</sup>, while some discussions are specific with the first basis like the second basis, i.e., the discussions relating to the Sunnah are specific with the Sunnah.

### Sunnah al-Sahabah

#### 1. Definition

The words (*aqwal*), acts (*af'al*), and approval by silence (*taqrirat*) of the companions of the Messenger of Allah (peace and blessings of Allah be upon him) are called Sunnah al-Sahabah. They are technically called as athar and athar. The words and acts of successors of companions (*tab'iin*) are also called athar/أثر.

In order to make a distinction between the affairs / matters (*'umur*) transmitted on the authority of successors, companions, and the Messenger of Allah (peace and blessings of Allah be upon him) different technical names have been given by the muhaddithin.

- The affairs / matters (*'umur*) transmitted in a hadith on the authority of a *tab'i* is called *hadith maquf*;
- The affairs / matters (*umur*) transmitted in a hadith on the authority of a Companion (*sahabi/صحابي*) is called *hadith mauquf*;
- The affairs / matters (*'umur*) transmitted in a *hadith* on the authority of the Holy Prophet (peace and blessings of Allah be upon him) is called *hadith marfu'*.<sup>276</sup>

#### 2. The Importance and Authoritativeness as a Proof

The Importance of the Sunnah of sahabah and its being a legal proof (*dali shar'i*) is evident from the honour with which Allah Almighty has blessed the companions and also from the sayings of the Messenger of Allah (peace and blessings of Allah be upon him) relating to this particular subject. The companions had the blessings to be the most aware and having understanding of the injunctions of Shari'ah and the intention of Allah and Messenger of Allah (peace and blessings of Allah be upon him) being benefited by the love of the Messenger of Allah (peace and blessings of Allah be upon him) and having got the period of revelation. Therefore, their words, acts, and approval by silence are worthy to be followed. Further, the Messenger of Allah (peace and blessings of Allah be upon him) has transmitted the word of Allah Almighty:

“Whosoever will adopt any thing told by the companions despite their mutual difference, he will be on the guidance.”

The Messenger of Allah (peace and blessings of Allah be upon him) also said:

<sup>275</sup> *Usul al-Shashi*, Ishaq bin Ibrahim al-Shashi al-Khurasani and *'Umdah al-Hawashi*, Maulana Faizul Hasan Gangohi, Rashidiyah Press, Delhi, pp. 73-74.

<sup>276</sup>

“All of my companions are like the stars. To whichever ye will follow, ye will be following the guidance.”

Regarding the four righteous caliphs, the Messenger of Allah (peace and blessings of Allah be upon him) said:

“On you is incumbent to adopt the sunnah of my guided caliphs.”

Ibn Mas`ud (Allah's pleasure be on him) said:

“Allah Almighty had selected the companions for the companionship of His Messenger (peace and blessings of Allah be upon him) and for the dissemination of His religion. Hence, you should believe in their superiority and follow their footsteps and adopt, as far as possible, their morals and character as they were on the right path.”<sup>277</sup>

For these reasons the four Imams and all reliable and creditable scholars and jurists are unanimous to consider and accept their words and opinions as authoritative proofs (*hujjat*).<sup>278</sup>

### 3. Rules (*Ahkam*)

Basically, the words and acts of companions have two parts.

- (a) Those words and acts in which reason has no say. In other words, it is not possible to know and understand them through the reason and intellect;
- (b) Those words and acts in which reason has got a say. In other words, it is possible to know and understand them through the reason and intellect.

The words and acts of sahabah that fall in the category (a) are considered falling in the category of sunnat nabawiyyah in the sense that it will be believed that the companions had heard and seen them and then stated and acted upon them.

The words and acts of sahabah that fall in the category (b) are attached to analogy (*Qiyas* (قياس)) but there are special rules in respect of them which are as under:

- (i) If the proof concerning them is by consensus of all whether it is by mutual consultation all had agreed to settle it or in presence of a gathering someone had stated or acted and none had denied it, it will be taken as an *Ijma`* (إجماع) or consensus as the prayer of Tarawih and Azan of Jumu`ah prayer;
- (ii) The problems regarding which there is no report of consensus of all and there is also no report of denial, those are also authoritative proofs (*hujjat*);
- (iii) The problems that are reported by mutual differences, those are not authoritative proof for one another among them but those who came

<sup>277</sup> *Mishkat al-Masabih*, Khatib Baghdadi, Rashidiyah Press, Delhi, pp. 30, 32, 554.

<sup>278</sup> *Al-Madkhal*, pp. 276, 278.

after them, it is not permissible for them to leave all and to adopt some opinion. The rule will be to act upon any one according to the inclination of the heart or to adopt both; and

- (iv) The problems that are reported by one or two companions those are also authoritative proofs provided that they do not relate to such matters which happen generally.<sup>279</sup>

#### 4. Words and acts of Tabi`in

- (a) The words and acts of successors of the companions in which reason has no interference are also under the rule of sunnat nabawiyah.<sup>280</sup>
- (b) The words and acts of the successors of the companions in which reason has interference are under the rule that the words and acts of such tabi`in are authoritative proofs (*hujjat*) who perform the job of giving opinion during the period of Sahabah and they had been reliable in the sight of the Sahabah in such performance. Though in the matter of juristic opinions (*al-ara' al-fiqhiyyah*) they had differed with the companions and the companions had tolerated it. Rather, they had turned towards their opinions as was the case with the well-known Qadi Shurayh and Masruq (Allah's pleasure be on them).<sup>281</sup>

<sup>279</sup> *Fawath*, vol. II, pp. 186-7; *Hisami and Nizami*, p. 93; *Nur*, pp. 218-9; *Taudih*, pp. 493-4; *Al-Madkhal*, p. 105.

<sup>280</sup> *Fawath*, vol. II, p. 188.

<sup>281</sup> *Taudih*, pp. 494; *Hisami and Nizami*, p. 94. This is the statement of Fakhr al-Islam Buzdawi and the author of *Manar* etc. The transmissions of Nawadir are reported on the authority of Imam while Shams al-A'immah Sarakhsi did not considered to follow them necessary on the basis of manifest transmission (*zahir rawayat*). *Fawath*, vol. II, p. 188.

### The Third Basis

#### Ijma` (إجماع)

##### 1. Definition

Literally, Ijma` (إجماع) means to firmly resolve, to agree on a matter.<sup>282</sup>

Technically, Ijma` (إجماع) means consensus of all reliable `Ulama` Mujtahidin (Men of Knowledge who exercise personal judgement).

##### 2. Nature of Ijma` (إجماع)

In fact, Ijma` (إجماع) is only an opinion like the **Qiyas** (قياس) which is also an opinion. However, the difference between the two lies in it that the opinion under **Qiyas** (قياس) is individual or at the most of a few individuals while the opinion under Ijma` (إجماع) is the agreed upon opinion of all the mujtahidin of a period. Due to this collectiveness (ijtima`iyyat) it has got superiority over the **Qiyas** (قياس).<sup>283</sup>

##### 3. Importance

From the above nature of Ijma` (إجماع), it is evident that Ijma` (إجماع) is the name of the agreed upon decision of the people of knowledge selected by ummah. Hence, there remains no possibility of mistake in it.

The Messenger of Allah (peace and blessings of Allah be upon him) said:

“My ummah shall not agree upon any astray. And Allah will not make my ummah to agree upon any astray.”

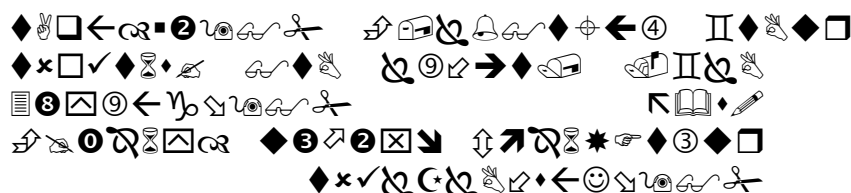
Rather on account of agreement and collectiveness, the help and succour of Allah comes. Allah Almighty says:

“The Hand of Allah is on the community”.

In other words, the help of Allah is with the community. Being separate from community has been declared as disconnection from Islam and a cause of destruction in the hereafter.

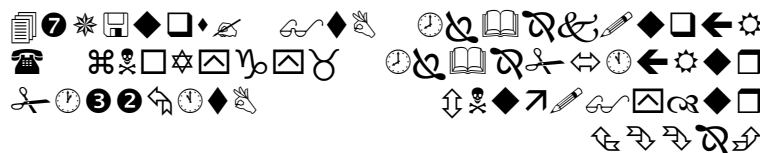
##### 4. Authoritativeness of Ijma` (إجماع) (hujjiyyat Ijma`)

The Ijma` (إجماع) being an authority is proved both on the authority of the Holy Qur'an and the Sunnah. It has its mention in many verses and reports. Allah Almighty says:



<sup>282</sup> Nizami, p. 94; Fawatih, vol. II, p. 211.

<sup>283</sup> Fawatih, vol. II, p. 246; Nur, p. 7; al-Madkhal, p. 334.



115. and whoever contradicts and opposes the Messenger (Muhammad) after the Right Path has been shown clearly to him, and follows other than the believers' way. we shall keep Him In the Path He has chosen, and burn Him In Hell - what an evil destination.

[4:115]

All the mufasssirin are unanimous that in this verse the way of Muslims refers to Ijma` (إجماع).<sup>284</sup>

In the hadith it is transmitted by Sa'id bin Musayyib that `Ali reported: "I submitted to the Messenger of Allah (peace and blessings of Allah be upon him), 'O Messenger of Allah (peace and blessings of Allah be upon him)! If there is a problem in which no injunction is available to us in the Holy Qur'an and in thy Sunnah, what should we do?' He (peace be upon him) said, 'Gather together believers who are men of knowledge and then settle it by mutual consultation and do not solve it merely on the opinion of any one.'<sup>285</sup>

The number of transmissions on the point of Ijma` (إجماع) is so much that the `ulama have clearly declared them as reaching the category of tawatur. It is for this reason that during the period of Sahabah when at least the men of knowledge among Sahabah were still in al-Madinah al-Munawwarah, this basis of law was used to the maximum. Rather it was the general routine of the righteous caliphs and particularly Hadrat Abu Bakr Siddiq and Hadrat `Umar Faruq (Allah's pleasure be on them) that as and when regarding any problem no injunction was found in the Holy Qur'an and Sunnah, they gathered the Sahabah and solved the problem.<sup>286</sup>

#### 5. Necessity of Ijma` (إجماع)

All the problems are not mentioned in the Holy Qur'an and Sunnah. And when no command is existing in the manifest words of them regarding any problem, then the injunctions mentioned in both these sources are deeply pondered upon and the solution of the problem is discovered. Ijma` (إجماع) is the collective and by consensus form of the said deep pondering upon. Hence, it has got superiority over **Qiyas** (قياس).

#### 6. Time of Ijma` (إجماع)

The period of Ijma` (إجماع) is the period after the departure of the Messenger of Allah (peace and blessings of Allah be upon him) from

<sup>284</sup> Ibn Kathir, vol. I, p. 555; *Ahkam al-Qur'an*, vol. II, p. 281.

<sup>285</sup> Al-Tabrani, *Al-Ausat Majma` al-Zawu'id bab fi'l- Ijma`*.

<sup>286</sup> *Al-Madkhal*, pp. 86-87.

this world as during his lifetime there was no need of such process nor there had been an occasion for it.<sup>287</sup>

### 7. Occasion of Ijma` (إجماع)

Basically, the occasion of Ijma` (إجماع) are the practical injunctions (*Al-ahkam al-furu`iyyah*). Further, those beliefs are also proved by it on which the belief or infidelity do not depend. However, the Sunnat and Bid`at definitely depend on them. For instance, the consensus of all the companions on the superiority of Hadrat Abu Bakr Siddiq (Allah's pleasure be on him). An opinion against it is bid`at.<sup>288</sup>

### 8. Essential Element (*Rukn*)

The essential element of Ijma` (إجماع) is agreement of all. Whether such opinion is adopted by all by consensus of all or after adoption of some, the remaining men of knowledge after getting knowledge of such opinion they have the opportunity to consider and even then they do not deny / reject it.<sup>289</sup>

### 9. Condition (*Shari*)

The consensus of the mujtahidin of the time.<sup>290</sup>

### 10. Competency (*ahliyyat*)

`Ulama' mujtahidin who are reliable on the basis of their faith and knowledge. However, if the problem is such in which the opinion of only men of knowledge is not necessary then some other person can also join as the consensus on copying the Holy Qur'an.<sup>291</sup>

### 11. Authority (*sanad*)

Those matters on which the Ijma` (إجماع) should be based and for want of which an Ijma` (إجماع) does not become reliable. It is so because both Ijma` (إجماع) and *Qiyas* (قياس) are not in themselves permanent proofs. The authority behind Ijma` (إجماع) are three, viz., Kitabullah, Sunnah Rasulallah, and such *Qiyas* (قياس) which is deduced from any of these two permanent sources of law.<sup>292</sup>

### 12. Divisions (*Taqsimat*)

There are three divisions of Ijma` (إجماع).

- (i) with regard to the form of consensus;
- (ii) with regard to the people who conducted the consensus and the status of consensus;
- (iii) with regard to transmission, degrees, and the rules relating to consensus.

<sup>287</sup> Nur, p. 222; *Usul al-Khalaf*, p. 45.

<sup>288</sup> *Fawath*, vol. II, p. 243.

<sup>289</sup> *Taudih*, pp. 533; *Nizami*, p. 94. In the former case, it is called *ittifaq `azimat* and in the later case, it is called *ittifaq rukhsat*.

<sup>290</sup> *Nizami*, p. 94; *Nur*, pp. 219, 221.

<sup>291</sup> *Hisami and Nizami*, pp. 94-95; *Nur*, pp. 219, 220; *Taudih*, pp. 513.

<sup>292</sup> *Fawath*, vol. II, pp. 238-9; *Nizami*, p. 94; *Taudih*, pp. 534; *Nur*, p. 222.

With regard to the form of consensus, it is further of two kinds.

- (a) Explicit (*sarih*). It is the adoption by all of a word or act;
- (b) Silent (*sukuti*). Those who do not adopt the consensus arrived at also do not refute it. Rather, they adopt silence.

It should be borne in mind that it can be both in the matter of word as well as act.

There are two kinds of Silent Consensus.

(i) There is some circumstance (*qarinah*) along with silence which shows that this silence is merely for agreement, e.g., the silence of all other companions besides Hadrat Abu Bakr Siddiq (Allah's mercy be on him) in the matter of waging war against those who denied to pay zakat. All of them had gone to wage war though they had not verbally expressed their agreement. Such a situation, in fact, is of the rank of explicit consensus.

(ii) The non-existence of the said circumstance along with silence.

The conditions for the proof and reliability of a silent consensus are as follows:

- (1) There is no transmission regarding conformity or opposition in any aspect from the side of those who keep silent, either explicitly (*sarahatan*) or allusively (*'isharatan*) or by inference (*dalalatan*).
- (2) There is silence despite proper and sufficient opportunity for thinking after knowledge and observation of the consensus.
- (3) The problem should be such regarding which there is scope for Ijtihad (exercise of personal judgement).
- (4) Those who observe silence must be men of knowledge and competent to exercise Ijtihad.

There are two kinds of consensus with respect to the people of consensus and the status of consensus.

#### **(1) The consensus of the companions.**

The consensus of companions is again of two kinds:

- (i) Explicit consensus of companions;
- (ii) Silent consensus of companions. It can be of two kinds, viz., silence with some circumstance and silence without any circumstance.

#### **(2) The consensus of the men of knowledge after the companions**

It is also of two kinds.

- (i) A consensus on a problem regarding which no conflict of companions is reported.

- (ii) Consensus on a problem regarding there was a conflict of opinion among the companions.<sup>293</sup>

**(3) With regard to the transmission and degrees and rules relating to Ijma' (إجماع)**

It is of three kinds.

*(i) Mutawatar:*

It is the consensus which from the period of companions is being transmitted continuously without any difference of opinion.

The example (*misdaq*) of it is the explicit consensus of companions and a silent consensus of opinion of the companions with which there exists some circumstance of conformity.

The example of explicit consensus is the consensus of the companions on the caliphate of *Hadrat* Abu Bakr Siddiq (Allah's mercy be on him).

The example of silent consensus of companions along with some circumstance (*qarinah*) is silence of the companions on Jihad against those who refused to pay Zakat.

The legal status of such a consensus is like the text of the Holy Book and the Hadith Mutawatar, i.e., it is considered in the eye of law a definitive proof (*dalil qat'i*). To believe in it and to act upon it are both compulsory and denial is infidelity.

*(ii) Mashhur:*

A consensus which is of the period after first century (*qarn awwal*) and is reported with continuity.

The example of it is the consensus of the `ulama of the period after companions on a problem regarding which no conflict of opinion is reported.

The legal status of a Mashhur consensus is like a Mashhur Hadith. It is considered in the eye of law a definitive proof (*dalil qat'i*) and to feel satisfaction and to act upon it is necessary.

*(iii) Ahad.*

This is a consensus which is reported by *khavar ahad*, i.e., it is not reported in any period and time with *tawatur*.

The *misdaq* of it are:

- (a) the consensus reported as a *khavar wahid*.
- (b) regarding any problem of the first period, a later consensus.
- (c) the silent consensus of companions without any *qarinah*.

The examples of it are:

- (a) Observation of strict punctuality in offering the four rak'ats of sunnah prior to the fard of Zuhur prayer.

<sup>293</sup> *Fawatih*, vol. II, pp. 244-5; *Taudih*, p. 534; *Hisami*, pp. 95-96; *Nur*, pp. 222-3.



(b) There was conflict of opinion among the sahabah regarding the sale of umm-i-walad (a female slave who gives birth to her master's child. Later on, there was consensus for its non-permissibility.

Legal status of Ijma` (إجماع) Ahad is like an authentic (*sahih*) and reliable (*mu'tabar*) khabar ahad. To act upon it with zann ghalib is necessary.<sup>294</sup>

From the above mentioned divisions, the degrees of consensus are evident and that a minimum rank of a consensus is that of an authentic khabar wahid. Hence, the **Qiyas** (قياس) cannot be given priority over the Ijma` (إجماع).

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<sup>294</sup> *Fawatih*, vol. II, pp. 242-6; *Nur*, pp. 222-3; Hisami, pp. 95-96.

### The Fourth Basis

#### Ijtihad `Aqli

##### 1. Definition

To state the command after thorough thinking with the help of the principles and regulations determined by the Shari`at regarding a circumstance concerning which there is no command transmitted by the Holy Qur`an, the Sunnah and the Ijma` (إجماع) .

##### 2. Kinds

There are four kinds of Ijtihad `Aqli.

- (i) **Qiyas** (قياس) : قياس
- (ii) Istihsan; إستهسان
- (iii) Istislah; إستهصلاح and
- (iv) Istishab. إستهصحاب

According to the whole ummah, with a few exceptions, the most significant and the most useful and agreed upon and reliable kind is the **Qiyas** (قياس) which has been used the most in every period. This kind is so well-known and prevalent that it is mentioned as the fourth source of Islamic Law. All these kinds, in fact, are the means and instruments to use Ijtihad `Aqli (exercise of personal judgement).

## CHAPTER 1

## Qiyas (قياس)

## Analogical Deduction

## 1. Definition

Literally, **Qiyas** (قياس) means to measure, to assess, to make equal.

Technically, it means to state the commandment of the text for the non-text on the basis of a common effective cause.

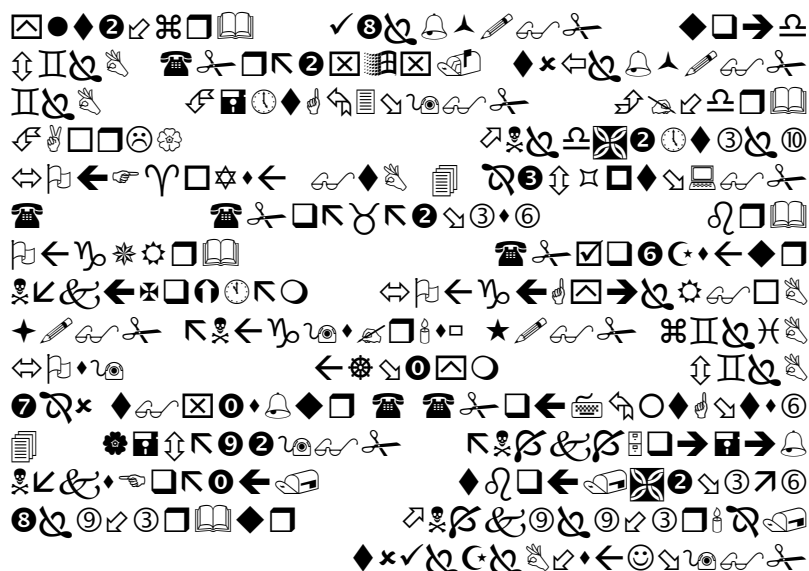
## 2. Nature

To state a command merely on the basis of one's own thinking and opinion is not the nature of **Qiyas** (قياس). Rather, the nature of **Qiyas** (قياس) is that the problem of which there is no commandment in the text is available, i.e., it is not available in the Holy Qur'an, the Sunnah, the aqwal sahabah, and the Ijma' (اجماع) then to declare basis for command on account of the relationship with any textual circumstance. The relationship means the existence of such effective cause of the textual command which is also present in the non-textual circumstance and there should also exist all the conditions for the validity of the **Qiyas** (قياس).

## 3. The Authoritativeness

From the nature of the **Qiyas** (قياس), it is apparent that it is also a form of acting upon the Holy Qur'an and the Sunnah. Further, there exists permanent arguments regarding its authoritativeness both in the tradition and the reason.

(a) Allah Almighty says:



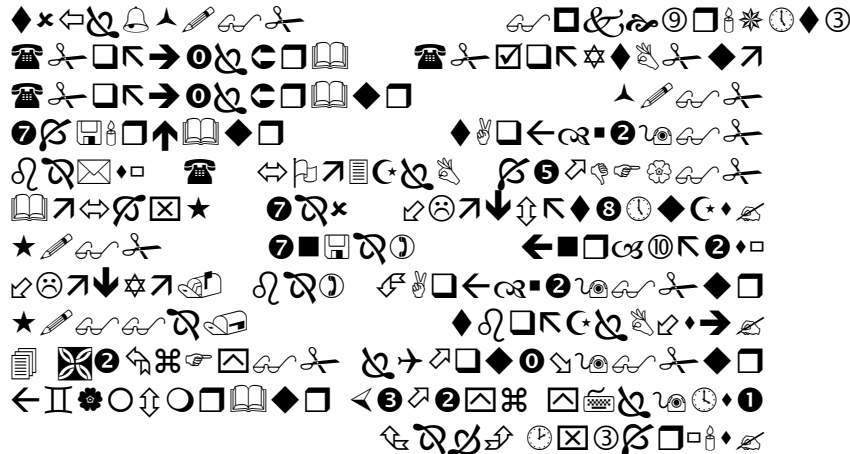


2. He it is who drove out the disbelievers among the people of the Scripture (i.e. the Jews of the tribe of Banî An-Nadîr) from their homes at the first gathering. You did not think that they would get out. and they thought that their fortresses would defend them from Allâh! but Allâh's (torment) reached them from a place whereof they expected it not, and He cast terror into their hearts, so that they destroyed their own dwellings with their own hands and the hands of the believers. Then take admonition, O You with eyes (to see).

[59:2]

The nature of admonition is to return a thing towards its like and this is **Qiyas** (قياس).

Allah Almighty says:



59. O You who believe! obey Allâh and obey the Messenger (Muhammad), and those of You (Muslims) who are In authority. (and) if You differ In anything amongst yourselves, refer it to Allâh and his Messenger (), if You believe In Allâh and In the Last Day. that is better and more suitable for final determination.

[4:59]

(b) The *ijtihad* referred to in *hadith* Mu`az is this **Qiyas** (قياس).

(c) This is also practically transmitted on the authority of the Messenger of Allah (peace and blessings of Allah be upon him).

(d) The words and acts of Companions (Sahab/صحابه) in favour of it are of the status of tawatur.

The above are the traditional arguments in favour of **Qiyas** (قياس) and on the basis of reason, the whole world considers the **Qiyas** (قياس) a reliable

source of knowledge. Hence, its reliability is also necessary in the Shari`ah as the Shari`at does not oppose such natural affairs. However, it does determine its principles and regulations and it has done so in the matter of **Qiyas** (قياس) as well.

As a **Qiyas** (قياس) whose effective cause is in the text, i.e., it is transmitted by the law-giver or it is Ijma`i (إجماع), it is authoritative. Likewise, the effective cause of it is deduced such as already discussed that the effective cause is of two kinds, the generality of `ulama considers it also as authoritative.

#### 4. Essential Elements of Qiyas (قياس)

There are four essential elements of **Qiyas** (قياس) .

- (a) Muqis `alayhi (the basis available in the text);
- (b) Muqis (the problem concerning which no direct command is available in the text. It is also called as a Far` (branch or issue));
- (c) `Illat Jami`ah (Exhaustive cause / an attribute which is the basis of the command of the problem in the text and which is also existing in the problem in hand); and
- (d) Hukm Jami` (the command which is proved for the problem mentioned in the text being the exhaustive cause and could also be proved applicable to the problem in hand).

#### 5. Conditions of Qiyas (قياس)

##### (a) With regard to muqis `alayhi

- (i) The proof must precede the muqis.
- (ii) The proof must be proved on the basis of some shar`i dalil and must be by hearing, i.e., it should be shar`i and sam`i thubut.
- (iii) It should be the root (asl) and not the branch (far`), i.e., it should be muqis `alayhi and should not be the muqis itself. In case, it is muqis itself, then the effective cause (`illat) must be the same which has been relied upon in making it muqis.
- (iv) It should not be against **Qiyas** (قياس) (khilaf **Qiyas** (قياس) ).
- (v) Its commandment should not include a branch (far`), i.e., it should not be in the form of maxims (kulliyat).

##### (b) With regard to muqis

- (i) The effective cause of muqis `alayhi should be found in it fully / completely.
- (ii) Its proof should not precede muqis `alayhi.
- (iii) No commandment should have been established in any form whether in the affirmative (ithbat) or negative (nafyi).

##### (c) With regard to effective cause (`illat)

- (i) The effective cause should be perceivable intellectually, i.e., it should appeal to reason.
- (ii) It should not be a compound that two mujtahidin had proposed two separate effective causes in respect of a single command and had declared them one and made the **Qiyas** (قياس) dependent on it.
- (iii) Its existence must be in both muqis `alayhi and muqis by agreement / consensus.
- (iv) It must possess the capability of becoming an effective cause, i.e., the qualities of effective cause must exist in it.

**(d) With regard to hukm (commandment)**

- (i) It must be legal (shar`i).
- (ii) It should not be particular with the root (asl).
- (iii) It should not be non-abrogated (ghayr mansukh).
- (iv) It should be present in equal circumstances in both muqis `alayhi and muqis, i.e., there should be no difference of any kind in muqis in relation to muqis `alayhi.

**6. Occasions of Qiyas (قياس) (mawaqi` Qiyas (قياس))**

The occasion of exercising **Qiyas** (قياس) are branches (*faru`-i-ahkam*), i.e., the practical commandments and not the basis, i.e., theoretical problems (*kalami masa`il*). Further, in the branches as well there is difference of opinion in the matter of *hudud* and *kaffarat*, i.e., those shar`i punishments the quantum and form of which are fixed and determined and the declaratory commands (*ahkam wad`iyyah*), i.e., in respect of means (*asbab*) and causes (*ilal*) and conditions (*shurut*).

**7. Commandment (hukm)**

To apply the law applicable to muqis `alayhi to muqis with the definitive belief (*zann ghalib*) and with the possibility of error as the truth (*haqq*) is one while the argument is *zanni* (çTĀG'). Hence, its validity (*sihhat*) cannot be declared with absoluteness (*qat`iyyat*).

**8. Example (mithal)**

The declaration of unlawfulness of any intoxicant on the basis of intoxication considering it the effective cause in the wine.

In this example the wine is *muqis `alayhi*, i.e., the form about which there is the law given in the Holy Qur'an and Sunnah or *Ijma`* (إجماع).

The other intoxicant is *muqis*, i.e., the form about which there is no law available in the text.

The intoxication is the exhaustive effective cause (*`illat*), i.e., the attribute which is the basis or root of *muqis `alayhi* and which is also present in the *muqis*.

The unlawfulness is the exhaustive command / law (*hukm*), i.e., the law which is established for *muqis `alayhi* on account of the exhaustive effective cause and is also proved for the *muqis*.

### 9. Qiyas (قياس) and Dalalah al-Nass

The basic reason of distinction between **Qiyas** (قياس) and dalalah al-nass is that the basis of **Qiyas** (قياس) is reason and thinking and the basis of dalalah al-nass is the diction (*lughat*). Hence, mujtahid is competent to exercise **Qiyas** (قياس) while the knowledge of dalalah al-nass is available to every man of language (*sahib lughat*). Further, **Qiyas** (قياس) is *zanni* (ظنّي) (probable) matter while dalalah al-nass is *qat'i* (قطعي) (absolute). Still further, **Qiyas** (قياس) is generally a matter of difference of opinion, while reliance of dalalah al-nass is agreed upon.

### 10. Kinds

There are two kinds of **Qiyas** (قياس) :

(a) **Qiyas** (قياس) *jali* (manifest **Qiyas** (قياس)).

It is that **Qiyas** (قياس) towards which the mind goes instantly / at the very first thought.

It is also termed as **Qiyas** (قياس).

(b) **Qiyas** (قياس) *khafi* (hidden **Qiyas** (قياس)).

It is that **Qiyas** (قياس) towards which the mind is not diverted immediately.

It is also termed as *istihsan* (juristic preference).

Although in **Qiyas** (قياس) *khafi* the *istihsan* is not in its technical sense. Rather, it is one of its mostly used kinds.

The real verifier (*misdaq haqiqi*) of the technical *istihsan* includes every such argument by means of which argumentation is made opposite to **Qiyas** (قياس). In **Qiyas** (قياس), the non-mention circumstance is carried to the precedents on account of the common effective cause while in *istihsan* the precedents are ignored and instead of their law another law is adopted, remaining within the limits of Shari'ah.

### Effective Cause ('Illat)

#### 1. Definition

- a. With regard to the declaratory rule (*bi i'tibar al-hukm al-wad'i*): The external attribute which is effective in the existence of a commandment.<sup>295</sup>
- b. With regard to the essential element of **Qiyas** (قياس): The common attribute found both in the *muqis* and the *muqis 'alayhi* which is the basis of the commandment of the *muqis 'alayhi* and is made the basis of the commandment of the *muqis*.<sup>296</sup>

2. The word 'illat is also used for the following meanings:

- i. ba'ith
- ii. manat

<sup>295</sup> *Fawatih*, vol. I, p. 304.

<sup>296</sup> *Usul al-Khalaf*, p. 60.

- iii. mujib
- iv. mu'aththir
- v. sabab
- vi. hamil
- vii. mustad'i
- viii. muqtadi<sup>297</sup>

### 3. Conditions of 'Illat

There are five conditions of 'illat:

#### a. Ta'thir

It means the existence of the said commandment on the existence of the said attribute.

There are four forms of ta'thir:

- (i) The effectiveness of one kind of attribute in favour of a particular commandment. For example, dropping of more than six prayers on account of senselessness. It is so because it is extremely inconvenient to offer so many prayers as qada. Therefore, there is no qada on the menstruating women. At both places the kind of the effective attribute is one while the commandment is particular.
- (ii) The effectiveness of one kind of attribute in favour of a particular right. For example, the dropping of the qada prayers on account of inconvenience during the days of menstruation on account of the menstruation. Similarly, a traveller has also been allowed the offering of two rak'ats instead of four on account of inconvenience.
- (iii) The effectiveness of a particular attribute in favour of a particular commandment. For example, the effect of often visiting of the cat in favour of remainder of the cat.
- (iv) The effectiveness of a particular attribute in favour of a particular kind of a commandment. For example, childhood is a particular attribute. On account of it the father of the child has got the right of guardianship. The nikah is also a fiscal affair, therefore, he shall have the walayat in the matter of nikah.<sup>298</sup>

#### b. zuhur

- a. sensible
- b. indibat
- c. 'adam mukhalifat
- d. munasibat

#### (a) Effectiveness (Ta'thir)

On the existence of the said attribute the existence of the said command.

#### (b) Manifestation (Zuhur)

<sup>297</sup> Irshad al-Fuhul, p. 207.

<sup>298</sup> Fawatih, vol. II. p. 268; Nizami, p. 102.



It is the sensibility of the said attribute. In other words, its being such that any sense may perceive it, like intoxication and murder etc as those are perceived by outer senses.

**(c) Regulation ('Indibat)**

The said attribute being not different on account of the variation in the members and the circumstances. For example, the hardship of journey is the effective cause of concession/leave/permission. But it is not essential that the hardship must exist in respect of every traveller nor it can be so understood. And it is the hardship on which the leave depends. But journey is a determined attribute hence it has been declared the effective cause.

**(d) relationship / connection / link (munasabat)**

It is also termed as mula'imat (Politeness / convenience).

It is to become a means to fulfil the policy and expediency of lawfulness of the said commandment to the extent of probability.

There are five kinds of Munasibat :

**1. Munasabat mu'aththirah;**

It is a relationship the reliability of which in favour of some commandment is proved by tradition (naql). For example, the effective relationship in the matter of remainder of cat is on account of its often visiting in the houses is transmitted in the text of tradition.

**2. Munasabat mula'imah;**

The mention of which is not particularly in the same text and Ibarat in favour of the said command in which the said command is mentioned but the reliability is proved by other texts. For example, the dropping of prayer from the senseless persons and the menstruating women. Their effective cause is not mentioned but the reliability of the effective cause is proved by other texts.

**3. Munasabat gharibah;**

An effective cause deduced from some text and its being not mu'aththirah or mula'imah is not apparent but it has munasibat with the said command. For example, the exclusion of a murderer of his Murith from his inheritance. Its effective cause is declared as his haste in getting a right before its time. Hence he will be declared excluded to have it. This 'illat is understandable but its coming under any of the first two kinds is not proved.

**4. Munasabat mulghat;**

The futility of which is proved by some dalil. For example, in the matter of breaking of the fast the expiation even for the king being to observe fast so that he may get warning due to the hardship though it is not necessary upon him. On the basis of dala'il shar'iyyah it is futile and worthy of rejection as according to the Shari'ah no form is necessary for any individual.

**5. Munasabat mursalah.**

It is that in favour of which neither there is any proof of its reliability (i'tibar) nor of its being futile ('ilgha'). The effective causes consisting of such relationship are called masalih mursilah which are made the basis of 'istislah.

#### **(E) Non conflict ('adam mukhālafat)**

An effective cause must not be contrary to any Dalil Shar'īyy whether it is a dalil of Kitabullah or dalil of Sunnah Rasulullah or qaul of Sahabi (ﷺ) or 'Ijma' (إجماع)

#### **4. Distinction between an 'illat, a maslihat and a hikmat**

An 'illat is the attribute which is the basis of a command.

A maslihat and a hikmat is the ultimate purpose and objective realised by means of acting upon a command, whether such objective is the achievement of benefit or the eradication of some evil and removal of some inconvenience.

A hikmat and a maslihat refer to the consequence of an act/work/deed.

'Illat exists first (prior to commandment) and on the basis of its existence some commandment is given while the existence of maslihat and hikmat comes later on (after the commandment) and it is achieved by acting upon the commandment.

#### **Sources of 'Illat:**

The occasions or the means to know the 'illat are basically three, viz., Nass, Ijma' (إجماع) and Istinbat.

#### **(a) Nass:**

The mention of 'illat in any form in the words of the Kitab and Sunnah. Basically, it has two forms, viz. Explicit (Sarih) and Allegorical (Ima' and tanbih)

#### **Sarih**

##### **Definition**

Those words which according to the diction and original formation indicate being an 'illat.

##### **Examples**

Li ajalin, kay, 'izan, lam ta'liliyyah, lam 'aqibat, ba' sababiyyah, 'inna muthaqqalah, 'inna mukhaffafah and fa ta'qibiyyah.

All these words do not convey the meaning in the same rank. Rather there is difference of ranks. By mentioning the numbers in between their mutual status and rank has been made clear. Further, difference of rank occurs with regard to it that if these words are in some verse of the Holy Qur'an or Hadith Nabawi those are considered superior to those sayings of the companions that consist of those words.

## 2. 'Ima' and Tanbih:

### Definition

Those words that indicate 'Illat on the basis of qara'in (circumstantial evidence)

### Examples

Qara'in are different. For example,

- (i) occurrence in reply to a question;
- (ii) mention of an attribute alongwith any commandment;
- (iii) To differentiate between two commands even if separate attribute are mention in respect of both or in between the two an 'istithna' (letter of exception) or hatta (Till, until) or a word equal to it in meaning, lakin (but) and a word in the same sense, or kalimat shart ( 'in, lau) are used.

### (b) 'Ijma' (إجماع) :

The consensus of opinion of Mujtahidin on the 'illat of a wasf (effective cause of an attribute) , as the ittifaqi 'illat is the minority of a child in respect guardianship of his property.

### (c) 'Istinbat:

**(a) Definition:** To declare an attribute as an 'illat for any hukm by means of mental exercise.

**(b) Forms:** It is of two forms, viz., sabr and taqsim and Izhar Munasabat.

**(i) Sabr wa taqsim:** To find out by mental exercise the commandments that deserve to become the 'ilat of the said command and thereafter make thorough scrutiny of each one of them by way of consideration and to sift the proper from the improper.

**(ii) Izhar munasabat:** To state the form and state of reliability of Shari'at regarding the attribute carrying the 'illiyyat for any commandment.

Besides these two forms other forms are also mentioned which have no reliability.

## 6. Kinds

There are two kinds of 'illat, viz., mansusah (textual) and mustanbitah (declaratory).

### Definition

Mansusah (textual) is an effective cause which is reported in any text in any form.

### Example

During the menstruation the effective cause of prohibition of cohabitation is impurity which is mentioned in the following glorious verse of the Holy Qur'an:

*yasalunaka ani'l-mahid qul huwa azan fa` tazilu al-nisa'a fi al-mahid.*

They ask thee concerning the menstruation. Say it is an impurity. Hence, be separate from the women during the menstruation. [2 : 222]

Mustanbitah is an effective cause which is deduced from any text in accordance with the rules and regulations.

### Examples

The effective causes mentioned for the shari`ah commands are generally of this kind.

### The stages of exercise of an effective cause

To give the *hukm* of *muqis `alayhi* to the *muqis*, the effective cause is to pass through three stages. In other words, three kinds of operations are to be conducted for this purpose:

1. Takhrij
2. Tanqih
3. Tahqiq

As an *`illat* (effective cause) is also called *manat*. Hence, these stages are also called *takhrij manat*, *tanqih manat* and *tahqiq manat*.

### Takhrij Manat

Takhrij Manat is to find out an effective cause of the commandment regarding a problem mentioned in the Holy Qur'an and the Sunnah. In other words, it means to find out the attributes present in such problem that can become an effective cause.

### Example

A beduin cohabited with his wife while he was observing fast. He put his problem before the Holy Prophet (peace be upon him) and the Holy Prophet (peace be upon him) gave the verdict that the fast stood broken and that both its *qada* (to be observed again) and *kaffarah* (expiation) became obligatory upon the beduin.

When the problem and the verdict were thoroughly considered to find out the attributes, it came to light that there were more than one attributes, such as:

- that the person who cohabited was a beduin;
- that his cohabitation was with his wife;
- that there existed a thing that was prohibited during observance of fast.

### Tanqih Manat

The process of determination and sifting the attributes of *muqis `alayhi* (the basis available in the text) that can become an effective cause from the attributes that cannot become such cause.

### Example

In the above example, to discard matters other than the three prohibited matters that is to eat, to drink and to cohabit and to declare the commission of any one of these acts as the effective cause.

**Tahqiq Manat**

To find out the determined effective cause in the *muqis* (the problem concerning which no direct command is available in the text) and when it is found to apply on it the command of *muqis 'alayhi*.

**Example**

In order to know the command in the problem of drinking of water by a fast-observer, after doing research of the effective cause (i.e., the three things that break the fast), to apply it to the problem in question and to give the verdict of *qada* and *kaffarah* in such problem also.

## Chapter 2

### Istihsan

#### [Juristic Preference]

#### Definition

*Literally*, istihsan means to consider good.

*Technically*, istihsan means to suggest an other command for a circumstance instead of the command of its *naza'ir* (precedents) on the basis of some such *dalil* (proof) that strongly requires it.

#### Distinction between Qiyas (قياس) and Istihsan

In **Qiyas** (قياس), the non-mentioned form is carried to the precedents, i.e., on account of the unity of effective cause it is carried to the forms similar to it. While in istihsan, the precedents are ignored and instead of their command another command is adopted.

#### Authoritativeness of Istihsan

The authoritativeness of istihsan is proved by the Holy Qur'an, the Sunnah, the practice of the ummah (ta'amul ummah), the rules of shari'ah and the reason ('aql).

#### Examples

a. The Holy Qur'an says:

*"wattabi'u ahsana ma unzila ilaykum min rabbikum."*

"And follow ye the best of that which has been revealed unto ye from your Lord." [39 : 35]

b. The Messenger of Allah (peace and blessings of Allah be upon him) said:

*Ma ra'a hu al-muslimuna hasanan fa huwa `indallahi hasanun.*

That which the Muslims see good is also good in the sight of Allah.<sup>299</sup>

c. In different matters there has been the exercise of **Qiyas** (قياس) and there exist accepted rulings against the general principles. For example, the permissibility of the eating of the dead for a person who is in extreme hunger; the permission of *bay` salam* where the goods to be purchased are not in the possession of the seller (being not yet manufactured or produced) while the rule is that the goods which are not in the possession of a person the sale of the same is not permissible but the shari'ah has permitted such sale in the aforesaid circumstance.

d. Rational Proof of Istihsan

Often to act upon a general command or a fixed rule or on a manifest **Qiyas** (قياس) causes the negation of the betterment sought by shari'ah, rather causes disorder, and in such a circumstance or

<sup>299</sup> *Sunan al-Kubra*, al-Bayhaqi; *Musnad*, Ahmad bin Hanbal.

situation or occasion remaining within the limits of the Shari`ah another command is adopted.

Istihsan is based on many things. It is not based only on reason and opinion. However, in the matter of definition of particular the same aspect is made more manifest and generally it is defined in the same manner. Even it is said that where the word istihsan is mentioned without any limitation it refers to *istihsan bi'l-`aql*.<sup>300</sup>

The reason is that the well-known kinds of istihsan are four. Out of these four, this kind is the most useful and significant as the remaining kinds are not *muta`addi*, i.e., on them other forms cannot be assessed, while on *istihsan bi'l-`aql* other forms can be assessed. Thus it has the status of a kind of **Qiyas** (قياس).

### Kinds of Istihsan

Many matters become the basis of istihsan. Keeping in view all of them, istihsan is divided into four kinds, viz., *Istihsan bi'l-athar* (باعتبار... wL±©¥ Z), *Istihsan bi'l-ljma`* (nL±%ê£... wL±©¥ Z), *Istihsan bi'l-`aql* (â°š£... wL±©¥ Z) and *Istihsan bi'l-dururah* (xey®š£... wL±©¥ Z).

#### (a) *Istihsan bi'l-athar* (باعتبار... wL±©¥ Z)

It is also called *istihsan bi'l-nass*.

#### Definition

On account of some verse of the Holy Qur'an or the hadith of the Holy Prophet (peace be upon him), to adopt some other command instead of the command of the precedents.

#### Example

The sale of non-existing goods (that are not present with the seller for the time being) is forbidden even on the authority of *naql* as the Messenger of Allah (peace and blessings of Allah be upon him) has forbidden such sale. It is also forbidden on the basis of reason as a thing that does not exist cannot become the subject-matter of a sale transaction but *bay` salam* which is a form of sale of non-existing goods as at the time of striking the bargain the goods to be purchased are not with the seller, is permissible on the basis of those ahadith in which the permissibility of *bay` salam* is reported.

#### (b) *Istihsan bi'l-ljma`* (nL±%ê£... wL±©¥ Z)

It is also called *Istihsan bi'l-`urf* or *Istihsan bi'l-ta`amul*.

#### Definition

On account of some consensus to leave the command of the precedents.

#### Similarity with *Ijma`* (اجماع) (*misdaq ijma`*) (nL±%Z qZ-³)

Here *ijma`* (اجماع) does not mean the technical *ijma`* (اجماع) (consensus of opinion). Rather, the reference is to the literal *ijma`*

<sup>300</sup> Qamar, p. 243; Taudih, p. 567.

(اجماع) , i.e., to agree upon any matter whether such agreement is of the mujtahidin which is technically called *ijma`* (اجماع) or it is the agreement of the common and the particular people which is called *`urf* or *`adat* or *ta`amul*. This detail makes the difference between the two manifest. That is *ijma`* (اجماع) is the name of the consensus of the men of knowledge who are competent to exercise their personal judgement, while the proof of *`urf wa `adat* (custom and usage) is dependent upon the consensus of the common and particular people of a locality. However, in the matter of *ijma`* (اجماع) , it is necessary that every mujtahid of the time must agree while in the matter of proof of *`urf wa `adat* (custom and usage) the difference of opinion of one or few of them is not effective and it is proved by the proof of majority acting upon it.

#### Example

To get a thing made on order, e.g., to place an order with the cobbler to make a pair of shoe is also a form of a transaction of sale of goods not existing at the time of placement of order by the vendee. However, in all ages such a bargain has not been objected to and as against **Qiyas** (قياس) the proof is of its permissibility.

#### (c) *Istihsan bi'l-'Aql*

It is also called *Istihsan bi'l-Qiyas* (قياس) .

#### Definition

It means leaving of the command of precedent on the basis of some non-apparent rational argument and to adopt another command.

It also means **Qiyas** (قياس) *khafi*.

Keeping in view these two meanings the **Qiyas** (قياس) is classified into two kinds, viz., **Qiyas** (قياس) *jali* and **Qiyas** (قياس) *khafi*. **Qiyas** (قياس) *jali* is the well-known **Qiyas** (قياس) while **Qiyas** (قياس) *khafi* refers to this kind of *Istihsan*. Generally, in the books of *Usul* (principles of jurisprudence) this kind of **Qiyas** (قياس) is termed as *Istihsan bi'l-'aql*.

#### Example

Where a land is made *waqf*, the passage of water for irrigation and the path for the persons coming for cultivation is not included in the *waqf* as per **Qiyas** (قياس) . The reason is that the *waqif* has only made the *waqf* of his land but as without having access to that land and without irrigation water reaching to that land, it cannot be utilised, hence, both these passages are considered included in the *waqf* on the basis of application of the principle of juristic preference (*Istihsan*).

#### Rule

The particular rule of this kind is that as the basis of it is reason and **Qiyas** (قياس) . Therefore, this kind is transitive (*muta'addi*). In other words such kind of rules can be made as *Muqis 'alayh* for other rules.

It is for this reason that it is given the title of **Qiyas** (قياس) *khafi* (hidden analogical deduction) and is declared the second kind of **Qiyas** (قياس) *mutlaq* (absolute **Qiyas** (قياس)).



This first kind which refers to **Qiyas** (قياس) ma'ruf is also called **Qiyas** (قياس) jali. As this kind is opposite to **Qiyas** (قياس) ma'ruf hence if on the basis of strength or on the basis of principles is declared preferable to **Qiyas** (قياس) jali then it is acted upon otherwise, the **Qiyas** (قياس) jali (manifest analogical deduction) is acted upon.

**(d) Istihsan bi'l-dururat**

**Definition**

On account of necessity or in compulsory circumstances to leave the ruling contained in the precedents (naza'ir) and to adopt other ruling.

**2. Definition of Dururat**

Such circumstance in which if the ruling of general circumstances is acted upon it is certain that it will cause loss of life or there is probability (zann ghalib) of that situation to result soon.

In such circumstances, the jurists have suggested two stages and they call the one as *dururat* (extreme necessity) and the other as *hajat* (need).

The basis of a *dururat* is the existing circumstance while the basis of *hajat* is the expected circumstance in view of the present circumstance while in favour of the present circumstance, there is a probability (zann ghalib) that it will enter in the stage of a *dururat* in the future. The Shari'ah grants concession in the stage of *hajat* as it grants concession in the stage of *dururat*.

The Islamic legal maxim on this point is:

"Al-dararu yazalu"

**3. Examples**

Eating of dead by a person who is in death hunger. To examine or show the private parts for medical treatment.

It is mentioned under the details in connection with the mutual comparison between **Qiyas** (قياس) and istihsan and the preference of one upon the other that if both are strong or weak then according to the principle of preference, any one of them is declared preferable. If one of them is strong and the other is the weak, then the strong will have preference over the weak. According to their strength and weakness, each one of them has been classified into two classes:

**(A) Istihsan**

- Istihsan qawi al-athr
- Istihsan zahir al-sihhah khafi al-fasad

**(B) Qiyas (قياس)**

- **Qiyas (قياس)** da'if al-athr
- **Qiyas (قياس)** zahir al-fasad khafi al-sihhah

The first kind of istihsan has preference over the first kind of **Qiyas** (قياس) and the second kind of **Qiyas** (قياس) has preference over the second kind of istihsan.

The example of the first kind is that the remainder of those birds who eat dead should be impure (najas) according to **Qiyas** (قياس) as their meat is unlawful but by the application of the principle of juristic preference (istihsan), their remainder is lawful. It is so because their saliva does not fall into the utensil when they drink water. They drink water with their beaks while the beasts drink water by putting their mouth into it and their saliva enters into the utensil in which there is water.

The example of the second kind is that according to the principle of juristic preference (istihsan) the offering of *sajdah talawat* by way of bowing (*ruku`*) is not valid but according to **Qiyas** (قياس), both the bowing (*ruku`*) and the prostration (*sajdah*) are offered as acts of respect, hence it is valid for *sajdah talawat*. But it is not valid for prayer as in the prayer both the acts of *ruku`* and *sujud* are the permanent objectives (*mustaqilan matlub wa maqsud*) while in *sajdah talawat*, the objective is only the expression of respect (*ta`zim*) which is obtained by both, i.e., by a *sajdah* or by a *ruku`*. Therefore, only *ruku`* also suffices in place of *sajdah*.<sup>301</sup>

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<sup>301</sup> Fawatih, vol. II, pp. 322-3; Nur al-Anwar, pp. 244-5; Hisami, pp. 103-4.

## Chapter 3

### ISTISLAH

#### 1. Definition

*Literally*, the word Istislah means to consider anything based on goodness.

*Technically*, Istislah means to state the commandment of a thing on the basis of *masalih mursalah*.

#### 2. Authoritativeness (hujjiyyat)

The greatest proof of authoritativeness of istislah is the acting upon of the righteous caliphs. Their verdicts and opinions were mostly based upon these masalih.

However, after the period of the companions, acting upon it became restricted and instead of it **Qiyas** (قياس) was more liked and the same became prevalent. It is so because the basis of **Qiyas** (قياس) is always on some *asl shar'i*. Therefore, it contains the aspect of care and caution dominant in it. As against it, the basis of istislah is purely maslihat (goodness) towards which the reason leads. At the most, its refutation is not mentioned in the Holy Qur'an and the Sunnah. Hence, in concession of pure maslihat, many clear and authentic ahadith had to be abandoned and after the period of sahabah, this apprehension is at increase.<sup>302</sup>

#### 3. Significance

The basis of all the commandments of Shari'ah is masalih while the circumstances and necessities are not always the same and they go on changing and their requirements also go on changing. The maslihat is the axis of the command and the demand. An act which is expedient is the objective and an act in which is not expedient is condemned whether such expediency is for this material world or for the hereafter. Similarly, whether the men can understand it or not.<sup>303</sup>

#### 4. Definition of Maslihat

The realisation or accomplishment of an advantage or eradication of some evil or inconvenience or such form of remission (*takhfif*) which is based on the protection and care of the objective of the Law Giver.<sup>304</sup>

#### 5. Kinds of Maslihat

There are three kinds of Maslihat, viz., Darurat, Hajat, and Tahsinat.

##### (a) Dururat

##### 1. Definition

<sup>302</sup> Tarikh al-Tashri' al-Islami, p. 200.

<sup>303</sup> Fawatih, vol. II, p. 26; Taudih, p. 548; Al-Madkhal, pp. 308-9; Al-Masadir, pp. 90-91.

<sup>304</sup> Al-Mustasfa min 'Ilm al-'Usul, Imam Abu Hamid al-Ghazzali, Dar Ihya al-Turath al-'Arabi, vol. I, p. 286; Al-Madkhal ila 'Ilm 'Usul al-Fiqh, Muhammad Ma'ruf Dawalibi, Dar al-'Ulum li'l-Malayin, p. 309.

Dururat (sing. *dururat*) are defined as those affairs, which cannot be ignored for the sake of human life and the continuity of human society.

Basically, such affairs are of five kinds:

- Religion
- Life
- Progeny
- Reason and
- Property

Thus, jihad is meant for the protection of religion.

Qisas is meant for the protection of life.

The imposition of hadd of zina is meant for the protection of progeny.

The imposition of hadd of drinking wine is for the protection of reason.

The imposition of hadd of theft is for the protection of property.

## **(b) Hajat**

### **1. Definition**

*Hajat* are those affairs which can be ignored with some inconvenience / hardship (*mushaqqat*). Under it are included such affairs whereby financial hardship is removed, inconvenience in the performance of compulsory duties is reduced and convenience and facilitation becomes available in the affairs. For example, in the affairs of sales and purchases, nikah and talaq, and such other aspects relating to human life and needs.

## **(c) Tahsinat**

### **1. Definition**

Tahsinat are such affairs which become the source of beauty and grace in human life both inwardly and outwardly.

Basically, under it come such things which are of nice morals, good habits, and acts of superiority.

For example, cleanliness, covering of private parts, wearing of proper dress for offering prayer.

## **(d) Tatimmat**

There are certain affairs whereby the above said affairs get fortified. For example, drinking a drop or two of wine whereby no intoxication is caused is the *tatimmah* of *dururat*, mahr mithl and reliability of *kafw* in *nikah* is the *tatimmah* of *hajat*, and the observation of the commendables and manners in cleanliness are the *tatimmah* of *tahsinat*.

## **The Rank and Mutual Relationship**

The ranks of these kinds are in the same sequence in which those have been mentioned. That is the highest degree being of the extreme needs, then lower then them the needs, and then further lower than them the tahsinat. The tatimmat of these three have also the similar sequence in their degrees. If for the sake of lower the higher is at stake, the lower shall be discarded. As for medical treatment the opening of privacy is of the kind of needs (hajāt) while the covering of the privacy is of the kind of ascetics (tahsinat). For the sake of treatment its discarding has been tolerated. Similarly, under the needs in the matter of the five affairs, for the sake of the first the loss of the second will be tolerated and they are mutually so coordinated that the hajāt for the sake of dururat are like the tatimmah, as by the needs the dururat are controlled and eradicated, the tahsinat have the same status for the hajāt as by the tahsinat the hajāt are controlled and eradicated.

#### 6. The basis of expediency.

Whatever kind of expediency, its basis is one of the two things, viz., the realisation of some advantage and the removal of the injury and hardship.

#### 8. Maslihat Mursalah

The state of a thing in the observance of which a mujtahid considers or sees the public interest and its reliance or rejection is not stated in a text (nass).

#### 9. Conditions of Reliance:

The following are the conditions to adopt any command on the basis of public interest:

- (a) There should not be the transmission of any text;
- (b) There is no precedent reported in the Shari`at on which **Qiyas** (قياس) could be exercised for it;
- (c) It should not be contradictory to any text or Ijma` (إجماع) ;
- (d) It should not be a case of personal interest/vested interest. Rather it should be of collective interest whether international, national or local.

There is scope for public interest in some problems.

- (e) Its expediency is proved by Shar'i dala'il

That is though by any text its affirmation or negation is not proved but it could be understood by the shar'i principles and rules that the Shari`ah tolerates it and keeps it in the category of expediency (*maslhat*).

#### 10. Examples

The collection of the Holy Qur'an in the form of script by Hadrat Abu Bakr Siddiq (Allah's Pleasure be on him);

The transmission of the said collection throughout the Islamic world by Hadrat Uthman Ghani (Allah's Pleasure be on him);

The maintenance of Register of the persons receiving stipends from the Baytu'l-Mal,

The minting of the Islamic coins; and such other affairs which were adopted keeping in view the public interest although such masalih (the public interests) are no where mentioned in any text (nass).<sup>305</sup>

### 11. Rules of Expediencies (Qawa'id Istislah):

The basis of all goodness, welfare and betterment is expediency (*maslihat*) as the basis of **Qiyas** (قياس) is the effective cause ('illat).

Further, the *maslihat* should be such that its acceptance or denial is not proved by any part of the Shariah. Evidently, it is a job of great responsibility to propose such maslihat the acceptance and denial of which is not proved in Shari'ah and then to make such maslihat as basis of any Shar'i Hukm. This job requires deep awareness and insight of the Religion. Hence during the period of the Companions and Successors of the Companions much use of it was made, rather this alone was mostly used but in the later period on there being no rules and regulation for its exercise as were in the matter of **Qiyas** (قياس), an attitude of extra care and caution was adopted and it was liked more to state the ahkam on the basis of an effective cause ('illat).

And it was made prevalent and many such rules were framed that could lead in the matter of expediency (istislah) and may serve as a basis for it. Thus the reason behind the restrictions of the details mentioned regarding the Masalih is also the same extra care and caution.

Still further, those legal maxims the manifest words of which state the masalih are of the same group.

For instance: the legal maxim: *Al-dararu yazalu* (The injury is avoided).

*Daf'u-l-maddarrati 'ula minjalbi-l-manfa'ati* (Removal of evil will have precedence over the getting of benefit).

*Al-duru'atu tabihu al-mahzurati* (The extreme/dire needs make the forbidden things permissible).

*Al-mushaqqatu tajlibu al-taysira* (Hardship attracts ease).

Many such legal maxims have been collected by Allamah Ibn Nujaym al-Misri in his well-known thesarus *Kitab al-Ashabah wa al-Naza'ir* and by Mufti 'Amim al-Ihsan in his well-known compilation *Kitab Qawa'id al-fiqhiyyah*.

Thus it can be said that Istislah is the name of istidlal from the qawa'id maslihat while **Qiyas** (قياس) is the name of istidlal from 'ilal ahkam. That is, if in case of stating the hukm of a formation which is ghayr mansus and the qawa'id of maslihat are made its basis it is called istislah and if the 'ilal are made the basis it is called **Qiyas** (قياس). But is is mentioned in the conditions that it is a condition precedent for

<sup>305</sup> Al-Madkhal, pp.301-2; Al-Masadir, pp.99-100

istislah that there should not exist any muqis `alayhi otherwise purely on the basis of any maslihat giving of any verdict is not permissible.

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## Chapter 4

### ISTISHAB

#### Definition

*Literally*, Istishab means to keep in company or to make companion.

*Technically*, it means to make the former state or hukm the authoritative.

In other words to keep a thing on its earlier state and command without any such permanent dalil whereby the continuity of its state or hukm is proved.

#### Authoritativeness and importance of Istishab

Istishab is a natural proof. It is customary that if the proof of existence of any thing come to knowledge by any means it is believed to exist till some proof against it is not available. Similarly when the non-existence of any thing is settled then unless some proof of its existence is put forward it is declared as non-existent. The jurists exercise it on this status of it when they do not find the hukm of any thing by some other proof. For this reason the usuliyyin have declared it the last thing to be depended in the matter of formulation of any opinion (fatwa) as will be seen under the chapter of conflict of arguments.

Some legal maxims are based on this principle of istishab. For example:

- (a) *Al- aslu baqa'un ma kana `ala kma kana ;*
- (b) *Al- 'aslu ba'atura'tu al-zimmati* (The basis rule is that man is free from responsibility in the matter of right and obligations of another man) ;
- (c) *Al-'aslu fil 'ashya'l al-'ibahatu*; and
- (d) *Al- Yaqinu l yazalu bi al- shakki.*

#### Kinds of Istishab

It is of two kinds, viz., Istishab `adam `asli and Istishab hukm shar`i.

##### Istishab `adam `asli:

To make authoritativeness in the matter of a thing that originally did not exist.

##### Example:

The non- existence of the rights of any person on another person. As it is the basic rule that every man is free from any responsibility in respect of the other person. It is so because if any person brings a claim against another person he is to produce witnesses to prove his claim.

##### Istishab hukm shar`i:

To make the former hukm of shari`ah as authority whether such hukm is of the nature of affirmation or negation.

##### Example:

The existence of zaujiyyat after nikah.



**Hukm:**

By exercise of it the claim of another can be rejected but on the basis of it no right can be proved.

**Example:**

A thing is in possession of Bakr since long time. Zaid claims it is his. Zaid's claim will not be accepted till he produces witnesses to prove his title to that thing. If he fails to produce evidence in support of his claim the said thing will be declared as belonging to Bakr.

If by any manner the said thing passes on to Zaid and Bakr claims that it was in his possession for a long time, the claim of Bakr will not be entertained till he brings evidence. In the first circumstance to reject the claim of Zaid Istishab was exercised as basis for it as an authority for it. And in the second circumstance to prove the right of Bakr it was not relied upon.

Mafqud i.e. a person whose whereabouts are not known and his life or death is not known. In his case for particular period of time he is declared as living as his death is not known by any source. This is istishab. Regarding such a person the commands are that his wife can not conduct second marriage nor his property is distributed.

The claims of others are rejected on the basis of istishab. If his near relative died his share is separated from inheritance i.e, istishab is not made a proof for his entitlement in the inheritance.

**Contradictory Proofs (Ta'arud dala'il)**

Sometimes in respect of one and the same matter and problem the proofs are mutually contradictory according to our knowledge. What should be the methodology to resolve such contradiction? This discussion is lengthy as well as difficult. However, a few guiding principles are stated briefly.

**Definition**

*Literally*, the word ta'arud means to collide with one another.

*Technically*, the word ta'arud means the ahkam obtained by proofs being opposite to each other in such a manner that if one is acted upon the other is to be necessarily left over.

**Conditions of mutual conflict:**

For the establishment of conflict there must exist disagreement in four things and agreement in four things.

**(a) Matters of disagreement:**

- i. Acceptance
- ii. Denial

- iii. Lawfulness
- iv. Unlawfulness

In the case of acceptance and denial, one requiring acceptance and affirmation while the other requiring negation and denial.

In the case of Lawfulness and unlawfulness, one requiring its lawfulness while the other requiring its unlawfulness.

(c) *Matters of Agreement:*

- (i) Time;
- (ii) Place;
- (iii) Person; and
- (iv) Sex.

When concerning any matter two proofs are different concerning the four affairs and united concerning the last four matters, the conflict stands proved in them at such time. It means that at one time, regarding one thing, for one person, one sort of proofs, should have disagreement in the matter of lawfulness and unlawfulness or affirmation and denial that adoption of any one aspect results in discarding the other aspect.

#### **Warning:**

Among the proof of the Holy Qur'an and Ahadith such sort of conflict is in relation to our knowledge while in reality it is not so. The reason is that Allah, the Blessed, the Most High, and His Messenger (Peace and blessings of Allah be upon him) know the reality best as to what hukm is for what occasion, place and state and what is for whom. We slaves are unable to comprehend the same due to lack of our own understanding and we think that there is conflict while actually there is none.

#### **Methodology of removal of conflict:**

If any Ijma' (إجماع) (consensus of opinion) is available, the same shall be reliable and worthy of dependence. In case of non availability of any Ijma' (إجماع) as the proofs are of various kinds hence for removal of conflict different formations and methods are adopted.<sup>306</sup>

#### **a. Qur'anic Proofs:**

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<sup>306</sup> [Fawatih, vol.I, p.191].

1. If both the proofs are the verses of the Holy Qur'an, and by any means it can be known as to which of the two verses is earlier in time of its revelation and which is later, the statement of Naskh (Repeal) shall be adopted. The later verse will be declared as the repealing law and the earlier verse shall be declared as the repealed law.
2. If this is not possible, then the statement of preference shall be adopted and with the help of the principle of preference one of the two shall be declared as preferred and having precedence over the other.

The basis of preference is the strength and weakness of the proof, the causes of which are various the giving of details of which is not possible here. Under the first basis at some places explanations and instances have been mentioned.

The basis of preference is not the multiplicity of proofs that is there are more proofs in relation to an aspect or a kind, then only those proofs will be reliable and if the quantity is little then there will not be reliability. However, if the multiplicity reaches to the extent of continuity and popularity, then multiplicity shall be depended. Though this rule shall be applied in the matter of proofs of the Sunnah alone and not at any other place. It is so because the discussion of continuity and popularity comes under it alone.

There are many principles of Preference. Some principles are common for Kitab, Sunnah and **Qiyas** (قياس) each.

3. If preference is not possible then according to the possibility some formation will be adopted whereby both could be combined.

There are permanent principles for combination. Some of those principles are:

- a. If both are particular, then one shall refer to the real and the other to the allegorical or one of them will refer to one state and the other will refer to another state.
- b. If both are absolute, then one of them shall be restricted.
- c. If both are general, then each shall be considered to refer to a separate specie. One shall refer to one specie and the other shall refer to another specie.
- d. If one is general and the other is particular, the general shall be declared as particular.
- e. If one relates to the Holy Qur'an and the other to the Sunnah and the Sunnah is mutawatir or mashhur, then the hukm of Sunnah shall be added to the command of the Holy Qur'an, otherwise keeping regard of the rank both the proofs shall be acted upon. The Qur'anic injunction shall be declared as a compulsory duty and the Injunction of the Sunnah shall be declared as an obligation and Sunnah.
- f. If combination is impossible, then Ahadith shall be searched, and in case no hadith is available then the aqwal sahabah will be searched

to solve the problem. If still the matter is not solved then the **Qiyas** (قياس) shall be resorted to.<sup>307</sup>

**(B) Sunnah Proofs Conflict:**

The same is the detail in the matter of removal of conflict between Sunnah proofs.

- i. Naskh;
- ii. Tarjih;
- iii. Combination;
- iv. Returning to the Aqwal Sahabah.

**(C) Aqwal Sahabah Conflict:**

In case of conflict in Aqwal Sahabah and preference and combination are not possible, then it is not the rule to abandon all such aqwal. The rule is to adopt the statement of any one Sahabi (صحابي) that appeals to the heart, i.e. toward which the heart leans and finds expansion.<sup>308</sup>

**(D) Qiyas (قياس) :**

If Aqwal Sahabah are not available then **Qiyas** (قياس) will be turned to. If there is conflict even among the proofs of **Qiyas** (قياس) i.e. the effective causes searched out by exercise of **Qiyas** (قياس) are themselves conflicting then the principle of Tarjih shall be applied. If the application of the principle of Tarjih is not possible then one should act upon such hukm toward which ones heart feels expansion and leans to.<sup>309</sup>

**(E) Istihsan:**

Where there is conflict between Istihsan and **Qiyas** (قياس), then according to the rules sometime the **Qiyas** (قياس) and some time the Istihsan is preferred to.<sup>310</sup>

**(F) Istishab:**

If the solution of the problem is not found by the exercise of **Qiyas** (قياس), then the original (asl) and the existing state (sabi q hal) and the hukm shall be adopted.<sup>311</sup>

<sup>307</sup> (Fawatih, Vol.II, pp. 129, 191, 194, 204, 210, 324.

<sup>308</sup> (Fawatih, Vol.II, p.193).

<sup>309</sup> [Fawatih, Vol.II, p. 193].

<sup>310</sup> [Ibib, p. 320-1; Taudih, p.589]

<sup>311</sup> [Fawatih, Vol II, p.192].

#### 4. Examples:

- (a) One verse of the Holy Qur'an prescribes the period of `iddat for a woman whose husband dies as four months and ten days:

*"Wallazina yutaaffauna min kum wa yaziruna 'azeajan yatarabbasna bi 'anfusiinna 'arba`ata 'ashhain wa 'ashran."*

Those of ye who die and leave behind wives, those women shall restrain themselves for four months and ten days. [II: 234].

- (b) In another verse the period of `iddat is mentioned as one year. [II: 240].

- (c) In the first verse it is mentioned that a woman whose husband dies, her `iddat is four months and ten days and there is no restriction as to the state as has been stated about a divorced woman:

*"Wal mutallaqatu yatarabbasna bi anfusiinna thlathata quru'in"*

And the divorced women shall restrain them selves for three menstruation (three lunar months). Here without any restriction for her the period fixed is three menstruation.

- (d) As against this there is a verse where another period of `iddat is prescribed with a particular restriction i.e. for a pregnant woman. The said verse reads as under:

*"Wa 'ulatul 'ahmali 'ajalu hunna an yada`ana hamala hunna"*

The period of `iddat for pregnant women is the delivery of the child. [65: 4].

Both the above quoted verses are general while this verse is particular. Hence the woman possessing this particular circumstance has been ousted from the application of those two verses while this general verse has been believed as the particular as is the case of those women who are no more discharging any menses or while yet they have not begun to discharge the menses their `iddat has been stated as three months [See 65:4], and they are also excluded from the application of the verse of three menstruation periods.

## Chapter 2

### Ijtihad

*Literally*, the word Ijtihad means to exert fully to do an act; to work to the extent of putting oneself into hardship.

*Technically*, the word Ijtihad means to consume fully the abilities of knowledge and thought to know the Ahkam of Shari`ah in the light of Shari`l dala'il.

#### Permissibility of Ijtihad:

It is proved on the authority of the Holy Qur'an and Sunnah and practically it is transmitted on the authority of the Messenger of Allah (Peace and blessings of Allah be upon him) and his companions (Allah's pleasure be on them) .

Allah Almighty says:

*"inna anzalna 'ilayka'l-kitaba bi'l-haqqi li tahkuma baynanassi bi ma 'arakallah"*

We revealed unto thee the Book with the Truth so that thou may decide matters between the people according to that which Allah has shown thee.

*"Wa lau radduhu 'ilarrasuli wa 'ila 'ulil-amri min hum la `alimahullazina yastanbituna hu minhum."*

And if they had referred it to the Messenger and those vested with authority from among them then those who could deduce they would have known.

On the authority of the above two verses of the Holy Qur'an the `ulama have mentioned the permissibility of Ijtihad. Rather as consultation the Holy Prophet (Peace and blessings of Allah be upon him) was commanded: *Shawir hum fil-ámri* (Counsel with them in the affairs).

Appreciating the conduct of the believers it is stated:

*"Wa 'amru hum shura baynahum."*

And they perform their affairs by mutual consultation.

The Holy Prophet (Peace and blessings of Allah be upon him) and his companions (Allah's pleasure be upon them) used to take much care

of it. The net result of it was this Ijtihad and the expression of the personal judgments concerning any problem.

The Hadith of Hadrat Mu`az bin Jabal (Allah's pleasure be on him) is practical proof of Ijtihad.

### **Need and Importance:**

The Shari`at Muhammadiyyah is to remain in force till the Last Day. So is the Book of Allah and the Sunnah of the Messenger of Allah (Peace and blessings of Allah be upon him). In both these sources of Allah each and every problem with which the human beings are to be confronted is not mentioned by name or with details nor it could be so as all the problems were not unfolded during the period of the Messenger of Allah (Peace and blessing of Allah be upon him). Rather, new problems are coming on the scene and they would continue so coming till the Day of Judgement. If the state and detail of all problems were to be mentioned in the Book and the Ahadith it would have become an endless volumes of both the Holy Qur'an and Sunnah, and it would have been very difficult to use them easily. Hence both the Holy Qur'an and the Sunnah have been declare Prime sources and in both of them injunctions have been laid down in an extremely wise manner. Some injunctions are very clear and unambiguous that every reader and listener understands the meaning of them and knows the command given by them. Some injunctions are such that need ponderance in whatever manner it may be and in whatever number of stages such thinking and ponderance have to pass or go through.

It is this second category of Injunctions the explanation of which was made by the Prophetic words. Though these two manners have also been adopted in respect of the Ahadith as well. However, in the Sunnah the injunctions have been more elaborately stated as compared to the Holy Qur'an.

After the Holy Prophet (Peace and blessings of Allah be upon him) had breathed his last, this explanation by his own prophetic words came to an end while the need survives and on the basis of that survival of need of explanation the jurists and those learned in law used the Shar'i sources and stated the solution of the ever new problems.

When this work was done collectively it was termed as Ijma` (إجماع) and when it was done individually it was termed as Ijtihad. It was also called the process of deduction or extraction of the ahkam by means of opinion, reason and **Qiyas** (قياس).

However, Ijtihad and **Qiyas** (قياس) are not one and the same thing in every respect. Rather there is difference between the two.<sup>312</sup>

<sup>312</sup> [Al-Madkhal, pp. 50-4; Al-Masadir, pp. 7,9, 34, 35.]

The nature and status of Ijtihad:

The nature and status of Ijtihad is not this that by the exercise of it the ahkam are proved. Rather by all forms of Ijtihad, the knowledge of ahkam is got that there occurs the manifestation of the coming forms of ahkam. Hence the jurist have made it clear that **Qiyas** (قياس) is not the muthbit (that which proves) the ahkam. Rather, the **Qiyas** (قياس) is the muzhir (that which manifests) of the ahkam. The same is the case with Ima'. The reason is that Ijma' (اجماع) is also an opinion. The only difference is that this is a collective opinion (consensus).

[Al-Masadir pp. 10 1nd 27.]

#### **People of Ijtihad:**

Every sane and adult believer who possess the qualification of exercise Ijtihad is competent to do so. Hence the Prophet as well as members of his Ummah can exercise Ijtihad. This right is available to the members of the Ummah even during the lifetime of the Prophet, as it is available after his death. However, during the life time of the Prophet only those members of his Ummah have such right who are so remote that it is not conveniently possible for them to approach and get answer of the problem from him directly or such members of the Ummah of the Prophet who are close to the Prophet and have been granted special permission to exercise Ijtihad as after grant of such permission by the Prophet to them there remains no possibility of error and if still there may occur any the same is rectified.

#### **Difference between the Ijtihad of the Prophet and of persons other than the Prophet:**

Though the right to exercise jihad is available both to the Prophet and persons other than the Prophet yet there is a basic difference between the two. A Prophet gets revelation and is the centre of the Shar'iah hence his ijihad is exactly in accordance with the truth and if there is any deficiency the same is pointed out and made good by the revelation.

On the other hand in the ijihad of a person other than the prophet there is possibility of its being correct as well as erroneous. Though the command is that every mujtahid in respect of his own Ijtihad and similarly those persons who follow him in that respect should keep zann ghalib regarding its validity and act upon it and the other mujtahid should keep zann regarding its erroneousness and act upon



his own Ijtihad. It is so because his own zann ghalib is that his own ijtihad is correct.<sup>313</sup>

#### **Conditions for Ijtihad:**

- A) Knowledge of Arabic and the allied science whereby the meanings of the Arabic statement is fully understood and comprehended;
- B) Knowledge of all the sciences relevant to understand the Qur'n and Hadith;
- C) Knowledge of all such verses in which the injunctions are stated;
- D) Knowledge of all such problems of Ummah that had already been settled by Ijma` (إجماع) and Ijtihad ;
- E) Knowledge of the rules and regulation of Ijtihad, the objectives and masalih of the ahkam Sahr`, the needs and circumstances of the society and surrounding of ones own era;
- F) Ability and expertise in deducing the ahkam by thinking over the proofs, which is called the psychology (fiqh al-nafs) or understanding of the human self.

The first five are attained by effort and exertion while the sixth is a gift of Allah.

It is narrated that Abdullah bin Mas`ud (Allah's Pleasure be upon him) was asked as to what is the right and liability of a woman who was married by a person without settling the dower and he died without consummation of marriage. He replied: The widow shall observe `iddat, she shall be entitled to get dower amount equal to the amount given to the ladies of deceased family and she will also inherit him. Thereafter, Ma`qal bin Sinan (Allah Pleasure be upon him) got us and said: The Holy Prophet (peace and blessings of Allah be upon him) had given the same decision in respect of a woman of our family.

#### **Occasions of Ijtihad:**

##### **Hukm Ijtihad:**

The Ahkam are different with regard to the circumstances.

- a) If the event is such that no hukm concerning it is already known and at the time or place where it has occurred there is only one individual person competent to exercise Ijtihad then it is Fard `ayn ( compulsory duty of such individual person to exercise Ijtihad to find out the hukm of such event).
- a) If in such an event there are present many persons competent to exercise Ijtihad then it is a Fard Kifayah.
- b) The circumstance that may occur in future to exercise Ijtihad to find out the hukm of such problems is Mustahabb(Commendable).

<sup>313</sup> [Fawatih, Voll., pp 363,366,370, 374 -6].

- c) In the presence of clear definitive proofs the exercise of Ijtihad is unlawful (haram).<sup>314</sup>

### **Kinds of Ijtihad:**

It is classified into two categories, viz., With regard to the mode of action and with regard to the sphere of action.

- a) Bi 'i'tibari tariqati al-`amali( With regard to the mode of action or with regard to the forms of efforts for ijtiḥad):

It is basically of two kinds, viz., Ijtihad bayani and Ijtihad `aqli .

#### **1. Ijtihad Bayani:**

##### **a) Definition:**

To state the hukm of a nass after full ponderance upon it is called Ijtihad Bayani.

##### **b) Formations:**

There are many basic forms of Ijtihad Bayani.

1. A nass the proof of which is not qat'i(definitive) to clarify the status of the proof of such nass by means of deep ponderance as to whether the nass is reliable with regard to its proof or not. And in case it is reliable then what is the degree or extent of its reliance. For example, the thorough investigation of the proof of a ghayr mutawatir hadith;
2. A nass whose meaning is not qat'i(definitive) and muta`ayyan (well determined or fixed) [ whether such proof is qat'i i.e. it is the verse of the Holy Qur'an or it is the Hadith Mutawatir, or the proof is also not qat'i i.e. the Hadith is ghayr mutawatir Hadith], to understand and determine its meaning by the help of the 'Usul, Qawa'id and Ahkam both literal and legal(shar'i);
3. To frame the basic rules and regulations ('usul wa qawa'id ) ;

For example the determination of the meaning of qar'un.

In the matter of wiping of the head the determination of the quantity which is Fard. What demand is proved by the imperative ('amr) and what is the extent told by the negative (nahy);

4. To determine the practical degree of a hukm proved by a nass containing a definitive proof (thubut qat'i) as to whether it is Fard or wajib or mustahabb or mubah or haram or makruh tahrimi or makruh tanzih ;
5. To reconcile the Fiqhi qawa'id wa kulliyat (legal maxims) with the particulars (juz'iyat) i.e. the relation of the particulars with them and the clarification of the legal maxims including such particulars as well.
6. The legal maxims are of two categories, viz.,
  - a) Those mentioned in the very words of the Shari` (the Law Giver) whether those are in the Holy Qur'an or in the Hadith Nabawi.

For instance, the Holy Qur'an says:

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<sup>314</sup> Fawatih, Vol.II, pp. 263.

*“Innallaha ya’muru bil-`adli wa’l- `ihsani.”*

Verily, Allah commands justice and good performance.

[XVI: 90]

The Messenger of Allah (Peace and blessings of Allah be upon him) said:

*Innama’l-`a`malu biinniyyati*

Verily, the reliability or unreliability of actions in the sight of Allah depends upon the intentions behind them.<sup>315</sup>

7. Those qawa`id and kulliyat that have been deduced from some nass or some basic principle of the Law (Asl Shar`) or some branch of the Law (Far` Shar`). For instance: Iza ijtimi`a al-halalu wa al-haramu au al-muharrimu wa al- mubihu ghulliba al- haramu wa al- muharrimu [Where lawful and unlawful combine or proof of unlawfulness and proof of permissibility combine, the preference is given to the unlawful and the proof of unlawfulness].<sup>316</sup>

Iza ijtimi`a al-haqqani qadima al-`abdu

[Where the right of God and the right of servant combine, the right of servant is given preference].<sup>317</sup>

### c) Real object of Ijtihad Bayani:

The real object of Ijtihad bayani is to determine and fix the intention of the Law Giver, hence it is agreed upon the entire Ummah.<sup>318</sup>

## 2. Ijtihad `Aqli:

### a) Definition:

To state the hukm after thorough ponderance with the help of the rules and regulations determined by the Shari`ah in respect of a circumstance the hukm of which is not mentioned in the Holy Qur`an , the Sunnah and the Ijma` (إجماع) is called Ijtihad `aqli.

### b) With regard to sphere (Bi i`tibari da`irati al-`amali)

The affairs in which a mujtahid uses his abilities, ijtihaad is of two kinds, viz., Ijtihad Mutlaq and Ijtihad Muqayyad.

#### 1. Ijtihad Mutlaq:

It is also called Ijtihad Mustaqil and Ijtihad fi al-Shar`.

### a) Definition:

The effort of a mujtahid to know the ahkam of Shar` from the four sources of Islamic Law without being bound by usul and furu`.

### b) Personalities:

The four leading jurists who exercised this kind of Ijtihad were:

Imam Abu Hanifah;

<sup>315</sup> Sahih Bukhari; Sahih Muslim.

<sup>316</sup> Qawa`id al-Fiqh p.55

<sup>317</sup> Ibid.

<sup>318</sup> Al- Madkhal pp. 344-5.

Imam Shafi'i;

Imam Malik; and

Imam Ahmad bin Hanbal.{Allah's mercy be on all of them}.

## **2. Ijtihad Muqayyad:**

### **a) Definition:**

To investigate and find out ahkam being bound by the Ijtihad of some Mujtahid.

### **c) Kinds of Ijtihad muqayyad:**

It is of four kinds: Ijtihad fi al- mazhab ; Ijtihad fi al- mas'il ; Ijtihad fi al-takhrij ; and Ijtihad fi al-tarjih.

## **1. Ijtihad in the matter of school of thought:**

### **(a) Definition:**

The statement or deduction of Usul and Furu` following some leading jurist in all or most of such Usul and Furu`.

### **(b) Personalities:**

The pupils of the four leading Jurists:

Imam Abu Yusuf;

Imam Muhammad [Allah's Mercy be on all of them].

## **2. Ijtihad in the matter of problems:**

### **a) Definition:**

Deduction of the ahkam concerning new problems following all the usul and furu` of a Mujtahid.

### **b) Personalities:**

Shams al-'a'immah al- Hulwani, Shams al-'a'immah al-Sarakhsi, Fakhr al-Islam al- Buzdawi, Qadi Khan [Allah's mercy be on all of them].

## **3. Ijtihad in the matter of giving details :**

### **a) Definition:**

To give detail of the ambiguous and brief statements of the Imam of the School of thought and his disciples.

### **b) Personalities:**

Abu Bakr Jassas Razi;

Abu al-Husayn Karkhi [Allah's mercy be on all of them].

## **4. Ijtihad in the matter of giving preference:**

### **a) Definition:**

To give preference between more than one transmissions from the Imam in respect of any problem.

### **b) Personalities:**

Abu al-Husayn Ahmad, the author of *Quduri*;

Burhanuddin al-Marghinani, the author of *Hidayah* [Allah's mercy be on all of them].

## 10. Taqlid

### a) Definition:

*Literally*, the word taqlid means to put a belt in the neck.

*Technically*, the word taqlid means to believe a thing without any proof.

This is the true nature of taqlid but according to the fuqaha' it signifies to make oneself bound by all or most of the 'usul and fru' of any Mujtahid, whether such binding is without detailed research as is the case of general muqalladin or it is with detailed knowledge and research as is the case of the big people of knowledge and research.

b) There are two stages of Taqlid , namely, Taqlid with thorough research; and Taqlid simpliciter.

1. Taqlid of a mujtahid with thorough research in the matters transmitted on his authority whether it is in the matter of all 'usul and furu' or in most of them.

There are five levels of muqalladin bi al-tahqiq:

1. Mujtahid fi al-mazhab;
2. Mujtahid fi al-masa'il;
3. Ashab al-Takhrij;
4. Ashab al-Tarjih; and
5. Ashab al-Tamyiz.

## 2. Taqlid Mahd (Blind following of a Mujtahid):

To transmit or follow the opinions of any mujtahid without any research or examination either through reading books or hearing from others.

## 11. Ijtihad and Usul al- Fiqh:

Ijtihad includes all discussion of Usul al- Fiqh as to get knowledge of the ahkam from the four basic sources of Law depends upon Ijtihad. Further , it is ijti had by the exercise of which any hukm is deduced from any proof. It is for this reason that the Usuliyyin always mention the discussions on Ijtihad at the end. Still further the knowledge of the "Science of Usul al-*Fiqh*" is one of the condition precedent for the eligibility and competency for exercise of Ijtihad.<sup>319</sup>



<sup>319</sup> Talwih p.603; Fawatih Vol II, p.363

[1: 1 to 7].