

# Part Three: The Sources of Islamic Law

## 1. Gradation of Revelation (Tanjeem)

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a. What is the gradation of revelation?

- i. The Qur'an was revealed piecemeal over a period of twenty-three years in relation to particular events.

1. .

وَقَالَ الَّذِينَ كَفَرُوا لَوْلَا نُزِّلَ عَلَيْهِ الْقُرْآنُ جُمْلَةً وَاحِدَةً  
كَذَلِكَ لِنُثَبِّتَ بِهِ فُؤَادَكَ وَرَتَّلْنَاهُ تَرْتِيلاً

32: **Muhsin Khan:** And those who disbelieve say: "Why is not the Quran revealed to him all at once?" Thus (it is sent down in parts), that We may strengthen your heart thereby. And We have revealed it to you gradually, in stages. (It was revealed to the Prophet SAW in 23 years.). [Surah al-Furqan, 25:32]

b. Why gradually?

- i. To give the believers an opportunity to reflect and memorize.
- ii. To facilitate continuous contact with the Divine.
  1. Whenever the Prophet *sal'Allaahu 'alayhi wasallam* received a revelation, he would perspire because of the weight of the message.
- iii. To give the believers enough time to spread the word and follow the injunctions.
- iv. To allow for a progression in legislation until it reached perfection

c. How was the revelation gradual?

- i. Considering the events that were experienced throughout the years of the revelation.
- ii. In response to a question the Prophet *sal'Allaahu 'alayhi wasallam* was asked.
- iii. Observing the rule of abrogation (Naskh).

d. Examples for the rule of abrogation:

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i.

وَمِنْ ثَمَرَاتِ النَّخِيلِ وَالْأَعْنَابِ تَتَّخِذُونَ مِنْهُ سَكَرًا وَرِزْقًا حَسَنًا إِنَّ فِي  
ذَلِكَ لَآيَةً لِّقَوْمٍ يَعْقِلُونَ ﴿٦٧﴾

67: **Muhsin Khan:** And from the fruits of date-palms and grapes, you derive strong drink (this was before the order of the prohibition of the alcoholic drinks) and a goodly provision. Verily, therein is indeed a sign for people who have wisdom. [Surah An-Nahl, 16:67]

ii.

﴿يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنْفَعٌ لِلنَّاسِ  
وَإِثْمُهُمَا أَكْبَرُ مِنْ نَفْعِهِمَا﴾ وَيَسْأَلُونَكَ مَاذَا يُنْفِقُونَ قُلِ الْعَفْوَ كَذَلِكَ  
يُبَيِّنُ اللَّهُ لَكُمُ الْآيَاتِ لَعَلَّكُمْ تَتَفَكَّرُونَ ﴿٢١٩﴾

219: **Muhsin Khan:** They ask you (O Muhammad SAW) concerning alcoholic drink and gambling. Say: "In them is a great sin, and (some) benefit for men, but the sin of them is greater than their benefit." And they ask you what they ought to spend. Say: "That which is beyond your needs." Thus Allah makes clear to you His Laws in order that you may give thought." [Surah al-Baqarah, 2:219]

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يَتَأْتِيهَا الَّذِينَ ءَامَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنتُمْ سُكَرَىٰ حَتَّىٰ تَعْلَمُوا مَا  
تَقُولُونَ وَلَا جُنُبًا إِلَّا عَابِرِي سَبِيلٍ حَتَّىٰ تَغْتَسِلُوا وَإِن كُنتُمْ مَّرْضَىٰ أَوْ  
عَلَىٰ سَفَرٍ أَوْ جَاءَ أَحَدٌ مِّنْكُمْ مِنَ الْغَايِبِ أَوْ لَمَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا  
مَاءً فَتَيَمَّمُوا صَعِيدًا طَيِّبًا فَامْسَحُوا بِوُجُوهِكُمْ وَأَيْدِيكُمْ إِنَّ اللَّهَ كَانَ

عَفُوًّا غَفُورًا ﴿٤٣﴾

iii.

**43: Muhsin Khan:** O you who believe! Approach not AsSalat (the prayer) when you are in a drunken state until you know (the meaning) of what you utter, nor when you are in a state of Janaba, (i.e. in a state of sexual impurity and have not yet taken a bath) except when travelling on the road (without enough water, or just passing through a mosque), till you wash your whole body. And if you are ill, or on a journey, or one of you comes after answering the call of nature, or you have been in contact with women (by sexual relations) and you find no water, perform Tayammum with clean earth and rub therewith your faces and hands (Tayammum). Truly, Allah is Ever Oft-Pardoning, Oft-Forgiving. [Surah an-Nisaa', 4:43]

iv. .

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ  
عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ﴿٩٠﴾

**90: Muhsin Khan:** O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, AlAnsab, and AlAzlam (arrows for seeking luck or decision) are an abomination of Shaitan's (Satan) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful. [Surah al-Maaidah, 5:90]

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One of the wisdoms behind this is to show the mercy of Allah. Aisha *radi'Allaahu 'anha* said that if only the first and then the fourth verse had been revealed, no one would have embraced Islam.

### 2. Asbab an-Nuzool

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a. *Definition:*

- i. The phenomenology of the Qur'an which explains the events that are related to the revelation of particular Ayaat.

b. *Why is it important?*

- i. Knowledge of words and concepts of an Ayah is incomplete without knowledge of the context.
- ii. Understanding the wisdom behind the legislation of a particular law.

c. *What is the source of Asbab An-Nuzool?*

- i. A reliable report related to us by a Sahabi who has been present at the time of the occasion.

d. *General text vs. Particular occasion*

- i. From a legislative perspective, what is considered in regard to a general text which was revealed for a particular reason, is it the generality of the text or the particularity of the occasion?
  1. The marriage of the Prophet *sal'Allaahu 'alayhi wasallam* to the ex-wife of his adopted son. By this marriage, Allah showed that one can marry one's adopted son's ex-wife.
  2. When Allah revealed the ayat for when the Prophet *sal'Allaahu 'alayhi wasallam* frowned towards the blind man.
- ii. Majority of jurists rule by the generality of the text unless another clue is provided to suggest otherwise.
- iii. Example
  1. The ruling of Dhihaar was made general even though the legal text revealed was for a particular occasion between Khawla bint Tha'laba and her husband Aws bin As-Saamit.

قَدْ سَمِعَ اللَّهُ قَوْلَ الَّتِي تُجَدِّدُكَ فِي زَوْجِهَا وَتَشْتَكَِي إِلَى اللَّهِ وَاللَّهُ

يَسْمَعُ تَحَاوَرَ كَمَا إِنَّ اللَّهَ سَمِيعٌ بَصِيرٌ ﴿١﴾

a.

1: **Muhsin Khan:** Indeed Allah has heard the

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*statement of her (Khaulah bint Tha'labah) that disputes with you (O Muhammad SAW) concerning her husband (Aus bin AsSamit), and complains to Allah. And Allah hears the argument between you both. Verily, Allah is All-Hearer, All-Seer. [Surah al-Mujaadilah, 58:1]*

- b. The Prophet *sal'Allaahu 'alayhi wasallam* refused her case based on the presumption of continuity, assuming that what the law had been before was still the law.
  - c. We must assume that the ruling does not only pertain to her. Other verses which were revealed in reference to specific incidents are also to be taken as general rulings unless otherwise specified in the Qur'an or Sunnah
- a. *Other examples of Asbab An-Nuzool are:*
- i. Surah Lahab (111), revealed when Abu Lahab mocked Muhammad *sal'Allaahu 'alayhi wasallam*
  - ii. Surah 'Abasa (81), the beginning of which was revealed when Muhammad *sal'Allaahu 'alayhi wasallam* turned away from a blind man because he was busy

### 3. Ratiocination in the Qur'an (Ta'leel)

a. *Definition*

- i. It is the rationale of an injunction, the purpose and the objective of the law. It is the search for the effective cause of legislation for a particular given law.
- ii. A cause (Sabab) is called Illah. Illah is also used to identify the wisdom (hikmah) or the benefit accrued with a particular law or for the higher objective of a ruling.

b. *How Illah is identified?*

- i. The Qur'an sometimes justifies the ruling with reference to Illah and the benefits accrued with it.

1.

خُذْ مِنْ أَمْوَالِهِمْ صَدَقَةً تُطَهِّرُهُمْ وَتُزَكِّيهِمْ بِهَا وَصَلِّ عَلَيْهِمْ إِنَّ صَلَاتَكَ

سَكَنٌ لَهُمْ وَاللَّهُ سَمِيعٌ عَلِيمٌ ﴿١٠٣﴾

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103: **Muhsin Khan:** Take Sadaqah (alms) from their wealth in order to purify them and sanctify them with it, and invoke Allah for them. Verily! Your invocations are a source of security for them, and Allah is All-Hearer, All-Knower. [Surah at-Tawbah, 9:103]

- ii. Jurists have identified the Illah through reasoning & Ijtihad
  1. .

يَتَأْتِيهَا الَّذِينَ ءَامَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِّنْ

عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ﴿٩٠﴾

90: **Muhsin Khan:** O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, AlAnsab, and Al-Azlam (arrows for seeking luck or decision) are an abomination of Shaitan's (Satan) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful. [Surah al-Maaidah, 5:90]

- a. The process of inference conducted by jurists concluded that intoxication is the main Illah for the prohibition of wine.
- iii. One hukm can have more than one Illah depending on how the scholars take it.
- iv. If the hikmah is not clear, only one hikmah becomes recognizable: it is a test from Allah
- v. The `Ulama are not obligated to find the wisdom behind the rulings, but they may do so in order to establish the higher objective of the law.
- vi. The authority of the Qur'an as the principal source of Shari'ah is absolutely independent of ratiocination.
- vii. The explanation of the Illah in the Qur'an in most occasions is designed to make the Qur'an easier to understand.

### **Chapter Three: Sources about which there is Unanimous Agreement: The Sunnah**

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The Sunnah has many technical definitions according to the different uses of the terminology used by the fuqahaa', muhaditheen, theologians, and usoolees (Scholars of Jurisprudence)

- Arabic Language
  1. The way of life, or tradition
- Fuqahaa'
  1. Mustahab
- Muhaditheen
  1. The life of the Prophet *sal'Allaahu 'alayhi wasallam* , including his habits, appearance and attributes, even before Islam, as well as his examples, statements, and his approvals and disapprovals.
- Theologians ('Ulama)
  1. Sunnah vs. Bid'ah (the straight path to Allah in belief and practices)
- Usoolees
  1. The Prophet's *sal'Allaahu 'alayhi wasallam* examples, statements, and his approvals and disapprovals.

### 1. Definition

- a. All that is narrated from the Prophet *sal'Allaahu 'alayhi wasallam* , his acts, his sayings and whatever he has tacitly approved.

### 2. As a source of law

- a. *"I left two things among you. You shall not go astray so long as you hold on to them: the Book of Allah & my Sunnah."*

### 3. An act, Sunnah Fi'liyyah (actual)

- a. *Aisha narrates, "The Messenger of Allah used to eat with his right hand and drink with his right hand."*

### 4. A saying, Sunnah Qawliyyah (verbal)

- a. *Omar narrates, "Deeds are judged by their intentions..."*

### 5. A tacit approval, Sunnah Taqreeiyyah

- a. *Anas narrates, "Handshaking was a common practice amongst the Companions of the Messenger of Allah."*

### 6. Sunnah vs. Hadith

- a. Hadith is a narration of the conduct of the Prophet *sal'Allaahu 'alayhi wasallam*.
- b. Sunnah is the example and the law that is deduced from the conduct itself (the actual ruling that is derived from the hadith)

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The definition used in this study is that of the Usoolees which serves the concept of legislation.

### Hujjiyah of the Sunnah (The Proof Value)

#### 1. Definition

- a. Hujjiyah is the proof value of the Sunnah as a source of law into the legal theory.
- b. The conduct of the Messenger of Allah *sal'Allaahu 'alayhi wasallam* was meant to establish a rule of Shari'ah and constitute a binding ruling.

#### 2. The Qur'an

- a. .

مَا آفَاءَ اللَّهِ عَلَىٰ رَسُولِهِ مِنْ أَهْلِ الْقُرَىٰ فَلِلَّهِ وَالرَّسُولِ وَلِذِي  
الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسْكِينِ وَأَبْنِ السَّبِيلِ كَيْ لَا يَكُونَ دُولَةً  
بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ  
فَانْتَهُوا وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ ﴿٧﴾

7: **Muhsin Khan:** What Allah gave as booty (Fai') to His Messenger (Muhammad SAW) from the people of the townships, - it is for Allah, His Messenger (Muhammad SAW), the kindred (of Messenger Muhammad SAW), the orphans, AlMasakin (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 SAW) gives you, take it, and whatsoever he forbids you, abstain (from it) , and fear Allah. Verily, Allah is Severe in punishment.** [Surah al-Hashr, 59:7]

#### 3. The Sunnah

- a. "Indeed I was given this Qur'an and something similar to it (Sunnah)."

#### 4. Practice of the Sahaba

- a. It was reported that the first Muslim Caliphs have issued instructions to their deputies and judges around the state in which they asked them to follow the Sunnah of the Prophet *sal'Allaahu 'alayhi wasallam* whenever they could not find the answer in the Qur'an.

#### 5. Ijmaa'



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- a. Muslim jurists are unanimous on the fact that Sunnah is a source of Shari'ah, and that it stands on the same footing as the Qur'an.
- If there is an apparent contradiction between the Qur'an and Sunnah, we need to look at the historical background. Also we need to check if somehow it is abrogated. If we can't tell from historical areas, then both are dropped and other means are looked at. This is going to be covered in Usool II.
- Therefore, those who say they follow the Qur'an but reject the Sunnah (Qur'aneeyoon) aren't actually following the Qur'an in the first place.
- The Hujjiyah (proof value) of the Sunnah becomes binding once the authenticity of that particular text of the Sunnah is determined i.e. Sahih or Hassan and Mutawattir (continuous reports) or Ahaad (solitary reports)

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### **Classification of the Sunnah and Value: Legal vs. Non-Legal**

#### 1. What is legal and what is non-legal Sunnah?

- a. Legal Sunnah, Sunnah Tashree'yah (literally: legislation)
  - i. The exemplary conduct of the Prophet *sal'Allaahu 'alayhi wasallam*, be it an act, saying or a tacit approval which incorporates the rules and principles of the Shari'ah.
  - ii. Wajib
    - 1. "Pray as you see me pray." [Bukhari]
  - iii. Mustahaab
    - 1. "Was it not for my fear of imposing a difficulty on my Ummah I would have ordered that the Miswak be used for every salaah, and delay in Isha prayer." [Bukhari]
- b. Non-legal Sunnah, Sunnah Ghayr Tashree'iyyah
  - i. The natural activities of the Prophet *sal'Allaahu 'alayhi wasallam* such as the manners in which he ate, slept, dressed and such activities which do not seek to constitute a part of the Shari'ah or the legal norms.
    - 1. The preference of the Prophet *sal'Allaahu 'alayhi wasallam* for certain foods: *Anas reports, "I saw Allah's Messenger going after the pumpkin round the dish, so I have always liked pumpkin since that day."*
    - 2. This is not an act of ibadah (simply to eat pumpkin). However, if your intention was to like something that Muhammad *sal'Allaahu 'alayhi wasallam* liked, then inshallah, the intention will be rewarded.

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3. Abdullah ibn Umar was the quickest to follow the non-legal Sunnah, to the point of taking the same footsteps as Muhammad *sal'Allaahu 'alayhi wasallam* and using the same rest stops when going for hajj.
  4. Some Sunnah practices are difficult to tell whether they are legal or non-legal.
2. *What is Hujjiyyah of each type of Sunnah?*
- a. Legal Sunnah
    - i. It establishes a Hukm Shar'ee. All commands and prohibitions that are imposed by the Sunnah are binding on every Muslim.
  - b. Non-legal Sunnah
    - i. The majority of jurists consider it an indication for permissibility (Mubaah), unless other evidence suggests otherwise.
3. *Khusoosiyaaat An-Nabi*
- a. Certain matters which are particular to the person of the Prophet *sal'Allaahu 'alayhi wasallam*.
    - i. Multiple marriages above the limit of four, connected fasting and the prohibition of remarrying his wives after his death.
4. *What is the ruling of the Khusoosiyah of the Prophet sal'Allaahu 'alayhi wasallam?*
- a. If the Qur'an addresses the Prophet *sal'Allaahu 'alayhi wasallam* with an exclusive term such as "O ye Messenger" then it is to the Prophet *sal'Allaahu 'alayhi wasallam* alone, unless there is conclusive evidence to suggest otherwise.

Coincidental actions of the Prophet *sal'Allaahu 'alayhi wasallam* such as his prayer inside the ka'bah in a certain position, praying in a specific location on his journeys or taking the pledge on Hudaibiyyah beside a particular tree do not constitute any ruling according to the vast majority of jurists.

## **Chapter Four: Sources about which there is General Agreement**

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### **1. First: Ijmaa' or Consensus of Opinion**

#### *a. Definition*

- i. The unanimous agreement of the Mujtahids of the Muslim Ummah of any period following the death of the Prophet *sal'Allaahu 'alayhi wasallam* on any matter.
  - I. This means 100% agreement, while consensus means almost 100% agreement.

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- II. Only Muslim Mujtahids can be involved in this process. Laymen and scholars of other faiths cannot issue legal verdicts.
  - III. It was never used within the Prophet's *sal'Allaahu 'alayhi wasallam* time because there was no need.
  - IV. The Mujtahids are not chosen or picked from a society; they are publicly and universally recognized as Muslim scholars.
- b. Is the Ijmaa' factual or relative evidence?*
- i. Majority of Muslim jurists accept the Ijmaa' as a universal consensus, while other jurists accept it as a valid concept in a relative sense, not as a factual evidence. This is because we cannot be sure that any Ijmaa' after the sahaba's time included all the 'Ulama or not.
  - ii. The only Ijmaa' which they accept as a factual evidence is the Ijmaa' of the Sahaba before they were dispersed.
- c. What is the value of Ijmaa'?*
- i. It reflects the natural evolution and acceptance of ideas in the life of the Muslim Ummah.
    1. Selecting Abu Bakr as a caliph.
  - ii. It ensures the correct interpretation of the Qur'an and Sunnah.
  - iii. It enhances the authority of rules that are of speculative origin. For example, the prohibition of simultaneous marriage to the close relative of one's wife.
  - iv. It represents an authority of its own right once it is established.
- d. There are two types of Ijmaa'*
- i. Explicit Ijmaa' or Ijmaa' Sareeh
    1. The Ijmaa' in which every Mujtahid expresses his opinion either verbally or by an action.
  - ii. Tacit Ijmaa' or Ijmaa' Sukooti
    1. The Ijmaa' in which some of the Mujtahids of a certain age express their opinion concerning an incident while the rest remain silent. This is not technically an Ijma' from a juristic perspective (because not everyone had their say, or they may not have spoken out for some other reason).

### Conditions of Ijmaa'

- *What are the conditions of a valid Ijmaa' ?*
  - Condition one

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- There should be a number of Mujtahids available at the time when the issue is encountered.
- Condition two
  - There should be a universal consensus of all the Mujtahids on the issue encountered. The presence of any dissenting view precludes the possibility of the Ijmaa'.
- Condition three
  - The agreement of the Mujtahids on the juridical opinion must be demonstrated by their expressed opinions on that particular issue.

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### 2. Second: Qiyas or Analogical reasoning

#### **a. Definition**

- i.** The application to a new case (Far') on which the law is silent of the ruling (Hukm) of an original case (Asl) because of the effective cause (Illah) which is in common to both.
- ii.** It is a branch of Ijtihad
- iii.** Applied to cases in which the Qur'an and Sunnah is silent

#### **b. What are the essential requirements (Arkaan) of Qiyas?**

- i.** First : Asl
  - 1.** The original case on which a ruling is given in the text & which analogy seeks to extend to a new case.
- ii.** Second: Far'
  - 1.** The new case on which a ruling is needed.
- iii.** Third: Illah
  - 1.** The effective cause which is an attribute of the Asl and is found to be common to the original and the new case.
    - a.** Find this in the asl, and can find this in the far' also.
    - b.** The Illah never fluctuates, regardless of the case being discussed and it must be generated before deciding upon the Hukm.
- iv.** Fourth: Hukm
  - 1.** The rule governing the original case which is to be extended to the new case.
    - a.** This is based on characteristic/reason which makes it similar to the new case.

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### c. Example

- i. Wine versus narcotic drugs
  1. Asl
    - a. Wine drinking
  2. Far'
    - a. Taking narcotic drugs
  3. Illah
    - a. Intoxicating effect
  4. Hukm
    - a. Prohibition
- ii. Gold vs. bank notes
  1. Asl
    - a. Paying zakah on legal amount of gold.
  2. Far'
    - a. Paying zakah on currency made of bank notes or other metals.
  3. Illah:
    - a. The value of all commodities.
  4. Hukm
    - a. Obligatory

## 3. Conditions of Arkaan Al-Qiyas

### a. Condition of Asl

- i. Asl must be constituted in the Qur'an and the Sunnah and according to the majority of jurists by Ijmaa'.
- ii. Asl may not be constituted by a former Qiyas.

### b. Conditions of Far'

- i. The new case may not be covered by the text or Ijmaa'.
- ii. The effective cause of the analogy must be applicable to the new case in the same way as to the original case.

### c. Conditions of the Illah

- i. The effective cause must be a constant attribute (Mundhabit) i.e. applicable to all cases without being affected by differences of persons, time, place, and circumstances.
- ii. The Illah must be evident not hidden.

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- iii. The Illah must be a proper attribute and bears a reasonable relationship to the law of the text.
- iv. The Illah must be an objective quality which can be transferable to other cases.
- v. The Illah must not be an attribute that runs counter to or seeks to alter the law of the text.

### **d. Conditions of hukm**

- i. The hukm must be of a practical ruling of Fiqh.
  - ii. The hukm must be operative, not abrogated.
  - iii. The hukm must be rational or the Illah is clearly given in the text itself.
  - iv. The hukm must not be confined to an exceptional situation or to a particular state of affairs.
- Qiyas is the most dynamic part of Usool Al-Fiqh which is what makes the Shari'ah so alive and contemporary.
  - The Illah and Hikmah are not interchangeable. The Illah for shortening prayers while traveling, for example, is that one is traveling. Therefore, any person who is traveling may shorten the prayers. The hikmah is that journeys are difficult, and so prayers are shortened. However, even if you have an easy journey, it doesn't mean you cannot shorten your prayers.

## **Chapter Five: Sources about which there is General Disagreement**

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### **1. Statement of the Sahabi**

#### *a. Definition*

- i. Should the statement of a single Sahabi which does not contradict the general opinion of the community of the Sahaba be considered as a proof of its own right, and be given a precedence over other rules such as Qiyas?
- b. The Prophet *sal'Allaahu 'alayhi wasallam* told us to follow his example and the khulafaa' that will follow after him. Some scholars say that their Ijtihad should be found as proof and some don't.

## Part Three: The Sources of Islamic Law

- c. Ibn Abbas said that the temporary marriage is acceptable to do in harsh conditions, even though all the other Sahaba say that this is unacceptable.
  - In this case, some scholars say the opinion is invalid.
  - Others say they would rather take the Ijtihad of the Sahaba than take their own.

### 2. 'Urf (Custom)

#### a. Definition

- i. It is recurring practices that are acceptable to people of sound nature, reasonable as to be taken in consideration in order to constitute a valid basis for legal decisions.
- b. For example, languages can use the same words and mean totally different things.
- c. Whenever we do things, we need to know what the custom of the land is before doing anything.

### 3. Istihsaan (Juristic Preference)

#### a. Definition

- i. It is setting aside an established analogy in favor of an alternative ruling that serves the ideals of justice and public interest in a better way.
- ii. Should not be against Qur'an or Sunnah, but against Qiyas.
- b. Should the Mujtahid use his personal discernment in deciding the ruling of an issue in contradiction to the established Qiyas?
- c. Example:
  - i. The Prophet *sal'Allaahu 'alayhi wasallam* said that you cannot sell something that doesn't exist.
    - 1. The scholars say that you can put conditions on items such that when the people invent items, it will be clear cut on what they are getting.

### 4. Maslaha Mursala or Istislaah (Consideration of Public welfare)

#### a. Definition

- i. It is a consideration that is proper and harmonious with the objectives of the Lawgiver; it secures a benefit or prevents a harm, and the Shari'ah provides no indication as to its validity or otherwise.

## **Part Three: The Sources of Islamic Law**

- ii. Does this concept fall under innovation or independent enactment of law? Can Maslaha Mursala be observed in devotional matters? No
- b. Example: A woman whose husband is missing can file for divorce after 1 to 4 years even though her husband is not proven to be dead because it would be in her best interest to get a divorce.

### **5. Istishaab (Presumption of continuity)**

#### *a. Definition*

- i. It is a rational proof that may be employed in the absence of other indications; specifically, those facts or rules of law and reason, whose existence or non-existence had been proven in the past and which are presumed to remain so for lack of evidence to establish any change.

### **6. Sadd Al-Dharaa'I (blocking the means)**

#### *a. Definition*

- i. Blocking the means to an expected (evil) end that is likely to materialize if the means towards it is not obstructed.
- b. This is why in Saudi Arabia it is forbidden for women to drive cars, and for farmers to sell grapes to wine makers.

### **7. Shar'u man qablana (Laws revealed prior to the advent of Islam)**

- a. Are the rules revealed before the advent of Islam applicable to the Muslims?
- b. If these laws contradict our laws – they are not to be taken
  - i. Example: Yusuf's *alayhis salaam* brothers prostrated to him, but that is wrong according to our Shari'ah