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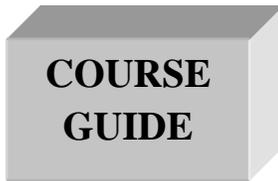
DEPARTMENT OF RELIGIOUS STUDIES

COURSE CODE: ISL431

COURSE TITLE: PRINCIPLES OF ISLAMIC JURISPRUDENCE

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ISL431: Principles of Islamic Jurisprudence

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INTRODUCTION

ISL431: Principles of Islamic Jurisprudence – is a two credit unit compulsory course in the B.A. Degree, Islamic Studies programme of the National Open University of Nigeria. The course which is usually taught in the final year gives the reader a clear picture of *Uşulu `l-Fiqh* (Principles of Islamic Jurisprudence). The topics covered are as listed under the Study Units section of this Guide in the next page to be specific.

The Aims and Objectives of this Course.

The course has fourteen units each of which has its instructional objectives. You are expected to read the objectives of each unit and bear them in mind as you go through the unit. Nevertheless, the following are overall objectives of the course. After readers have gone through the whole course he/she should be able to expatiate and analyze the following:

- *Uşulu `l-Fiqh* and its relationship with *Fiqh*.
- *Al-Hukmu `s-Shar-`ī*: the Rules of Law set forth by the lawgiver for the actions of the *Mukallaḫīn*
- Jurists' divisions of the *Sharī`ah* rules into *wājib*, *ḥarām*, *mandūb*, *makrūh* and *mubāh*.
- *Al-Hukmu `l-waḏ`ī* (situational rule of law); the speech of the lawgiver which enacts something as *sabab* (cause) *shart* (condition) *māni`* (preventive) or hindrance, *ṣaḥīḥ* (valid) or *bāṭil* (invalid).
- Principles of deriving rules from primary and secondary sources
- *Al-`azīmah wa `r-rukḥṣah* (strict law and concession).

- Principles governing derivation of rules from the main sources of Islamic Jurisprudence.
- Principles governing some miscellaneous sources
- *Iftā, Taqlīd and Talfīq*
- *Al-qawā 'id al-fiqhiyyah* (Juristic maxims) and
- *Naskh* (Abrogation) *A`d-da 'āwā wa `sh-Shuhūd* (Procedure and evidence).

Working through this Course

The Components of this Course which you are expected to work through without leaving one on touched are:

1. This Course Guide
2. Study Units
3. Textbooks
4. Assignments File
5. Presentation Schedule

Study Units

There are fourteen units (of three modules) in this course. These are listed thus:

MODULE 1

Unit 1: Concept, Scope and Brief Historical Background of *Uṣūlu 'l-fiqh*.

Unit 2: *Al-Ḥukmu 's-Shar- 'ī* (*Sharī'ah* Rules of Law) and its Divisions.

Unit 3: *Al-Wājib al-Muhaddad* and *al-Wājib ghayr Muhaddad*

Unit 4: *Al-Ḥarām*, (the Prohibited), *al-Makrūh* (the Repulsive) and *al-mubāh* (the Permissible)

Unit 5: *Al-Ḥukmu 'l-Waḍ'ī* (Situational Rule of Law)

Unit 6: *a`l- 'Azīmah* (Strict Law), *a`r-Rukḥṣah* (Concession).

MODULE 2: SOURCES OF SHARĪ'AH

Unit 1: The *Manqūlāt* (The Revelation)- *Qur'ān* and *Hadīth*

Unit 2: The *'Aqliyyāt* (Reason): 1. *Ij-māu*. (Concensus)

Unit 3. The *'Aqliyyāt* (Reason): 2. *Qiyās* (Analogy)

Unit 4 : The *'Aqliyyāt* (Reason): 3. *Al-Ijtihād* (Exercise of Reasoning)

MODULE 3: MISCELLANEOUS

Unit 1: *Istiftā, Taqlīd* and *Talfīq*

Unit 2: The Miscellaneous Sources

Unit 3: *Al-Qawā'id al-Fiqhiyyah* (Juristic Maxims)

Unit 4: *Naskh* (Abrogation), *Da'āwā wa`sh-Shuhūd* (Procedure and Evidence)

References and Other Resources

Every unit has a list of references and further reading designed to enhance and deepen learner's knowledge on the course. These are some of them, try as much as possible to lay your hands on the materials (some are in soft and hard copies).

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19. Al-Khaṭīb, A. M. 2003. *’Uṣūl al-Ḥadīth, ‘Ulūmuhu wa Mustalahuhu*. Beirut.
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21. Al-Ghazālī, M. M. n.d. *al-Mustaṣfa min ‘Ilm al-’Uṣūl*. Beirut.
22. Kamālī, M.H. 1991. *The Principles of Islamic Jurisprudence*. Cambridge.
23. A. Raḥīm, M. A. 1994. *The Principles of Islamic Jurisprudence*. New Delhi.
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25. Zubair A. Q. 1994. *The Rules of Law in the Sharī‘ah*. Lagos..
26. Schacht, Joseph. 1969. *The Origin of Muhammadan Jurisprudence*. Oxford.
27. Al-Tahanawi, M.A. 1862. *Dictionary of Technical Terms* (ed.) ‘Abd al-Haqq and Gulam Kadir, Turkey.
28. *Al-Fiqh wa Uṣūluh* (1422H -2001CE.), Ministry of Education ; catalogue no 22/0603; Saudi Arabia.

29. Dr. Salahu `d-Dīn Abdu`l-Hamīd (2012): *An Enquiry into Khulāṣatu `l-Uṣūl of Abdullah b. Fūdī*; an Unpublished PhD Thesis, University of Ibadan.

Assignment File

Here, there are details of work you must do and submit to your tutor for making. Your scores from these assignments shall be used as part of your final marks in the course. Detail of this shall be found in ASSIGNMENT FILE and in Course Guide in the assignment section. Note that ASSIGNMENT will be marked based on tutor-marked assignment (TMAs) and a final written examination at the end of the course.

Assessment

Your assessment will be based on tutor-marked assignments (TMAs) 30% and a final examination which you will write at end of the course 70%.

Tutor Marked Assignment

Each unit has at least three or four assignments. You are expected to work through all the assignments and submit them for assessment. Your tutor will assess the assignments and select four, which will constitute the 30% of your final grade. The tutor-marked assignments may be presented to you in a separate file. Note that there are tutor-marked assignments for you. It important you do them and submit for assessment.

Presentation Schedule

The Presentation Schedule included in your course materials gives you the important dates for the completion of tutor-marked assignments and attending tutorials. Remember, you are required to submit all your assignment by the due date. You should guard against falling behind in your work.

Course Overview and Presentation Schedule

Unit	Title of Work	Weeks	Assessment Activity
Module 1:			
Unit 1	Concept, Scope and Brief Historical Background of <i>Uṣūlu 'l-fiqh</i> .	Week 1	
Unit 2	<i>Al-Ḥukmu 's-Shar- 'ī</i> (<i>Sharī'ah</i> Rules of Law) and its Divisions	Week 2	Assignment 1
Unit 3	<i>Al-Wājib al.Muhaddad and al-Wājib ghayr Muhaddad</i>	Week 3	
Unit 4	<i>Al-Ḥarām</i> , (the Prohibited), <i>al-Makrūh</i> (the Repulsive) and <i>al-mubāh</i> (the Permissible)	Week 4	Assignment 2
Unit 5	<i>Al-Hukmu 'l-Waḍ'ī</i> (Situational Rule of Law)	Week 5	
Unit 6	<i>a`l- 'Azīmah</i> (Strict Law), <i>a`r-Rukhṣah</i> (Concession)	Week 6	
MODULE 2: SOURCES OF SHARĪ'AH			

Unit 1	The <i>Manqūlāt</i> (The Revelation)- <i>Qur'ān</i> and <i>Hadīth</i>	Week 7	
Unit 2	The <i>'Aqliyyāt</i> (Reason): 1. <i>Ij- māu</i> .(Concensus)	Week 8	Assignment 3
Unit 3	The <i>'Aqliyyāt</i> (Reason): 2. <i>Qiyās</i> (Analogy)	Week 9	
Unit 4	The <i>'Aqliyyāt</i> (Reason): 3. <i>Al- Ijtihād</i> (Exercise of Reasoning)	Week 10	Assignment 4
Module 3: MISCELLANEOUS			
Unit 1	<i>Istiftā, Taqlīd and Talfīq</i>	Week 11	
Unit 2	The Miscellaneous Sources	Week 12	
Unit 3	<i>Al-Qawā'id al-Fiqhiyyah</i> (Juristic Maxims)	Week 13	
Unit 4	<i>Naskh</i> (Abrogation), <i>Da'āwā wa`sh-Shuhūd</i> (Procedure and Evidence)	Week 14	
Revision			
Examination			

Final Examination and Grading

At the end of this course, you will write a final examination, which shall constitute 70% of your grade. In the examination, you will be required to answer three (3) questions out of at least five (5) questions.

Course Marking Scheme

This table shows the actual marks allocations

Assessment	Marks
Four Assignments	Best three marks of the four assignments count as 30%
Final Examination	70% of overall marks
Total	100% of course marks

How to Get the Most from this Course

In distance learning, the study units replace the university lecture. This is one of its great advantages. You can read and work through specially designed study materials at your own pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to the lecturer. In the same way a lecturer might give you some reading to do, the study units tell you when to read, and which are your text materials or set books. 'You are provided exercises to do at appropriate points, just as a lecturer might give you an in-class exercise. Each of the study units follows a common format. The first item is an introduction

to the subject matter of the unit, and how a particular unit is integrated with the other units and the course as a whole. Next to this is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. These learning objectives are meant to guide your study. The moment a unit is finished, you must go back and check whether you have achieved the objectives. If this is made a habit, then you will significantly improve your chances of passing the course. The main body of the unit guides you through the required reading from other sources. This will usually be either from your set books or from a Reading section. The following is a practical strategy for working through the course. If you run into any trouble, telephone your tutor. Remember that your tutor's job is to help you. When you need assistance, do not hesitate to call and ask your tutor to provide it.

1. Read this Course Guide thoroughly, it is your first assignment.
2. Organize a Study Schedule. Design a 'Course Overview' to guide you through the Course. Note the time you are expected to spend on each unit and how the assignments relate to the units. Important information, e.g. details of your tutorials, and the date of the first day of the Semester is available from the study centre. You need to gather all the information into one place, such as your diary or a wall calendar. Whatever method you choose to use, you should decide on and write in your own dates and schedule of work for each unit.
3. Once you have created your own study schedule, do everything to stay faithful to it. The major reason that students fail is that they get behind with their course work. If

you get into difficulties with your schedule, please, let your tutor know before it is too late for help.

4. Turn to Unit 1, and read the introduction and the objectives for the unit.
5. Assemble the study materials. You will need your set books and the unit you are studying at any point in time.
6. Work through the unit. As you work through the unit, you will know what sources to consult for further information.
7. Keep in touch with your Study Centre. Up-to-date course information will be continuously available there.
8. Well before the relevant due dates (about 4 weeks before the dates), keep in mind that you will learn a lot by doing the assignment carefully. They have been designed to help you meet the objectives of the course and, therefore, will help you pass the examination. Submit all assignments not later than the due date.
9. Review the objectives for each study unit to confirm that you have achieved them. If you feel unsure about any of the objectives, review the study materials or consult your tutor.
10. When you are confident that you have achieved a unit's objectives, you can start on the next unit. Proceed unit by unit through the course and try to pace your study so that you keep yourself on schedule.

11. When you have submitted an assignment to your tutor for marking, do not wait for its return before starting on the next unit. Keep to your schedule. When the Assignment is returned, pay particular attention to your tutor's comments, both on the Tutor-Marked Assignment form and also the written comments on the ordinary assignments.
12. After completing the last unit, review the course and prepare yourself for the final examination. Check that you have achieved the unit objectives (listed at the beginning of each unit) and the course objectives (listed in the Course Guide).

Tutors and Tutorials

The dates, times and locations of these tutorials will be made available to you, together with the name, telephone number and address of your tutor. Your tutor will mark each assignment. Pay close attention to the comments your tutor might make on your assignments as these will help in your progress. Make sure that assignments reach your tutor on or before the due date. Your tutorials are important, therefore try not to skip any. It is an opportunity to meet your tutor and your fellow students. It is also an opportunity to get the help of your tutor and discuss any difficulties encountered on your reading.

Summary

In this Course Guide, we have provided you a general overview of *ISL 431: The Principles of Islamic Jurisprudence*, in which students pursuing Degree in Arabic and Islamic Studies programme must two credit Units. The Course Aims and Objectives and what learners will gain working through the Course Material and its Study Units are stated clearly at the onset. We have also provided you a list of textbooks and references for your further reading. As an

inference in the Guide, to develop an active interest in the Course is a prerequisite for its successful completion. Assess yourself through the Self Assessment Exercises (SAEs). You will equally be assessed for grading purposes through the Tutor-Marked Assignments (TMAs). Thus to do well- in the course, you must get yourself organized and try to conform to the presentation schedule.

Conclusion

Much as I cannot promise you a too-easy ride on this course, I equally do not envisage much difficulty as long as you play the roles assigned to you in the whole exercise.

We wish you best of luck and success in the course.



MATERIAL

ISL431: Principles of Islamic Jurisprudence

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MODULE 1

Unit 1: Background of *Uṣūlu 'l-fiqh*.

Unit 2: *Al-Ḥukmu 's-Shar- 'ī* (*Sharī'ah* Rules of Law) and its Divisions

Unit 3: *Al-Wajīb al-Muhaddad* and *al-Wājib ghayr Muhaddad*

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UNIT 1: CONCEPT AND SCOPE OF UṢŪLU 'L-FIQH

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1.0 Introduction

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3.1 Definition of *Uṣūlu 'l-Fiqh* and Its Two Components and their differences.

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3.5 Role of Imam Shafii as founder of *Uṣūl al-Fiqh*

3.6 Approaches to the Study of '*Uṣūl al-Fiqh*': the theoretical and the deductive

3.7 Main Characteristics of the approaches to the study of '*Uṣūl al-Fiqh*'.

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

Al-Fiqh and the *Uṣūl* are, since early days of their development, two separate though related disciplines. Their common basis is the Islamic injunction. Knowledge of *Uṣūl al-fiqh* often entails knowledge of *al-fiqh*, but the opposite is not necessarily the case. In fact, there are many Muslim scholars who have good knowledge of *al-fiqh* or '*Ilmu`l-furū`*' (science of the detailed branches of laws) but have little or no knowledge of *Uṣūl al-fiqh*. This has often resulted into misleading references and even wrong practices at times. The confusion arises from the fact that the two subjects have different functions. Our focus in this unit is to take you through the definition of *Uṣūl al-Fiqh*, its significance, scope and differences between the two components of the term. You shall also be taken through the historical development of the science. Welcome. .

2.0 OBJECTIVES

At the end of the unit, you should be able to

- Define *'Uṣūl al – Fiqh*
- Analyze the two components of the terminology.
- Define *'Uṣūl* proper
- Define *Fiqh* proper
- Highlight the Scope of the Science
- Differentiate between *Fiqh* and *'Uṣūl al – Fiqh*
- Trace the origin and development of *Uṣūl al-Fiqh*
- Expatiate upon the role of Shafii
- Highlight the emergent approaches to the study of *Uṣūl al-Fiqh* by various schools
- Discuss the characteristics of the various approaches adopted by various schools.

MAIN CONTENTS

3.1 Definition of *Uṣūlu `l-Fiqh* and Its two Components

Orientalists such as Joseph Schach simply define *Uṣūl al-fiqh* as the science of the principles underlying the branches of Islamic law. This definition is purely technical and it neither reflects the literal meaning of the expression nor take into account that the words *Uṣūl al-fiqh* are two separate nouns with separate literary and technical meanings. As a result, it has not enjoyed much recognition among Muslim scholars. Therefore, most of them appear to prefer a definition which will reflect both aspects of the terminology.

The word *Uṣūl* is plural of *'aṣl*, which has a variety of technical meanings. It is used for:

- (i) evidence (*dalīl*) for root or origin;
- (ii) preference (*al-rājiḥ*); and
- (iii) principle (*al-qā'idah*)

The last meaning is the one which later became part of the technical expression “*Uṣūl al-fiqh*”, and thus *Uṣūl al-fiqh*, *Uṣūl al-Ḥadīth* are synonymous with *qawā'id al-fiqh* and *qawā'id al-Ḥadīth*.⁵

As for *al-fiqh*, it literally means knowledge and understanding (*al-'Ilm wa al-fahm*). Technically, it has been confined to the knowledge of the branches of Islamic law.

However, out of this breakdown, the *Uṣūliyyūn* (legal theorists) formed a more plausible definition which reflects both literary and technical meanings of the term. They first defined *aṣl* on its own as “what another thing is built upon” (ما يبنتي عليه غيره) *Ma yubtana 'alayhi ghayruhu*); then, they combined this definition directly with *al-fiqh* and defined it as follows: (ما يبنتي الفقه عليه ويستند اليه) *Ma yubtana al-fiqh 'alayhi wa yustanad ilayhi*) meaning “what *al-fiqh* is built upon and depends on”. This definition seems to have become popular among the *Uṣūliyyūn* since the third and fourth centuries. In fact, Abu al-Husayn al-Basri (d. 436A.H) mentioned this definition in his book *Kitāb al-mu'tamada fi Uṣūl al-fiqh*. Most *Uṣūliyyūn* regard this definition as a most comprehensive one because the term *Uṣūl al-fiqh* includes every aspect of the science, such as امر *amr* (direct command) القياس *al-qiyās* (analogical deduction), إجتهد *ijtihād*

(individual reasoning or discretion). *إستحسان* *Istihsan* (preference) and other aspects of *Uṣūl al-fiqh*.

However, some scholars, while not discarding this definition of *'Uṣūl al-fiqh*, consider other definitions formed by the Orientalists. Muhammad b. 'Ali al-Tahanawī, the author of the Dictionary of Technical Terms, defined it as the science of the principle which leads to law by way of investigation' (العلم بالقواعد التي يتوصل بها إلى الفقه علي وجه التحقيق) *al- 'ilm bi-al-qawā'id allati yutawassulu biha 'ila al fiqh 'ala wajh al-tahqiq*). This one seems to be more precise and those who put it forward call it “a popular definition” (*al-ta- 'rif bi'l-laqab*).

Definition of *'Uṣūl al-Fiqh* Proper

'Uṣūl al-fiqh or the roots of Islamic law is defined as the knowledge or science of the juristic procedures with which jurists derive juristic or legal conclusions or rulings from certain general legal precepts on specific issues - or phenomena.

Thus, *'uṣūl al-fiqh* provides the basis upon which the *faqīh* builds universal propositions or *qawā'id 'āmmah* to be used in deriving the propositions of the law applicable to particular cases¹⁰. It is “the principles by the use of which the *mujtahid* arrives at the legal rules through specific evidences”

This can be explained better by saying that, a general principle of *'uṣūl al-fiqh* is that every positive imperative statement of the *Qur'ān* or prophetic tradition implies an obligatory duty (*wujūb*), while negative imperative requires prohibition (*tahrīm*). For

example the *Qur'an* says: “observe the obligatory prayer and give legal alms”. The imperatives here require *wujūb* or obligation. While the saying of Allah: “do not come near adultery” requires *tahrīm* or prohibition. *Al-wujūb* and *al-tahrīm* are general propositions to be used by the *Uṣūlīs* (the Legal Theorist).

’Uṣūl al-fiqh is constituted by several authoritative (proofs) namely the *Qur’ān*, the *Sunnah*, the consensus (*ijmā’*), *al-qiyās* (analogical reasoning) *al-Istiṣhāb* (presumption) and the like.

Definition of *Fiqh proper*

Fiqh according to legal theorists (*Uṣūlīs*) is defined as a knowledge subsidiary to the sources of Islamic law. In other words *Fiqh* is “the science of deducing Islamic Laws from evidence found in the sources of Islamic law” by extension; it also means the body of Islamic laws so deduced.

Fiqh is also defined as the: knowledge of the practical rules of *sharī’ah* acquired from the detailed evidence in the sources.¹¹

The knowledge of the rules of *fiqh*, in other words, must be acquired directly from the sources, a requirement which implies that the *faqīh* (the jurist) must be in contact with the sources of *fiqh*. Therefore, *fiqh* is the deduction of the *sharī’ah* value relating to a particular evidence.

The above definition of *fiqh* conveys a sense of leaving out the intellectual and perceptual values (such as the obligation of belief in Allah and the Prophets (*al-’aqīdah*)). This type

of knowledge belongs to the abstract theological study and not concrete devotions like the act of *ṣalāt* and *ḥajj*.

According to jurists, a person is not a *faqīh* when he knows only the *sharī‘ah* values or *aḥkām*. He is called a *faqīh* only if he has himself, by personal inquiry and thought, deduced those values from their primary sources.¹²

Difference between *Fiqh* and *Uṣūl al-Fiqh*.

The main differences between *fiqh* and *‘uṣūl al-fiqh* is that the former is concerned with the knowledge of the detailed rules of Islamic law in its various branches, and the latter with the methods that are applied in the deduction of such rules from their sources. *Fiqh*, in other words, is the law itself whereas *‘uṣūl al-fiqh* is the methodology of the law. The relationship between the two disciplines resembles that of the rules of grammar to a language, or of logic (*manṭiq*) to philosophy.

Self - Assessment Exercise

Define *‘Uṣūl al – Fiqh* and its various components.

Differentiate between *Fiqh* and *‘Uṣūl al – Fiqh*

3.2 Scope of *Uṣūl al-fiqh*

Some of the branches of knowledge or basic areas of discussions upon which *‘ilm al-‘uṣūl* is built include:

- a. Basic principles of logic (*muqaddimat manṭiqiyyah*)

- b. Linguistic discourse (*Mabāḥith al-lughah*)
- c. Injunctions and prohibitions (*al-awāmir wa 'l-nawāhi*)
- d. Generalized and specific ruling (*Al- 'āmm wa al-khāṣ*)
- e. The concised and the detailed (*al-mujmal wa al-mubayyan*)
- f. The imports of the Prophet's Actions (*Af'āl al-rasūl wa dilālatiha*)
- g. Consensus (*al-Ijmā'*)
- h. Analogy (*al-qiyās*)
- i. Textual conflicts and Juristic preference (*al-ta 'āruḍ wa al-tarjīḥ*)
- j. Exertion of Juristic Effort and Blind imitation (*al-Ijtihād and Taqlīd*)
- k. Proofs upon which Scholars differed (*Al- 'adillah al-mukhtalaf*).¹⁷

Self Assessment Exercise

Enumerate the specific areas that could be covered in the science of '*Uṣūl al – Fiqh*

3.3 Early Phases of *Uṣūl al-Fiqh*

Uṣūl al-fiqh, as previously indicated, is among the Islamic scientific knowledge that developed in the later part of the second century of *Hijrah*, or after the period of the Prophet, his Companions and their Successors. But, it remained without any proper definition for some time though its actual subject matter seemed to be well established. Only in the third and fourth centuries when definition became more necessary did some scholars try to give it a definition in order to distinguish it from other Islamic sciences. Even al-Shafi'ī who many people have described as the originator of this science did not give it the title *Uṣūl al-fiqh*.

It is nevertheless accurate to say that *fiqh* preceded the *'uṣūl al-fiqh* and that it was only during the second Islamic century that important development took place and led to the emergence of *'uṣūl al-fiqh*. For when the Prophet was alive, the necessary guidance and solutions to problems were obtained either through divine revelation or his direct rulings. Similarly, during the period following the demise of the Prophet, the Companions remained in close contact with the teachings of the Prophet and their decisions were mainly inspired by his precedents. Their proximity to the source and intimate knowledge of the events provided them with the authority to rule, on practical problems without there being a pressing need for methodology. However, with the expansion of the territorial domain of Islam, the companions were dispersed and direct access to them became increasingly difficult. With this, the possibility of confusion and error in the understanding of the textual sources became more prominent. Disputation and diversity of juristic thought in different quarters heightened the need for clear guidelines, and thus time was ripe for methodology of legal theorization which al-Shafi'ī was to articulate for *'uṣūl al-fiqh*. Al-Shafi'ī came on the scene when juristic controversy had become prevalent between the jurists of Madina and Iraq, respectively known as *ahl al-ḥadīth* and *ahl al-ra'y*.

This was also the time when the *'ulamā'* of *Ḥadīth* had succeeded in their efforts to collect and document the *Ḥadīth*. Once *fuqahā'* were assured of the subject matter of the *Sunnah*, they began to elaborate the law and hence the need for methodology to regulate *Ijtihād* became increasingly apparent. The consolidation of *'uṣūl al-fiqh* as a *sharī'ah* discipline was, in other words, a logical conclusion of the compilation of the vast

literature of *Ḥadīth*⁵ Other factors that prompted the Uṣūlīs (Legal theorists) into refining the legal theory of *'uṣūl al-fiqh* was the extensive influx of non-Arabs into Islamic territories and the disconcerting influence they brought to bear on legal and cultural traditions of Islam.

Self - Assessment Exercise

Discuss the early phases of *'Uṣūl al-Fiqh*

3.4 The Role of Imam al-Shāfi'ī and *'Uṣūl al-Fiqh*

In his work entitled *Risālah*, Shāfi'ī enacted guidelines for *ijtihād* and expounded the rules governing the *Khāṣṣ* and the *'Āmm*, the *nāsikh* and *mansūkh* and articulated the principles governing *ijmā'* and *qiyās*. He expounded the rules by relying on the solitary *ḥadīth* (*khabar al-wāḥid*) and its value in the determination of *aḥkām* (judgment).

Muḥammad Abū Zahrah considers al-Shāfi'ī to be the founder of *'Ilm al-'Uṣūl*. He preceded others in laying down the foundation of *'Ilm al-'Uṣūl*. On the other hand a statement is credited to Fakhr al-Dīn al-Rāzi to the effect that “Al-Shāfi'ī stood in relation to *'Ilm al-'Uṣūl* in a position similar to that of Aristotle with respect to logic and al-Khalīl bn Aḥmad with respect to prosody”.

However, in this connection the Shi'ite *'ulamā'* have claimed that their fifth Imām Muḥammad al-Bāqir, and his son and successor, Ja'far aṣ-Ṣādiq, were the first to write on the subject of *'uṣūl*. According to Abū Zahrah, who has written extensively on the -lives of and the works of the early Imams, the Shi'ite Imams have written, like many others on the subject, but neither of the two Imams have written anything of an equivalent to that of

Risālah. Hence al-Shāfi‘ī’s position and contribution to *’uṣūl al-fiqh* remains unique and he is rightly regarded as the founder of *’uṣūl al-fiqh*.

Admittedly, al-Shāfi‘ī was not the first to address these matters, but it is widely acknowledged that he brought a coherence to *’uṣūl al-fiqh*, which had hitherto remained scattered and unconsolidated.

Self-Assessment Exercise

Explain the role of Shāfi‘ī in the emergence of *Uṣūl al-Fiqh* as a science.

3.5 Approaches to the Study of ’Uṣūl al-Fiqh

Following the establishment of the *Madhāhib* (schools of thought), the *’ulamā’* of various Schools adopted two different approaches to the study of *’uṣūl al-fiqh* one of which is theoretical and the other deductive.

The theoretical approach is known as *’Uṣūl al-Shāfi‘iyyah* or *Tarīq al-Mutakallimīn* whereas the latter is known as *’Uṣūl al-Hanafīyyah* or *Tariqat al-Fuqahā’*.

The theoretical approach to the study of *’uṣūl al-fiqh* is adopted by the jurists of the Māliki and Shāfi‘ī and the *Mu’tazilah*. It is known as *’Uṣūl al-Shāfi‘iyyah* while its followers are known as *al-Mutakallimun*, because some problems of *kalām* and philosophy found their way into *’ilm al-’uṣūl*, such as *taḥsīn wa taqbiḥ ’ aqlī* (the rational basis of ethical judgments), the necessity of the correlation between reason (*’aql*) and divine law (*Sharī‘āh*), *wujūb shukr al-mun‘im* (Obligation of the duty of gratitude to the Benefactor), *taklīf bi al-muḥāl* (imposition of a duty exceeding capacity), *taklīf bi al-ma’dūm* (imposition of a duty which includes something non-existent) the infallibility

(*iṣmah*) of the Prophets and whether their infallibility precedes their appointment to Prophethood or only accompanies it, and so on.

Main Characteristics of the theoretical Approach.

1. The main purpose of *'ilm al-'uṣūl* was deduction of *aḥkām* (legal rulings) in the approach of the *shāfi'īyyah* and the *Mutakallimūn*. *'Ilm al-'uṣūl* thus lost its practical relevance, as it is becoming more and more abstract and theoretical.
2. This theoretical approach became permeated with discursive arguments, being not merely concerned with *ẓawāhir al-Kitāb, Sunnah and Ijmā'*. As a result, some problems of logic also entered *'ilm al-'uṣūl*.¹³
3. Al-Shāfi'ī was mainly concerned with articulating the theoretical principles of *'uṣūl al-fiqh* without necessarily attempting to relate these principles to the *fiqh* itself.
4. Al-Shāfi'ī enacted a set of criteria, which he expected to be followed in the detailed formulation of the rules of *fiqh*.
5. His theoretical exposition of *'uṣūl-fiqh* in other words, did not take into consideration their practical application in the area of the *furū'* (branches of *fiqh*).
6. In addition, the *Shāfi'īyyah* and the *Mutakallimūm* are inclined to engage in complex issues of a philosophical character which may or may not contribute to the development of the practical rules of *fiqh*.¹⁴

Main Characteristics of the Deductive Approach

1. The Ḥanafīs have on the other hand attempted to expound the principles of *'uṣūl al-fiqh* in conjunction with the *fiqh* itself and tend to be more pragmatic in their approach to the subject.

2. While the theoretical approach of the Shafiiyyah and the Mutakallimun tends to envisage *'uṣūl al-fiqh* as an independent discipline to which the *fiqh* must conform, the deductive approach attempts to relate the *'uṣūl al-fiqh* more closely to the detailed issues of the *furū' al-fiqh*.

3. When for example, the Ḥanafis find a principle of *'uṣūl* to be in conflict with an established principle of *fiqh*, they are inclined to adjust the theory to the extent that the conflict in question is removed, or else they try to make the necessary exception so as to reach a compromise.

4. So, Imām Abū Ḥanīfah and his disciples adopting the guide provided by the Prophet and his Companions as basis of his scientific theory developed subtle rules of legal and juristic scholarship and judgment.

5. They deduced *sharī'ah* values from the sources of *sharī'ah* without going into theoretical aspects.

6. Scholars were later to write books to chart clear cut pattern of classification on the development of *'uṣūl al-fiqh*.

Self – Assessment Exercise

Discuss the main approaches to the study of *'Uṣūl al-Fiqh* and enumerate the main characteristics of each of them.

4.0 CONCLUSION

To deduce the rules of *Fiqh* from the evidences that are provided in the sources is the expressed purpose of *'uṣūl al-fiqh*. *Fiqh* as such is the end product of *'uṣūl al-fiqh*, and

yet the two are separate disciplines. ‘*Uṣūl al-Fiqh* in this sense provides standard criteria for the correct deduction of the rules of *Fiqh* from the sources of *sharī‘ah*.

An adequate knowledge of *fiqh* necessitates close familiarity with its sources. This is borne out in the definition of *fiqh*, which is Knowledge of the practical rules of *sharī‘ah* acquired from the detailed evidence in the sources.

The knowledge of the rules of *fiqh*, in other words must be acquired directly from the sources, a requirement which implies that the *faqīh* must be in contact with the sources of *fiqh*.

During the last phase of development, ‘ilm al-’uṣūl attained its maturity and achieved a relative independence from ‘ilm al-*kalām*. This independence however does not contradict the great influence of ‘ilm al-*kalām* on ‘ilm al-’uṣūl, an influence which has clearly sustained down till these today when the books written nowadays are free from ‘*Ilm al-Kalām*.

5.0 SUMMARY

This Unit elucidates the definition of ‘*Uṣūl al-Fiqh* in detail using both the classical and modern approaches. The two parts of the terminology are analyzed and the significance of the science shown. The difference between the two components of the term is also briefly stated. A section highlighting the scope of the science constituted the discussion before the Units conclusion.

6.0 TUTOR MARKED ASSIGNMENT

1. Elaborate on the definition of *Uṣūl al-Fiqh* and its components
2. Discuss the main approaches to the study of *'Uṣūl al-Fiqh* and enumerate the main characteristics of each of them.

7.0 REFERENCES & FURTHER READINGS

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UNIT 2: AL-ḤUKMU `SH-SHAR-‘Ī (SHARĪ‘AH RULES OF LAW) AND ITS DIVISIONS

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 The Concept and Definition of the *Al-Hukmu `sh – Shar ‘ī or a`t- Taklīfī*

3.2 The Acts of *Mukallafs*

3.3 Obligation of Rule of Law (*Al-Hukmu `sh – Shar ‘ī or a`t- Taklīfī*)

3.4 *Al-Wājib/al-Farḍ* and Its Divisions

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

The prescriptions which *Al-ḥukm al-shar‘ī* or *al-taklīfī*, set forth for the actions of the *Mukallafīn* (the capable people) by the Lawgiver are divided into five divisions as unanimously agreed to by the majority of jurists namely:

- i. *Al-farḍ / al-wājib* (obligation)
- ii. *Al-taḥrīm* (prohibition)
- iii. *An-nadb* (Recommendation)
- iv. *Al-ikrāh* (abomination/dislike)
- v. *Al-ibāḥah* (indifference)

These shall be examined one by one for our understanding. Come on board.

2.0 OBJECTIVES

At the end of this Unit you should be able to:

- Define *al-ḥukmu `sh-shar- `ī* and explain the concept of legal capacity.
- Discuss the acts of *Mukallaḥīn*
- Elaborate on the implication of the attainment of legal capacity in respect of the rules in the Shariah.
- Explain *al-Wājib / al-Farḍ* (*The Rule of Law* which implies Obligation)
- Define and explain the implications of *Al-Ḥukm sh-Shar- `ī* or *al-Taklīfī* which imposes duties.
- Highlight the divisions of *al-Wājib / al-Farḍ*

3.0 MAIN CONTENTS

3.1 Concept and Definition

According to the legal theorists (*Usulists*) *Hukm Shāri'ī* is the speech (*Qur'ān* and *Sunnah*) or communication from the Lawgiver which relates to the acts of the *mukallaf* (person legally capable) with which he is charged. The above definition of the speech of the Lord or the Lawgiver is concerned with man's outward conduct and excludes the intellect and perceptual values (such as the obligation of belief in Allah and the Prophets).

Moreover, the speech of Allah consists of a requirement which according to the rhetorician is termed *inshā'u ṭalabī* which is usually communicated in the form of either a command (*al-'amr*) or prohibition (*al-nahy*). The Command requires that the *mukallaf* (the capable person) does something, whereas the prohibition requires him to avoid doing something. Thus, the *mukallaf* (the legally responsible person) is interchangeably called *al-maḥkūm 'alayhi* (subject of law) in *'uṣūl al-fiqh*.

The Usulists differentiate between the legally capacitated person and the other whose legality was incapacitated and curtailed due to certain circumstances which prevented him from discharging his responsibility actively and efficiently. Usulists call the incapacitated person, the unmindful which is loaded with meanings. It can be, the minor, the insane or the one who sleeps. The other legally incapacitated is the *mukrah* (a legally capacitated acting under duress). The Usulists termed these issues as *'awāriḍ al-ahliyyah* that is impediments of legal capacity. The possession of *'aql* (mental faculty) is the basic criterion of *taklīf*. The law as expounded by the Usulists, concerns itself with the circumstances that affect the sanity and

capacity of the individual such as minority, insanity, duress, intoxication, interdiction (*ḥajr*) and mistake, all these terms are grouped under the word *ghāfil* and *mukrah*.

Self – Assessment Exercise

Define *al-Hukmu 'sh-Shar'ī* and elucidate concept of legal capacity.

3.2 The acts of *Mukallaḥfūn*

The related speech of God to the acts of *mukallaḥfīn* as it is expressed in the definition, is an indication of the following

- i. That the speech of God which is not related to the acts of *mukallaḥfūn* is excluded from this definition.
- ii. That the speech of God which relates to the *mukallaḥfūn* but not to their acts is beyond the scope of this definition.
- iii. That non-*mukallaḥfūn* is exempted from the *ḥukm*.

Active legal capacity is only acquired upon attaining a certain level of intellectual maturity and competence. Only a person who understands what he does and says is competent to conclude a contract, discharge an obligation or can be punished for violating the law. This is why an adult who is insane, or an adult of any age who is asleep, is not held responsible for his conduct. The principle here is clearly stated in the *ḥadīth* which provides:

The pen is lifted from three persons: the one who is asleep until he wakes;
the minor until he attains puberty and the insane until he regained sanity.

Other *Ḥadīth* in this regard provides as follows: verily God has, for my sake overlooked the mistakes and forgetfulness of my community and what they are forced to do.

In other words these three people are exempted from liabilities unless in some aspects of tortuous cases where their guardians or relatives will be held liable. It can be conveniently deduced that sleeping, infancy and madness are preventive of liability as the *ḥadīth* pointed out.

As for the active legal capacity, three possible situations have been envisaged:

First, a person may be totally lacking of active legal capacity as in the case of a minor during infancy or an insane person of any age. Since neither is endowed with the faculty of intellect, no legal consequences accrued from their words and action. When a child or a madman kills someone or destroys the property of another person, they can only be held liable with reference to their property but not their persons. They cannot be subjected, for example to retaliation or any other types of punishment.

Second, a person may be partially lacking in active legal capacity. Thus the discerning child (*al-ṣabiyy al-mumayyiz*) that is, a child between seven and fifteen years of age or an idiot (*ma'tūh*) who is neither insane nor totally lacking in intellect but whose intellect is defective and weak possesses a legal capacity which is deficient. Both of them possess an active legal capacity which is incomplete and partial, and thus can only conclude transactions that are totally to their benefit, such as accepting gift or charity; even without the permission of their guardians.

Third, active legal capacity is complete upon the attainment of intellect maturity. Hence every person who has acquired this ability is presumed to possess active legal capacity unless there is evidence to show that he or she is deficient of intellect or suffers from insanity.

Self Assessment Exercise

When is a man said to have attained legal capacity? Elaborate on the envisaged three possible situations.

3.3 *Al-Ḥukm sh-Shar-‘ī* or *al-Taklīf al-Wājib /al-Fard* (The Rule of Law which implies Obligation)

Al-Ḥukm sh-Shar-‘ī is defined as:

the communication from Allah which assumes the form of requirement which may be absolute or not absolute.

If the former (absolute), the requirement may consist in demanding men to do something in which case the act required is regarded obligatory *fard* or *wājib*. Or it may require him to forbear or abstain from doing something, in which case the action to be forborne or abstained from is said to be forbidden (*ḥarām*).

If such a speech imposes duties of commission or omission, when the requirement is not of an absolute character the act to which it refers, if it be one of commission, is commendable (*mandūb*), and if it be one to be forborne or abstained from it is called condemned, or abominable or improper (*makrūh*).

An act with reference to the doing or omission of which there is no requirement, or in other words, with respect to which the Lawgiver is indifferent, is regarded as permissible (*mubāḥ*).

All acts which are neither obligatory, nor forbidden, nor commanded fall within the last category.

Law which thus defines the characteristics of a man's actions, namely, whether they are obligatory, forbidden, condemned or permissible or indicate the legal effects of acts for instance, that the right of ownership arise from an act of purchase, the obligation to pay rent, from possession of another's land and the like, are called in Arabic *taklīfī* (literally: imposition). This law defines or indicates the extent of a man's liberty of action and the restraint imposed upon it, or in other words his right and obligations.

Self Assessment Exercise

Define and explain the implications of *Al-Hukm sh-Shar- 'ī* or *al-Taklīfī* which imposes duties.

3.4 *Al-Wājib/Al-farḍ*

This refers to an action, which the *mukallaf* is compelled to do while failure to do it attracts heavy punishment.

Farḍ and *wājib* are arrived at by means of clear and definitive text of the *Qur'ān* and *Sunnah*.

A typical example of *al-farḍ* or *al-wājib* is the institution of ritual prayer, where Allah says: “Set up regular prayers; for regular prayers are enjoined on believers at stated times” (Q. 4: 103). فأقيموا الصلّاة إنّ الصلّاة كانت علي المؤمنين كتابا موقوتا.

The reason being that another verse of the *Qur’ān* narrated that among the causes of divine punishment on the would-be-dwellers of Hell, is their neglect of regular prayers where Allah says:

What led you into Hell fire? They said: we
were not of those who prayed (Q. 74:42-43)

ما سلككم في سقر قالوا لم نكن من المصلين

Besides, *al-farḍ* according to Usulists is a synonym for word *al-wājib* in the view of the majority schools of law.²⁵ Imām Mālik and Imām ash-Shāfi‘ī and those who follow them are representatives of this view. Thus, the majority of jurists defined *al-farḍ* and *al-wājib* as:

Al-farḍ is a legal norm arrived at by means of clear and definitive text of the *Qur’ān* and *Sunnah* and whose performance is strictly required from *mukallaḍīn*.

On the other hand *al-wājib* is defined by the majority of Usulists as in the following:

Al-wājib is a legal norm established by definitive evidences and speculative authority and whose performance is equally strictly required from *mukallaḍīn*.

That is to say, *al-wājib* and *al-farḍ* are based on clear textual evidences, which admit no interpretation and which have been transmitted through so many channels that no doubt can be cast on their authenticity, like the obligation of prayer and *zakāt* etc.

However, Ḥanafis school opined that *al-farḍ* is an action which is proved with a definitive and emphatic evidence, like prayer and *zakāt* and so on, while *al-wājib* is an action proved with a clear evidence but not emphatic, like Umrah (lesser hajj).

Al-Ghazālī concluded when he said that; as far as we are concerned, there is no difference between *farḍ* and *wājib*, the two terms are synonymous.

Imām Shāfi‘ī on the other hand is of the opinion that *farḍ* and *wājib* are to be merged into a single concept being defined as that whose commission is rewarded and omission punished.

Self Assessment Exercise

Expound the concept of *al-Wājib / al-Farḍ*. Give a critical presentation of the stand of various schools and shades of opinion.

3. 5 Divisions of *al-Wājib / al-Farḍ*

Taking various aspects of duties into consideration, there are different types of *al-wājib* recognized by the Usulis. The most important of them are:

First, *al-wājib* in consideration of the period of which it must be done or carried out, is divided into two: *al-muṭlaq* and *al-mu’aqqat*.

(a) *Al-wājib al-muṭlaq* is an obligatory action which the Lawgiver does not specify any particular period for its performance.

Mukallaf is therefore free to perform the duty at his convenient time. An instance of this is the violation of an oath. The time of expiation for violating the oath is not specified by the Lawgiver. Allah says:

Allah will not punish you for what is unintentional in your oaths, but He will punish you for your deliberate oaths; for its expiation, feed a ten poor persons, on a scale of the average of that which you feed your own families, or clothe them or manumit a slave. But whosoever cannot afford that, then, he should fast for three days. That is the expiation for the oaths when you have sworn. (Q. 5 :92).

لا يؤاخذكم الله باللغو في أيمانكم ولكن يؤاخذكم بما عقدتم الأيمان فكفارته إطعام
عشرة مسكين من أوسط ما تطعمون أهليكم أو كسوتهم أو تحرير رقبة فمن لم يجد
فصيام ثلاثة أيام ذالك كفارة أيمانكم إذا حلفتم واحفظوا أيمانكم كذالك بيّن الله لكم
ءاياته لعلكم تشكرون

The same thing is applied to a *nadhr* (vow to do a lawful thing) at unspecified day.

Al-wājib al-mu'aqqat is an act that the Lawgiver prescribes a certain rule for its performance, examples of such are *Ramaḍān* fasting and *Hājj*. These actions are to be performed at

specialised times which had been ordained in order to attain legal validity. This *Wājib Mu'aqqat* is also divided into three kinds.

- (a) *al-waqt al-muwassa'* (long period)
- (b) *al-waqt al-muḍayyaq* (short period)
- (c) *Al-waqt dhū al-shabahayn* (controvertial period)

(i) *Al-waqt al-muwassa'* is a prescribed period which is sufficient to perform the *wājib mu'aqqat* in it, and still remains sufficiently for another act of the same nature.

The example of this is *Ṣalat Zuhr*, the afternoon prayer whose period accommodates its *raka'ts* and other types of prayer like *nawāfil*.

al-Wājib al-muḍayyaq indicates the period which cannot accommodate another act of the same nature except the prescribed act.

Example of this is Ramaḍān fasting which its period cannot be shared or allotted to another act of fasting.

Al- Wājib dhū al-shabahayn or *al-mushkil*

Al-waqtu dhū al-shabahayn is a period which seems in one aspect to be accommodating another act of the same nature rather than the prescribed act for the period. But it is on the reverse if we consider its other aspect.

An instance of this *wājib* is Ḥājj which can be carried out ones in a year but during the renowned months, that is *Shawwāl, Dhūl-Qa‘dah, Dhūl-Ḥijjah, ‘Umrah* or lesser Ḥajj, can also be carried out, Ḥājj in considering its performance once in a year and in a specific day which cannot be deferred seems to be unaccommodating. At the same time, since ‘*Umrah* which is similar to it can be performed during the Ḥājj’s limited time it can be said to be accommodating. Thus Ḥājj is *Wājib* of *Dhū al-shabahayn*.

Subsidiary Laws Regulating Divisions of the Muwaqqat Duties.

Meanwhile, Islamic jurists have formulated subsidiary laws regulating these divisions of *Mu‘aqqat* which validate the duties by determined intention from *mukallaf*. For instance, if a person performs four *rak‘ats* at the period of *Ṣalāt al-Zuhr*, or afternoon prayer, if he intended with these four *rak‘ats* obligatory afternoon prayer it will be valid. But if he failed to put his intention the *rak‘ats* will not be taken for obligatory prayer. The reason is that it is possible for him to make these four *rak‘ats* as *nāfilah* that is, non-obligatory.

In the case of *al-waqt al-muḍayyaq* the validity of the action is granted with ordinary intention, because the time itself is an indicator. For example the Ḥanafīs are of the opinion that if a *mukallaf* intends to fast during the month of Ramadān without specifying the nature of the fast whether obligatory or non-obligatory, his fast will necessarily be considered obligatory because he cannot do otherwise legally.

In the cases of actions of *al-waqtu dhū shabahayn*, the validity of the main action is granted with ordinary intention. But if a *mukallaf* intends to do an accommodated action, he must specify the act with determined intention. This means that a *mukallaf* who

wishes to perform *'Umrah* during the period of *Hājj* needs to be specific in his intention, because activities of *'Umrah* can also go for *Hājj*. Another subsidiary law on this division is that if the *mukallaf* delayed an action of *al-mu'aqqat* without any legally acceptable reason, he is indictable.

In addition to this, the *Usulis* further divided *Al-wājib* in consideration of its characteristic; these are:

(b) *Al-mu'ayyan* and *al-mubham*

al-Wājib al-Mu'ayyan is a specified obligatory act which cannot be substituted by another act. This is to say in other words, that the Lawgiver has categorically formulated the act and ordained it as a compulsory act which must be done, whether we are in position to find reason and wisdom which may serve as the kernel of the act or not. No iota of change can be effected on it. An example of such is the act of *Ṣalāh*. Similarly, other specific prescribed obligatory acts cannot be substituted like cases of *ḥudūd* that is, prescribed punishment.

Al-wājib al-mubham is an unspecified obligatory action in which a choice is given to a *mukallaf* to select one out of the mentioned actions.

An instance of them is the *kaffārat al-yamīn* (atonement for the breaking of an oath). A verse of the *Qur'ān* prescribes several options for violator of oaths. This includes feeding of ten needy people, or clothing of ten poor, or liberation of a slave, or three days fast. Only one of the actions can be specifically required. The following verse explains this kind of *al-wājib*:

...for its expiation: feed ten poor persons, on scale average of that which you feed your families, or clothe them, or manumit a slave, but whosoever cannot afford that, then he should fast for three days..(Q.5: 89).

This *wājib mubham* is equally known as *al-wājib al-mukhayyar*.

(c) *Al-Wājib al-'Aynī* and *al-Wājib al-Kifā'ī*

Al-wājib, in relation to who is held responsible and answerable for its execution, is also divided by the Usulis into two, namely *al-wājib al-'Aynī* and *al-wājib al-kifā'ī*.

Al-wājib al-'Aynī is an action which its performance is required from all and sundry of *Mukallaf* by the Lawgiver. No representation can be accepted.

Examples of this acts is prayer, fasting, *zakāt*, fulfillment of contractual obligations etc. Notwithstanding, when anyone of these actions become debts on a *mukallaf*, it may in some specific conditions be carried out by another *mukallaf* rather than the debtor.

The major evidence for the rule of law of *al-'aynī* is found in the verse which states thus:

I have only created Jinns and men that they may worship me.(Q. 51:56)

Al-Wājib al-Kifā'ī

Al-wājib al-kifā'ī: Is an act that its execution is required from any person or group of *Mukallafs* by the Lawgiver.

This means that it is the execution of the duty that matters not the doers, because if the duty is carried out by any member of the *mukallaḥ* the remainders who did not participate will also be free from any liability or indictment.

Examples of acts of this nature are numerous like *al-'amr bi al-ma'rūf* and *al-nahy 'an al-munkar* (enjoining of what is just and forbiddance of what is evil), *al-janāzah* (burial of a Muslims corpse), rescue of a drowning person, reply of greetings, etc. the intention of the law is to see that these actions are performed for the good of all. It is not required from all members of 'Ummah. However, collective neglect of the action there will bring collective indictment.

It is worthwhile to mention that an action of *al-wājib al-kifā'ī* can be circumstantially changed to *al-wājib al-'aynī* if it happens that the skill to do the action in question is known by one particular person or a specific group of persons. In this instance the act will become compulsory and *'aynī* upon the skilled person or person alone. But the generality of Muslims will also be bound to encourage skilled men' until the action is executed .

Self Assessment Exercise

Elaborate on the divisions of *al-Wājib / al-Farḍ*

4.0. CONCLUSION

Al-ḥukm al-shar'ī or *at-taklīfī*, are requirements from the *Qur'ān* and *Hadīth* relating to the acts of the Mukallaḥs.

The Mukallafs are people who attained legal capacity by being free from circumstances which can prevent them from discharging their responsibility actively.

Fard/Wājib (Obligatory) is the absolute requirement for an action while *harām* (prohibition) is the absolute requirement forbidden an action.

Mandūb is non absolute requirement for doing something while *makrūh* is the act of non absolute forbidden of an act or something.

An act in respect of which the Law giver is indifferent is permissible (*mubāh*).

The above are the rules that are called *al-ḥukmu at-taklīfī*.

Al-Wājib/ al-Fard is divided into:

- (a) *Mutlaq* is for actions with unspecified period and *muqayyad* is for action with unspecified.
- (b) *Muayyan* is the term for the action that cannot be substituted and *mubham* for that which choice is given to select one.
- (c) *Fard ‘aynī* is the term for an action to be performed by all and sundary and *fard kifayah* is for the action required from a person or group.

5.0. SUMMARY

The main contents of this Unit opens with an elucidation of the concept of *al-Hukum taklīfī* and definition of the *Mukallaf*. It gives detailed (analysis of a man who has attained legal capacity and elaborates the envisaged possible situation. Detailed analysis of *al-Hukmu ash-shar-‘ī. at-taklīfī* is there after given with focus on *Al-wājib al-Fard*, its different types and various divisions. This main content ends with an analysis of the division of the *wajib/ al-fard*.

6.0. TUTOR MARKED ASSIGNMENT

Expatiate upon the term *al-ḥukm al-sharʿī* or *at-taklīfī*.

Define the term *al-Mukallaf*. Support your answer with examples.

Discuss the major divisions of *al-Wājib/ al-Farḍ*

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UNIT 3: AL-WĀJIB AL-MUHADDAD AND AL-WĀJIB GHAYR MUHADDAD

(The Restricted and the Unrestricted Obligatory Requirements)

CONTENTS

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1. *Al-Wajib al-Muhaddad and al-Wajib ghayr Muhaddad*

3.2 Kinds of Restricted Obligatory Requirement (*wajib*) in Relation to the
Period of its Performance and Characteristic.

4.0 Conclusions

5.0 Summary

6.0 Tutor Marked Assignments

7.0 References and Further Readings

1.0 INTRODUCTION

In the last section of Unit 2, the divisions of al-wajib al-fard were analysed with focus on consideration of its period, specification and who is held responsible for its execution. This Unit expounds the restricted and the unrestricted obligatory requirements.

2.0 OBJECTIVE

At the end of this Unit you should be able to expound

- the obligatory requirements as either restricted or unrestricted.
- the concept of *al-wājib al-mu'ajjal* in the principles of Islamic law.
- the principle of *al-Adāu* with the opinions of the various *madhāhib*.
- the principle of *al-qadāu* in the Islamic Jurisprudence.
- the concept of *Iādah/takrar*. Mention divergent opinions.

3.0 MAIN CONTENT

3.1 *Al-Wājib al-Muḥaddad and al-Wājib ghayr Muḥaddad*

Al-wājib, in regard to the required quantity is divided into two: *al-wājib al-Muḥaddad* and *al-wājib ghayr al-muḥaddad*. (Restricted and unrestricted)

(i) *Al-wājib al-muḥaddad*.

Al-wājib al-muḥaddad is jurisprudential requirement in which the Lawgiver, God, stipulates a certain quantity which a *Mukallaf* needs to meet before he can be free from liability.

Examples of this can be seen from actions such as five obligatory prayers, *zakāt*, monetary debts etc. The stipulated quantity of these actions needs to be satisfied.

A *mukallaf* who does not meet this requirement, either by omission of a part of the required quantity or by addition, especially in ritual duties, will not be free from liability and he can be indicted. For this, if a *mukallaf* executed four obligatory prayers instead of

five, or he added one prayer to it to become six prayers, he is accountable for his omission as well as his addition of one prayer. The same rule applies to every quantitative action of *al-wājib al-muḥaddad*.

(ii) *Al-wājib ghayr muḥaddad* is action in which no quantity is stipulated such as spending in the way of God, righteousness and piety, alms-giving (not *zakāt*) to the poor and the needy, feeding of hungry persons etc. The intention of the law in this regard is to eliminate hardship and to provide relief, which usually vary according to circumstances. A *mukallaf* is not under any compulsion to meet a specific quantity of these actions.

Meanwhile the jurists deduced that if *al-wājib al-muḥaddad* (a restricted obligation) is not carried out as it is stipulated, it will remain a liability on the concerned person, and it must be paid before he can be free from the liability. The case is reverse in *al-wājib ghayr al-muḥaddad* if it is missed by the *mukallaf*, it cannot be compulsorily repaid as a debt. Thus, a husband who does not give sufficient maintenance to his wife cannot be liable for the payment of past insufficient maintenance because the law does not specify for him any quantity. But he will be liable to the specified amount if the matter is brought to a court of law and a specific amount is pronounced, or by his personal promise.

Self Assessment Exercise

Obligatory requirements are either restricted or unrestricted. Discuss.

3.2 Kinds of Restricted Obligatory Requirement (*wājib*) in Relation to the Period of its Performance and Characteristic.

There are four kinds of restricted *wājib* obligatory acts in relation to the period of its performance, namely :

(i) *Mu'ajjal* (prompt) (2). *Al-'adā'u* (3) *Qadā'u* (4). *I'ādah*

1. *Mu'ajjal* (to act in advance)

This action is always mentioned by the Jurists along with the others mentioned above.

Al-mu'ajjal is a kind of action performed before its due time provided the Lawgiver allows such an action in advance. An instance of such is the giving out the *ṣadaqat al-fiṭr* before the 'Īd day: *ṣadaqat al-fiṭr* is only obligatory on the dawn of the day of *īd al-fiṭr* according to the views of the Mālikis and Ḥanafis. Similarly, the time of *ṣadaqat al-fiṭr* starts from the sunset of the last day of the month of Ramaḍān.

This view is upheld by both Imām Aḥmad and Ash-Shāfi'ī. The Lawgiver however has permitted the giving out of *ṣadaqat al-fiṭr* in advance before its due time. There are divergent views regarding this matter. The Ḥambalis allow its presentation in advance a day or two before the fast breaking festival. The Ḥanafis allow it to be presented at any time of the month of Ramaḍān; it may be in the beginning or middle of it. What matters is that it should be giving out in the month of Ramaḍān. The Shāfi'ī on the other hand held the view that *ṣadaqat al-fiṭr* can be presented in the beginning of the month of Ramaḍān, because according to them, the fasting and the breaking of the fasting are both the reason that bring about the issue of *ṣadaqat al-fiṭr*, and when one of these reasons is found, expediting the *ṣadaqat fiṭr* is permissible. On the basis of this if a person carries out the

sadaqat al-fiṭr before the daybreak on the day of *Īd*, he has fulfilled the condition and has promptly performed the obligatory duty of *sadaqat al- fiṭr* even though the performance was done before its due time. Such action is called *al-wājib al- mu‘ajjal* (performance of an act in advance).

Self Assessment Exercise

Discuss the concept of *al-wājib al- mu‘ajjal* in the principles of Islamic law. Illustrate your submission.

2. Al-'Adā'u (Prompt Performance of Obligatory Act)

Al- 'adā'u is the performance of an act of worship at its specified time in a complete form without being preceded (that is the obligatory act) by any deficient position. An instance of such is the observance of valid and complete *Zuḥr* prayer during sundown. This is called *'adā'u al-wājib* (performance of obligatory action) promptly even though it is possible for the person not to realize the full correctness of the act during that time. This is the opinion of the majority of the jurists. For instance many jurists hold the view that when a person prayed *Zuḥr* prayer lonely and then repeats the same prayer in congregation within the due time of *Zuḥr* prayer, the repeated *Zuḥr* prayer is still qualified as *'adā'u* (prompt performance of obligatory act).

The Ḥanafis however hold the contrary. They consider the repeated *Zuḥr* prayer *I'ādah* (repetition) and not *'adā'u* . They maintain that when an action is preceded by a deficient situation, then it is repeated to make it fully completed. The repeated act will then be the

prompt performance of that duty, because according to them, the deficient act is deemed non-existent and that the promptly and valid performance according to them is the performance of obligatory act during its legally specified time.

On the basis of this the Ḥanafis have divided *al-'adā'u* into two divisions namely *al-'adā'u al-kāmil* (complete promptly performance) and *al-'adā'u al-qāsir* (incomplete or deficient prompt performance of obligatory act).

Al-'adā'u al-kāmil in the act of worship is to perform the required action while fulfilling all the legal qualities that validate the action, an example of such is the observing of *ṣalat* (the prayer) in congregation.

Al-'adā'u al-qāsir (the deficient prompt performance of obligatory action) is the performance of the required action without meeting all the legal characteristics which validate it, an example of such, is to pray lonely.

Self Assessment Exercise

Expound on the principle of *al-Adāu*, Mention the opinions of the various *madhāhib*.

3. Al-Qaḍā'u (Payment of Obligatory act as Debt)

Al-Qaḍā'u is the performance of an obligatory act after the expiration of its legal specified time like praying the *Maghrib* prayer at the time of '*Ishā'i*'. Such performance at that time is *qaḍā'u* because it was performed after its legal specified time.

Majority of jurists agree that whoever missed an obligatory action in its stipulated time must pay it back there after, and he is indictable when the delay was without any genuine excuse. Similarly, deliberate neglect of an obligatory action, or forgetting it and sleeping are all equal in necessitating the re-payment of the missed actions.

The Zāhiris differ with the majority of jurists and hold a contrary view on this issue. They did not make the repayment of the missed obligatory act compulsory for a person who intentionally neglected it; they only make the repayment necessary on a person who was asleep and the person who was forgetful. They reason with the saying of the prophet which informed that;

There is no negligence in the sleep, the abuse is found in wakefulness.

So when anyone forgot a prayer or slept over it, let him pray it whenever he remembers it.

Self Assessment Exercise

Examine the principle of al-qaḍāu in the Islamic Jurisprudence.

4. Al-I'ādah/Takrār (Repetition of an Obligatory act)

Al-'i'ādah (repetition of an obligatory act) is the performance of an obligatory action in a complete form in its legal specified time, though the action was being preceded by a deficient condition. An instance of such is when a person has performed an obligatory prayer but later, discovered that he has not made ablution. He then performed ablution

and observe a fresh prayer. The last prayer, according to the majority of jurists is called '*i'ādah* (repetition).

The Ḥanafis called it '*adā'u* (prompt performance) because they are of opinion that the former action is non-existent. They maintained that '*i'ādah* is the performance of an obligatory action in its complete form and during the legal time set for it, after it had been formerly performed but not valid for some reason. An example of such is the person who previously prayed lonely then repeated the prayer in a congregation. However, the majority of the jurists call the repetition of the prayer in the congregation '*adā'u* (prompt performance) and not '*I'ādah* (repetition of the action) as held by Ḥanafis.

Self Assessment Exercise

Analyse the concept of *Iādah/takrar*. Mention divergent opinions.

4. CONCLUSIONS

Al-wājib al-muḥaddad is an act in which the Lawgiver, God, stipulates a certain quantity which a *Mukallaḥ* needs to meet before he can be free from liability.

(ii) *Al-wājib ghayr muḥaddad* is action in which no quantity is stipulated.

There are four kinds of restricted *wājib* obligatory acts in relation to the period of its performance, namely :

(1) *Mu'ajjal* (to act in advance) (2) *Al-'adā'u* (prompt action)

(3) *Qaḍā'u* (to act in arrears) and (4). *Al-I'ādah* (repetition of action)

There are differences of opinions in the Schools on these principles.

5. SUMMARY

This Unit discusses the Islamic jurisprudential principles of the restricted and the unrestricted obligatory requirements. It relates the implications of carrying out and failure to carry out the two. Copious examples are given as illustration of each of them. The Unit also highlights the kinds of restricted obligatory requirement (*wājib*) in relation to the period of its performance and. Opinions of various schools of Islamic jurisprudence are presented on the issues.

TUTOR MARKED ASSIGNMENTS

Elucidate the jurisprudential principles of **restricted and unrestricted obligatory rules**.

Enumerate the four kinds of restricted obligatory acts and explain each of them.

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**UNIT 4: AL-ḤARĀM, (THE PROHIBITED), A`L-MAKRŪH (THE REPULSIVE)
AND AL-MUBĀH (THE PERMISSIBLE)**

CONTENTS

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1. *Al-Ḥarām*: Its Definition, Divergent Views and Divisions

3. 2. Recommended act (*Mandūb*) and its Divisions

3.3 *Al-Makrūh* and its Division by the Hanafis

3.4 Concept and Divisions of *al-Mubāh*

4.0 Conclusions

5.0 Summary

6.0 Tutor Marked Assignments

7.0 References and Further Readings

1.0 INTRODUCTION

In the Unit 2 of this Module we discussed some detailed issues relating to *al-Hukmu` t-Taklif* and its major divisions with particular focus on *al-Wājib/al-farḍ* (the obligatory requirement).

Unit 3 of the Module focuses on the restricted obligatory requirements and the unrestricted.

This Unit 4, focuses on the remaining categories of jurisprudential requirements.

2.0 OBJECTIVE

At the end of this Unit you will be able to

Define *Al-Ḥarām* mentioning dissenting opinions.

Explain the divisions of al-Haram and their implication.

Define *Al-Mandūb*, explain its divisions and exemplify your answers.

Expatriate upon *al-Makrūh* and its Division by the Hanafis.

Discuss the concept and divisions of *al-Mubāh*. Illustrate your answers.

3.0 MAIN CONTENTS

3.1 *Al-Ḥarām*: Definition, Divergent Views and Divisions

Al-Ḥarām: connotes what the Lawgiver proscribed among the actions of *mukallaf*. It is defined as “what is forbidden strictly. The precept of actions under this provision is that certain punishment of either divinely or worldly nature, or both, is awaiting whoever violates the rule. An example of this can be drawn from the *Qur’ān* where Allah says:

O you who believe! Eat not up your property among yourselves unjustly except it is a trade amongst you, by mutual consent, and do not kill yourselves (nor kill one another). Surely, Allah is most merciful to you and whoever commits that through aggression and injustices, we shall cast him into the fire, and that is easy for Allah. (Q. 4:29-30).

The prohibited actions are possibly indicated in many ways, such as using the word “prohibit” or its indication as in the verse which reads as follows.

Prohibited to you (for marriage) are your mothers, daughter, sisters.

(Q. 4:23)

Another verse of the *Qur’ān* reads:

And divorced women shall wait for three menstruation periods, and it is not lawful for them to conceal what Allah has created in their wombs, if they believe in Allah and the last Day. (Q. 2:228).

The Ḥanafis have divided *al-ḥarām* into two kinds viz: *ḥarām* and *makrūh al-taḥrīm*, while the majority of jurists, considered the two divisions to be synonymous and identical. To Ḥanafis, *ḥarām* means what its prohibition is stipulated by emphatic and manifest evidence, while *makrūh al-taḥrīm* means what its prohibition is pronounced by non-forceful and ordinary evidence. Nonetheless, the Hanafis agree with other schools of law that *ḥarām* and *makrūh al-taḥrīm* are of the same nature in the rule of law. This is to say, in other words that the doer of *ḥarām* and *makrūh al-taḥrīm* subject himself to divine legal punishment, while who refrains from it is entitled to divine legal reward. The only disparity so ever in the division of Ḥanafis is in the fact that whoever disputes *ḥarām* can be considered a renegade (*murtadd*) while the disputant of *makrūh al-taḥrīm* can only be subjected to both divine and legal punishment and the notion of renegade is remote.

Divisions of *Ḥarām*

Prohibition of actions is divided into two namely *ḥurmatun dhātiyyah* that is perfect prohibition and *ḥurmatun ‘āriḍah* that is conditional prohibition.

- (i). Perfect prohibition is what the Lawgiver, proscribed *ab initio*, among the actions of *mukallaḥīn* e.g. adultery, incest, theft, sale of carrion, etc. These prohibited actions can, by no means, create a legitimate right in Islamic law

For example, neither adultery nor incest can originate kindred, while theft also cannot create ownership.

- (ii). Conditional prohibition (*ḥurmatun ‘āriḍah*) indicates that the actions is initially valid but because certain condition applies to the action and thus renders it prohibited. Acts, such as prayer on extorted land and sale with deceit are good examples. These acts can legitimise rights in *sharī‘ah*. This is the popular opinion of Islamic jurists and they explained that prayer performed on extorted land is valid because the action of prayer is required and rewardable. Conversely, they agreed that extortion of another man’s property is prohibited and punishable. In the same way, the action of sale is recommended but deceit is condemned and proscribed in *sharī‘ah*.

Self Assessment Exercise

Define *Al-Ḥarām* mentioning dissenting opinions.

Explain the divisions of *al-Ḥarām* and their implication.

3. 2. Recommended act (*Mandūb*) and its division

(i) Definition

When an act is legally preferable to be done it is known as *al-mandūb* or *mustahab*. The definition of this act is what is demanded from *mukallaf* preferably:

There are various ways to indicate acts of *mandūb*, however the major rule of making the requirements to be optionally demanded is indicated within the context. For example, Allah says in the *Qur'ān* thus:

O you who believe! When you contract a debt for a fixed period, write it down (Q. 2: 282).

The order in this verse, which is the writing down of debt, is considered to be *mandūb* because in the following verse there is syntax which renders it optional. And that is the clause which says:

... Then if one of you entrust the other let the one who is entrusted discharge his trust (faithfully). (Q. 2:283).

This clause shows also that if the creditor trusts the debtor it may not be necessary for them to resort into writing their contract of debt.

Another example is seen in the Qur'anic verse which says:

... and such your slaves as seek a writing (of emancipation), give them such writing, if you find that there is good and honesty in them" (Q. 24:33)

This verse indicates that it is commendable act for a master to set his servant free because the injunction in the verse includes a condition which can only be fulfilled at the option of the master himself. Similar examples of recommended acts (*mandūb*) are the traditions of prophet Muḥammad which bear strict commands.

The precept of *mandūb* is that the doer is promised with reward and that is why it is commendable even though its neglect warrant no punishment.

(ii) *Divisions of al-Mandūb.*

There are some acts of *mandūb* which warrants blames while others do not. This is what led some Jurists to divide *mandūb* acts into some divisions. *Mandūb*, according to these Jurists, can be divided into three divisions.

- (i) A *mandūb* act whose requirement includes some emphasis. Although the omission of any act under this category does not warrant any punishment, it subjects the culprit to be blamed. Examples of this *mandūb* are the acts which accompanies the obligatory acts, like *al-'adhān*(calling to prayers) and the performance of five obligatory prayers in congregation. Also, every practice of the Prophet, persistently observed and rarely omitted, is enshrined under this category. It is also *Sunnah Mu'akkadah*.
- (ii) A *mandūb act* whose requirement is without any emphasis. Its doer is rewarded while its defaulter is not meted with any punishment. The pretext of this act is what Prophet Muḥammad did not persistently observe. Example of this can be seen in alms-giving to the needy; fasting on Thursday; *nawāfil* that is voluntary prayers after the obligatory prayers. It is also known as *Sunnah Zā'idah*.

(iii) The *Mandūb* acts which are supplementary for the *mukallaf*. These are generally exemplified by natural acts of Prophet Muḥammad such as eating, drinking, sleeping, dressing etc. When a *mukallaf* emulates the Prophet in anyone of these acts, his act will be considered to be *mandūb*, because it shows that the person has the love of the Prophet which will entitle him rewards. But one who avoids following such good examples of the Prophet is not to be blamed or punished, because they are not legal proclamations from the Prophet. *Mandūb* is synonymously called *mustahab*, or *Sunnah* or *Taṭṭawu'* (voluntary act).

Self assessment exercise

Define *Al-Mandūb* and explain its divisions. Exemplify your answers.

3. 3 Al-Makrūh and its Division by the Hanafis

(i) Definition of Term

This designates what Allah commands *mukallaḥīn* to refrain from even though the command is not strictly ordered. It is defined as follows “*Makrūh* is an act whose neglect is preferable than its performance”.

The precept of this act is shown when the structure of the text contains a syntactic mood which renders the proscription to a minor stage of distaste. An example is seen in the *Qur'ān* which says:

...O you who believe! Ask not about things which if made plain to you may cause you trouble. But if you ask about them while the *Qur'ān* is being revealed, they will be made plain to you. Allah has forgiven that, and Allah is oft-forgiving, most forbearing. Before you, a community asked such questions, then on that account they became disbelievers.(Q. 5: 101-102).

This verse indicates that the unwarranted questions are distasteful. But there is a syntactic structure within the verse which renders this proscription to a minor stage of distastes.

...But if you ask about them while the *Qur'ān* is being revealed, they will be made plain to you, Allah has forgiven that, and Allah is oft-forgiving, most Forbearing. (Q. 5: 101).

Another example of *Makrūh* is the *Ḥadith* of the Prophet which says:

Allah distastes for you acts of gossip, abundant questions and extravagance.

This two evidences indicate that the acts in questions are distasteful in *Sharī'ah*.

(ii) *Hanafi's Divisions of al-Makrūh*

The Ḥanafis have divided *al-Makrūh* into two divisions namely; *al-makrūh al-taḥrīmī* and *al-makrūh al-tanzīhī*.

1. *al-makrūh al-taḥrīmī* is what Allah commands the *mukallaḥīn* to strictly refrain from, though this type of *makrūh* is based on presumptive evidence (*dalīl ḥannī*) and not definitive evidence (*dalīl qatī'ī*). It is infact an act which is closer to strictly prohibit act.

Examples of such acts are the prohibition of a Muslim proposing a woman over the proposal of his Muslim brother; similarly, the bargaining of commodity is prohibited when a Muslim is bargaining it. This type of *makrūh* according to the view of the Ḥanafīs is equivalent to *al-wājib* (obligatory act). That is, to avoid these acts are obligatory.

The legal rule on this is that committing any of these acts is punishable under Islamic law even though the defaulter could not be declared an infidel, because, the evidences that established this law are presumptive proofs (*dalīl ḡannī*).

2. *Al-makrūh al-tanzīhī* is a kind of command that the Lawgiver requests the *Mukallaḡīn* to refrain from, though the command is not strictly ordered. Example of such acts are the eating of the meat of horse out of the need especially during the war, or performance of ablution from the remnant of water drunk by wild birds. The commission of this act under this concept does not warrant any punishment or blame.

Meanwhile, all *mandūb* are *makrūh* if they are neglected and vice-versa. We can therefore know the rule of *makrūh* from the rule of *mandūb* conveniently.

Self Assessment exercise

Expatiate upon *al-Makrūh* and its Division by the Hanafīs.

3.4 Concept and Divisions of *al-Mubāḡh*

(i) Definition of Term

Al-mubāḡh is an act that stands in equilibrium between requirements to do and requirements not to do. This can be known through legal means or through mental faculty of human beings. That is *Ibāḡḡah Shar‘iyyah* or *Ibāḡḡah ‘Aqliyyah* respectively. This process paves way

to divide the act into two kinds. The act of *Mubāḥ* can be known in Islamic law through various indicators such as no objection, no blame, and no interdiction in the performance of the duty.

Examples of such are the following verses which say:

No blame or sin is there upon the blind, nor is there blame or sin upon the lame, nor is there blame or sin upon the sick (that they go not for fighting) (Q. 48:17).

And there is no sin on you, if you make a hint of betrothal or conceal it in yourself. (Q. 2:235).

...But if one is forced by necessity without willful disobedience nor transgressing due to limits, then there is no sin on him. Truly, Allah is off-forgiving, most merciful (Q. 2:173).

These verses, in essence testified that indictment is overruled for the commitment of any of the act in question, if they are within the circumstances prescribed by law.

(ii) Division of *Al-Mubāḥ*

In

addition to this we bring here the division of *al-mubāḥ* as recognized by the Usulis. *Al-Ibāḥah*: the indifference in the rule of law is divided into two, namely, *al-Ibāḥah al-shar‘iyyah* is legal indifference and *al-Ibāḥah al-‘aqliyyah* is logical indifference.

(1) A legal indifference indicates indifferent acts which are only known through the means of law. e.g intercourse with wives during the night of Ramaḍān's fast. The *Qur'ān* states as follows:

It is made lawful for you to have sexual relations with your wives on the night of the fast, they are the body cover for you, and you are the same for them (Q. 2:187).

The above mentioned example is a legal indifferent act because the source of their being known are legal not through reasoning.

(2) Logical indifference is also known in Usulis technical terms as *Istiṣhāb al-aṣliyyah*, which means “associating to the natural absence of law.” The general rule of Islamic law shows that the natural absence of law is an evidence of no indictment *ab initio*.

Example of this is shown in the transaction of Usury (*ribā*) at the beginning of the Islamic era. When the law of its prohibition was ordained the companion of the Prophet (s.a.w) entertained fear of what would be the fate of their resource which had accumulated from this transaction. For this reason a verse was revealed as allay their worries thus Allah says:

So whoever receives an admonition from his Lord and stops eating *ribā* (Usury) shall not be punished for the past, his case is for Allah to (judge), but whoever returns to *Ribā* (Usury), such are the dwellers of the fire-they will abide therein (Q. 2:275).

The clause “shall not be punished for the past” indicates that what they transacted before the prohibition of the act is to be associated to the natural absence of law (*al-barā'ah al-*

aṣliyyah) and no indictment for it. A similar example is also available in the verse which says:

And marry not women whom your fathers married, except what has already passed, indeed it was shameful and most hateful, and an evil way (Q. 4:22).

The clause except what has already passed is an excuse which indicates that what had passed before the ordinances of this law are forgiven.

The importance of dividing *Ibāḥah* into these divisions is that alteration or cancellation of legal indifference can be called *al-naskh* that is, abrogation. For instance the cancellation of option of breaking the fast in Ramaḍān and its substitution for the feeding of a poor which was the law for anyone who finds difficulty in fasting, as indicating in this verse thus:

...And as for those who can fast with difficulty, they have to feed a poor person for everyday. But whoever does good of his own accord, it is better for him. (Q.2:184).

This verse is regarded by jurists to have been abrogated. They quoted another verse. The verse reads thus:

So whoever of you sights the month and is present at his home, he must observe (fasts) that month (Q.2:185).

They said that the insistence in this verse for the fast is more evident, to the extent that the sick people and the travelers who are to be included in the first verse (that is options for who

can do it with hardship) are now ordained to repay back the missing period of Ramaḍān by fasting.

Self Assessment Exercise

Discuss the concept and divisions of *al-Mubāh*. Illustrate your answers.

4.0 CONCLUSION

In conclusion, it is clear from this discussion that *al-ḥukm al-taklīfī* is obligatory rule of law, in majority view is five divisions namely: *al-wājib*, *al-ḥarām*, *al-mandūb*, *al-makrūh* and *al-mubāh*, while in view of Hanafi jurists it has seven division viz: *al-fard*, *al-wājib*, *al-mandūb*, *al-ḥarām*, *al-makrūh al-tahrīm*, *al-makrūh al-tanzīh* and *al-mubāh*.⁵⁵

Meanwhile, an act can be judged with different range of rules of law. For example, act of marriage can be *mandūb* or *sunnah mu'akkadah*, when there is no fear for *mukallaf* of being corrupt and he or she is financially capable. It will become *wājib* when there is certainty that he or she will commit the offence of adultery or fornication, it becomes *makrūh* when there is fear of occurrence of injustice or it may lead to the violation of another strict ordinance, e.g. marriage of the fifth wife when there are four already in *mukallaf's* possession all of lawful wedlock and they are free woman, it becomes *al-mubāh* when a *mukallaf* wishes to marry third or fourth wife not for the fear of committing an offence or for any necessity. This instance can be applicable to other acts of *mukallaf* within the limit and boundary of Islamic law and with proofs from the authentic sources of law.

5.0 SUMMARY

This Unit defines proscribed requirements (*al-Ḥarām*), highlights modes of expressing it by the law-giver in the Muslim scripture, divergent views of the schools of Islamic Jurisprudence and Divisions. The Unit also acquaints you with principles of deducing recommended act (*Mandūb*) and its divisions. An analysis of modes of expressing, the concept and division of *al-Makrūh* and its division by the Hanafis and the concept and divisions of *al-Mubāh* concludes the main sections of the Unit.

TUTOR MARKED ASSIGNMENTS

1. (a) Discuss *Al-Ḥarām* mentioning dissenting opinions.
(b) Explain the divisions of al-Haram and their implication.
2. Expatiate upon principle of deducing *al-Makrūh* and mention its division by the Hanafis.

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UNIT 5 : *AL-HUKMU`L-WAḌ-‘Ī* (POSITIONAL RULE OF LAW)

CONTENTS

1.0 Introduction

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3.1 Definition of *al-Hukmu al-WaḌ-‘ī* and its kinds

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1.0 INTRODUCTION

Another major theme in the science of *Uṣūl al-Fiqh* is *al-Hukmu al-WaḌ-‘ī*. It connotes the speech of the Lawgiver which enacts something as a cause (*sabab*), or condition (*sharṭ*), or a hindrance (*māni‘*), validation (*Ṣiḥḥah*) or invalidation (*buṭlān*)

to another jurisprudential requirement. Various kinds of the acts of *Mukallaf* which demand that these rules of law be applied are imparted to you in this Unit.

2.0 OBJECTIVES

At the end of this Unit you should be able to:

- Define *al-Ḥukm al-Waḍ-ʿī*.
- Enumerate kinds of *al-Ḥukm al-Waḍ-ʿī*.
- Discuss *as-Sabab* (a Cause to a jurisprudential requirement), its divisions and Characteristics. Give examples for your submissions.
- Provide a comprehensive analysis of *al-Sharṭ* (Condition) and Its Divisions in the principles of Islamic jurisprudence.
- Give an analysis of existence of *al-Māniʿ* (preventive situation) with examples.
- Elaborate on the terms *Ṣaḥīḥ*, *Bāṭil* and *Fāsid* (Valid and Invalid) as principles in of Islamic Jurisprudence.
- Give examples in support of your submissions.

3.0 MAIN CONTENTS

3.1 Definition of term

Al-Hukm al-Waḍ-‘ī is the speech of the Lawgiver which enacts something as a cause (*sabab*), condition (*shart*), or a hindrance (*māni‘*), validation (*Siḥḥah*) or invalidation (*buṭlān*) to another jurisprudential requirement.

The numerous types of acts of *mukallaf* demand that the positional rule of law, which is to guide them, should be numerous in kind. Thus *al-ḥukm al-waḍ-‘ī* according to al-Shāṭibī is divided into seven namely: *al-sabab*, (cause), *al-shart* (condition), *al-māni‘* (hindrance), *Aṣ-ṣiḥḥah* (validity) *al-buṭlān* (invalidity), *al-‘azīmah* (strictly required) and *ar-rukḥṣah* (permission or strictly required with modification).

Self Assessment Exercise

Define *al-Ḥukm al-Waḍ-‘ī* and mention its kinds.

3.2 Kinds of *al-Ḥukm al-Waḍ-‘ī* and their characteristics

(i) *As-Sabab* (a Cause to a jurisprudential requirement), its divisions and Characteristics

As-Sabab is “a clear and adequate description upon which the Lawgiver based the happening of certain thing which will compel the presence of *al-musabbab*, that is, the act, while in its absence the act will go into abeyance.

In other words, *Sabab* is defined as an apparent and constant attribute (*wasf zāhir mundābit*) which the Lawgiver has prescribed as the indicator of a rule (*ḥukm*) in such a way that its presence necessitates the presence of the *ḥukm* and its absence means that the *ḥukm* is also absent.

This shows that the Lawgiver imposes an act or an instance as a cause to another act of *mukallaf* which serves in turn as a pre-requisite for the regulated act. The essence of this connection is that *al-musabbab* that is, the regulated act, cannot become valid except if the *sabab* is available.

Divisions and Characteristics of *As-Sabab*

Al-Sabab is of two kinds (1) *maqdūr lil mukallaf* i.e that which comes under *mukallaf*'s capability and (2) *ghayr maqdūr li 'l-mukallaf* i.e that which comes out of the *mukallaf*'s capability. These are *as-sabab* of divinely nature and *al-sabab* of worldly nature respectively.

As-Sabab of divinely nature: is a cause which is originated by the order of the Lawgiver. An example of this cause is the *niṣāb* or minimum amount due for the payment of *zakāt*. The *niṣāb* is a cause for the obligation of *zakāt*. If this amount is diminished or there is prevention by any circumstance, like debt there shall be no obligation of *zakāt*. Another example is in the breaking of fasting, if a *mukallaf* engages in a lawful journey during the month of Ramaḍān, the lawful journey has been prescribed as a cause for the breaking of the fast by the Lawgiver. These two acts of *Sabab*, the *Niṣāb* and the travelling, are under the capability of *mukallaf*.

Examples of what are out of *mukallaḥ*'s capacity can be drawn from the setting in the time of prayers which is a cause for the obligation of each particular prayer and the coercion which is also a cause for the eating of unlawful foods. These acts, setting-in of the time of prayers and coercion, are out of every *mukallaḥ*'s control.

As-Sabab of worldly nature (sabab li ḥukm sharʿī duniyāwī), is a cause of whose rules govern the law ordained by the Lawgiver, Allah, but its origin is created by the action of human beings. An example of this is the act of contract which causes the sanctity of contractual obligations. Another example is the damage of another man's property which is a cause for being liable. These two acts are under *mukallaḥ*'s capability.

Examples of *sababs* which are beyond the control of *mukallaḥ* are like kindred (*qarābah*) which is a cause to the inheritance and infancy (*sighar*) which is a cause for guardianship. These two acts are not depended on the wishes of those that are affected by the positional rules of law; therefore, these causes are beyond their control.

Self Assessment Exercise

Discuss *as-Sabab* (a Cause to a jurisprudential requirement), its divisions and Characteristics. Give examples for your submissions.

(ii) *Al-Sharṭ* (Condition) and Its Divisions

Al-sharṭ is “the Condition that the Lawgiver laid down as a requisite for an act”. In other words *Sharṭ* connotes:

An evident and constant attribute whose absence necessitates the
Absence of the *ḥukm* (rule /judgement) but whose presence
does not automatically bring about its object (*mashrūṭ*).

An example of this is that the presence of a valid marriage is precondition of divorce, but it does not mean that when there is a valid marriage, it must lead to divorce. The same rule is applicable to the ablution which is requisite, that is, conditional for ritual prayer, but the presence of ablution does not necessitate *Ṣalāh*.

Al-sharṭ is divided into two in consideration of its relation to the act or the cause of an act namely.

- (i) *Sharṭ mukammil li sabab*, that is, condition which is requisite for the cause.
- (ii) *Sharṭ mukammil li al-musabbab*, that is, condition which is requisite for the act.

Examples for these divisions are as follows:

Al-sharṭ al-mukammil li sabab which is the first kind under this division can be exemplified by the expiration of a year, that is, *murūr al-ḥawl*, which is a requisite of *al-niṣāb* that is the minimum amount due for *zakāt*. This *niṣāb*, in turn, is a cause or *al-sabab* for the obligation of *zakāt*. If a *mukallaf* is out of possession of this minimum amount no obligation can be imposed upon him to pay *zakāt*. Another example is witness, which is a condition in the contract of marriage.

The second kind of this division is *al-sharṭ al-mukammil li musabbab*, and it is exemplified by ablution (*wuḍūʿ*) which is a requisite condition for prayer. In this

example, ritual prayer is the *musabbab*, because it is the act in question for a cause (*al-sabab*). The condition is regulated by the Lawgiver for the *musabbab* without which the prayer will be invalid.

The cause that makes the prayer to become an obligation on *mukallaf* is the setting-in of its period, that is, *dukhūl al-waqt*. The reason is the fact that a *mukallaf* can have his ablution at any time without having any obligation to perform prayer if the period of the prayer in question has not set in.

This type of *mukammil* is also complementary condition.

A second division of *al-sharṭ* is in consideration of its characteristic and it is divided into two: *sharṭ al-wujūb* and *sharṭ al-siḥḥah*.

Sharṭ al-wujūb is exemplified by post meridiem, *al-zawāl* (p.m.), for afternoon prayer. This means that if a *mukallaf* performs his afternoon prayer before the post meridiem, his afternoon prayer will be invalid.

The example of *sharṭ al-siḥḥah* is seen in ablution for any ritual prayer, because no prayer can be valid without ablution, and for this, it becomes a requisite for any ritual prayer.

In other words examples of *sharṭ al-wujūb* are: *al-zawāl* that is post meridiem, for afternoon prayer as in the above mentioned example; similarly, *murūr al-ḥawl* that is, expiration of one year, in the case of *zakāt*, chastity in the case of adultery and custody of

stolen property in the case of amputation for theft. All these are under positional rules of law (*al-hukmu `l-waḍ-`ī*.)

The third division is in consideration of the origin of *al-sharṭ*. It is divided into three namely: *al-sharṭ al-shar`ī*, *al-sharṭ al-lughawī*, *al-sharṭ al-`aqlī*.

Al-sharṭ al-shar`ī is what we have been discussing since the beginning of this topic. This is because it originates from sources and provision of Islamic law as revealed by the Lawgiver. The rules of law that regulates this condition are ordained by Allah.

Al-sharṭ al-lughawī is the condition that people lay down by themselves in their transactions, and it is understood through the literal meaning of the words in use and the custom of the transaction in question. An example of this is, is the statement of a husband to his wife thus; “if you (wife) enter A’s house you are divorced”, or a person says: “if my father agrees, I will sell you the goods”.

The first statement concerns the institution of divorce, while the second statement relates to the sale of goods. These conditions are right and the acts are valid since the intentions are clearly understandable and they are not contravening any rule of law.

The *sharṭ* is called a lingual condition because we understand it from the usage of language and *modus operandi* of acts in question, not from other means like legal or logical means.

The last of this is *al-sharṭ al-`aqlī* which denotes that the relevant act cannot be reasonably accomplished without the *sharṭ*. It is exemplified by knowledge *al-`ilm* which

is a condition for intention. This means that you must have knowledge of the object of your intention.

The means of understanding this, is neither *sharī'ah* nor use of language but reasoning. Similar example of this, is to avoid the opposite act of what is commanded to do, for instance when one is required to sit, he is not expected to stand. Also it is known that if something is none-existing, the knowledge about it will not emerge. This kind of condition depends largely on logic.

The *sharṭ sharī'* is a condition laid down by Allah, while *sharṭ waḍ-ī'* or improvised condition is laid down by human being. An example of the former is witnesses in a marriage contract, and of the latter, is the case when spouses stipulate the condition in their marriage contract that they will reside in a particular locality.

Self Assessment Exercises

Provide a comprehensive analysis of *al-Sharṭ* (Condition) and Its Divisions in the principles of Islamic jurisprudence.

(iii) *Al-Māni'* (The Preventive)

Al-Māni' is another important element of positional rules defined as:

an act or attribute whose presence nullifies either the *ḥukm* or the cause. In either case, the result is that the presence of *māni'* means the absence of the *ḥukm*.

In other words, the legal cause and conditions of an act may be duly fulfilled, yet if the preventive is existing, the rule of law in issue will fall into abeyance. For example, a valid contract of marriage or kinship may exist between a heir and a deceased person but if there is any legal preventive, such as difference of religion between the heir and his or her deceased relatives or it happened that the heir was the murderer of the deceased, the inheritance between them will be abated.

In the second instance, the cause of an act may be prevented which in turn will prevent the continuance of the rule of law on the issue. For example, if a *mukallaf* possesses the *niṣāb*, that is minimum amount due for the obligation of *zakāt* and at the same time, he is in debt that is capable to diminish this *niṣāb*, he will be exempted from the obligation of *zakāt*. The reason is that the debt is a preventive to the proper ownership of *niṣāb* which is a cause for the compulsion of *zakāt*.

From the viewpoint of its effect on the cause or on the *ḥukm* itself, *māni‘* is divided into two types;

First, *māni‘ mu’aththir fī sabab*, that is *māni‘* which affects the cause in the sense that its presence nullifies the cause. The example of this is the instance of debt that hinders the cause of *zakāt*, which is ownership of property.

Second is the *Māni‘ mu’aththir fī al-ḥukm nafsīhi fayaslubuhu*

That is, there is the hindrance which affect the *ḥukm* (the rule of law). The presence of this type nullifies the *ḥukm* directly, even if the cause and the condition are both present.

An example of this is paternity, which hinders retaliation; if a father kills his son, he is not liable to retaliation although he may be punished. Paternity thus hinders retaliation according to the majority of jurists despite the presence of the cause of retaliation, which is killing, and its condition, which is hostility and the intention to kill.

Self Assessment Exercise

Give an analysis of existence of *al-Māni'* (preventive situation) with examples.

3.4 *Ṣaḥīḥ* and *Fāsid* or *Bāṭil* (Valid and Invalid)

The *ṣaḥīḥ* (valid) and *fāsid* (invalid) are situational rules of law which describe and evaluate legal acts incurred by the *mukallaf*. To evaluate an act according to these criteria, depends on whether or not the act in question fulfills the essential requirements (*arkān*) and conditions (*shurūṭ*) that the *sharī'ah* has laid down for it, as well as to ensure that there exist no obstacles to hinder its proper conclusion. For example, *ṣalāh* is a *Sharī'ah* act and is evaluated as *ṣaḥīḥ* (valid) when it fulfils all the essential requirements and conditions that the *sharī'ah* has provided for its observance. Conversely, *Ṣalāh* becomes void (*bāṭil*) when some of its essential requirements and conditions are lacking. A valid contract gives rise to its effective consequences whereas a void contract fails to satisfy its legal purpose.

Muslim jurists are in agreement to the effect that acts of devotion (*ibādāt*) can either be valid or void, in the sense that there is no intermediate category in between. Legal acts are

valid when they fulfill all the essential requirements (*arkān*), causes, conditions and hindrances. They are void when any of these is lacking or deficient.

Majority of Muslim jurists maintained that *fāsid* and *bāṭil* are two words with the same meaning whether in reference to devotional matters or to civil transactions. The Hanafis have however, distinguished an intermediate category between the valid and void, namely the *fāsid*. When the deficiency in a contract affects an essential requirement (*rukṅ*), the contract is null and void and fulfill no legal purpose. If however, the deficiency in a contract only affects a condition, the contract is *fāsid* but not void.

A *Fāsid* contract although deficient in some respect, is still a contract and produces some of its legal consequence, but not all. Thus a *fāsid* contract of sale establishes the purchaser's ownership over the object of sale when he has taken possession thereof, but does not entitle the purchaser to the usefulness (*intifā'*).

Similarly, in the case of an irregular contract of marriage, such as one without witnesses the spouse or the *qāḍī* must either remove the deficiency or dissolve the marriage, even if the marriage has been consummated. If the deficiency is known before consummation, the marriage is unlawful but the wife is still entitled to the dower and must observe the waiting period of *'iddah* upon dissolution of marriage. The offspring of a *fāsid* marriage is legitimate, but the wife is not entitled to maintenance, and no right of inheritance between the spouses can proceed from such marriage.

The Hanafis describe the *fāsid* as something which is essentially lawful (*mashrū'*) but is deficient in respect of an attribute (*wasf*) as opposed to the *bāṭil* which is unlawful (*ghayr*

mashrū‘) on account of its deficiency in regards to both the essence (*aṣl*) and attribute. The Hanafī’s approach to the *fāsid* is also grounded in the idea that the deficiency which affects the attribute but not the essence of a transaction can often be removed and ratified. If for example, a contract of sale is concluded without assigned specified price, it is possible to specify the price (*thaman*) after the conclusion of the contract and thus rectify the irregularity at a later opportunity, that is, as soon as is known to exist or as soon as possible.

Self Assessment Exercise

Elaborate on the terms *Ṣaḥīḥ*, *Bāṭil* and *Fāsid* (Valid and Invalid) as principles in of Islamic Jurisprudence.

Give examples in support of your submissions.

4.0 CONCLUSION

From the above we can deduce the following conclusions:

Al-

Hukm al-Waḍ-‘ī can be defined as the speech of the Lawgiver which enacts something as a cause (*sabab*), condition (*sharṭ*), or a hindrance (*māni‘*), validation (*Siḥḥah*) or invalidation (*buṭlān*) to another jurisprudential requirement.

As-Sabab is “a cause the presense of which the Lawgiver based the happening of *al-Musabbab* (an act) while in its absence the act will go into abeyance.

A third kind of *al-Hukmu ‘l-Waḍ-‘ī* is *Al-Māni‘* implying an act or attribute whose presence nullifies either the *ḥukm* or the cause.

Ṣaḥīḥ, *Bāṭil* and *Fāsid* (Valid and Invalid) are the last of the principles of *al-Hukmu 'l-Waḍ- 'ī*. They describe and evaluate legal acts incurred by the *mukallaf*.

5.0 SUMMARY

This Unit opens with a definition of *al-Hukmu 'l-Waḍ- 'ī* and enumeration of its kinds. It elaborates *as-Sabab* (a Cause of jurisprudential requirement) its divisions and characteristics. Thereafter it defines *ash-sharṭ* (the Condition) and its division. The third kind of the positional or situational rule discussed in the main content of the Unit is *al-Māni 'u* (the Preventive) and its different kinds. The *Ṣaḥīḥ* (*valid*), *Fāsid* and the *Bāṭil* which are terminologies for jurisprudential evaluation of acts constitutes the concluding parts of the main content of this Unit.

6.0 TUTOR MARKED ASSIGNMENT

- (i) Define *al-Hukm al-Waḍ- 'ī* and mention its kinds.
- (ii) Discuss *As-Sabab* as a kind of *al-Hukm al-Waḍ- 'ī*.
- (iii) Mention the kinds of *as-Sabab* and their characteristics.

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UNIT 6: A`L-`AZĪMAH (STRICT LAW), A`R-RUKHṢAH (CONCESSION)

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1. Definition of *al-'Azīmah* and *a`r-Rukhṣah* (Strict Law and Concession)

3.2. Different Ways of Using the term *Rukhṣah*.

3.3 Change of Rule of *a`r-Rukhṣah* to *al-‘Azīmah*

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

The rigours of the obligatory rule of laws (*aḥkām taklīfī*) have a soften influence by *rukḥṣah* (concession) which are the bounties of Allah which should not be rejected. This bounties from the Law-giver is the main focus of this Unit.

3.0 OBJECTIVES

At the end of this Unit you should be able to

Define *al-‘Azīmah* and *a`r-Rukḥṣah* and support your definition with examples

Highlight the different ways of using the term *Rukḥṣah*.

Substantiate how a rule of *a`r-Rukḥṣah* can change to *al-‘Azīmah*.

3.0 MAIN CONTENTS

3.1 Defintion of *al-‘Azīmah* and *a`r-Rukḥṣah*

A rule of law or (*al-ḥukm*) is *‘azīmah* when it is in its primary rigour without reference to any circumstances which may soften its original force or even entirely suspend it. For example

Ṣalāh (prayer) *Zakāt*, the *Hāj*j, *Jihād* etc. which Allah has enjoined upon all *Mukallaf* are classified under '*azīmah*.

A rule of law (*ḥukm*) is a *rukḥṣah* by contrast. Whereas, '*azīmah* is the law in its normal state, *rukḥṣah* embodies the exceptions, if any, that the Lawgiver has granted with a view to bringing facility and its difficult circumstances. For instance, the law which grants concession to traveller to break the fast during the month of Ramaḍān is exception to the norm that requires everyone to fast.

Thus *al-‘azīmah* (Strict law) and *al-rukḥṣah* (concession) are types of *al-ḥukm al-waḍ-ī*.

Self Assessment Exercise

Define *al-‘Azīmah* and support your definition with examples.

Define *a`r-Rukḥṣah* and support your definition with examples

3.2 Different Ways of using the term *Rukḥṣah*.

First, the word is used in constrained circumstances where the prohibited acts will become permissible, e.g. eating of carrion, and drinking of intoxicant. The evidence to this is in the verse of *Qur‘ān* which says:

He has forbidden you only the dead animals, and blood, and the flesh of swine, and that which is slaughtered as a sacrifice for others than Allah. But if one is forced by necessity without willful disobedience nor transgressing due limits then there is

no sin on him. Truly, Allah is Oft-forgiving, most Merciful (Q. 2: 172-173).

The clause: *But if one is forced by necessity, without willful disobedience, nor transgressing due limits, there is no sin on him...* states that if a person is constrained to take any of the aforementioned forbidden, without prejudice, God will forgive him. Similar example is in pronouncement of pagan word under duress and without any intention of heathenism. The person will be forgiven.

This is evidenced by the *Qur'ān* where Allah says:

Whoever disbelieved in Allah after his belief, except who is forced thereto and whose heart is at rest with faith... Q. 16:106).

Secondly, the word *al-rukḥṣah*, is used in reducing the required quantity of an obligatory act. For example ritual prayers are four prostrations (*rak'at*) in *Zuhr*, *Aṣr*, and *'Ishā'i* prayer, when a *Mukallaf* is in normal condition and he is resident. This situation is called *al-'azīmah* because the Lawgiver initially ordained these prayers in this formula. Incidentally, if a *mukallaf* engages in a lawful journey, either for worldly gains or eternal rewards, he is allowed to shorten these prayers into two *raka'āts* respectively. Similarly, in the month of Ramaḍān fast if a *mukallaf* is on journey or in illness, he is allowed to postpone it till another convenient time Allah says:

So whoever of you sights the month he must observe fasts that month, and whoever is ill or on a journey, the same number must

be made up from other days, Allah intends for you ease, and he does not want to make things difficult for you. (Q. 2:185).

These usages of permission are initially known as *a`r-Rukhṣah* in the technical term of Islamic jurists.

Another extensive use of the term is in the usage for all what Allah simplified for Muslim community out of hard obligations of old revelation and ordinances of the past prophets. Repentance by way of killing each others as in the law of prophet Mūsa and invalidity of prayers of Jews except in their cults are some examples.

This is explained in the *Qur`ān* where Allah says:

Our Lord lay not on us a burden like that which you did lay
on those before us (Q. 2:286)

Although the verse is in form of prayer, it is an indication that all the hardships in the previous religions had been easened for Muslims' community.

Finally, although the rule of *rukḥṣah* is applicable when the occasion warrants it in accordance with the given circumstances, a *mukallaḥ* is at option to adhere to the permission or to prefer the *'azīmah* (the strict law) on the matter in question.

The reason why the rule of permission is optional is that all evidences that indicate its proposition are clearly of indifferent nature.

Self Assessment Exercise

Highlight the different ways of using the term *Rukḥṣah*.

3.3 Change of Rule from *a'r-Rukhṣah* to *al-'Azīmah*

Meanwhiloe, rule of *rukḥṣah* which is initially optional can eventually change to act of *al-'azīmah*. Suppose a person is in a constrained condition of hunger in which he has nothing to make him survive rather than carrion, the eating of carrion becomes the only option left for him and it is no longer *rukḥṣah* in this situation. This assertion is based on other evidence in the *Qur'ān* additional to the provision that allows such a person to eat carrion. The evidences are as follows. Allah says: *And make not your own hands contribute to your destruction.* (Q. 2:190). Also, *And kill not yourselves* (Q. 4:29).

This rule gains the consensus of Islamic jurists except in a case of pronouncing heathenish words which no jurist makes a compulsory act.

Self Assessment Exercise

Can a rule of *a'r-Rukḥṣah* change to *al-'Azīmah*? Substantiate.

4.0 CONCLUSION

A rule of law (*al-Hukmu*) is either strict (*azīmah*), or lenient/concessionl (*rukḥṣah*). The rule is strict (*azīmah*) when it lacks circumstances which may soften its original force or suspend it. By contrast *rukḥṣah* rules embody concessions/exceptions that the Law-giver has granted to alleviate difficult circumstances. Both *'azīmah* and *rukḥṣah* are types of *al-Hukmu al-waḍ'ī*. There are different ways of expressing *rukḥṣah*. Finally a rule may change from *rukḥṣah* to *'azīmah* and vice versa.

4.0 SUMMARY

This Unit defines the rules of *al-azīmah* and *a`r-rukḥṣah* (Strict rule and concession) as principles in Islamic Jurisprudent. I analyses the different ways by which rukḥṣah was expressed by the Law-giver; and substantiates situations when rukḥṣah rules can change into ‘azīmah and vice versa.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the cocept of *al-azīmah* and *a`r-rukḥṣah*. Illustrate your answers with examples.

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MODULE 2: SOURCES OF SHARĪ‘AH

Unit 1: The *Manqūlāt* (The Revelation)- *Qur’ān* and *Hadīth*

Unit 2: The ‘*Aqliyyāt* (Reason): 1. *Ij-māu*. (Concensus)

Unit 3: The ‘*Aqliyyāt* (Reason): 2. *Qiyās* (Analogy)

Unit 4: The ‘*Aqliyyāt* (Reason): 3. *Al-Ijtihād* (Exercise of Reasoning)

UNIT 1: THE MANQŪLĀT (REVELATIONS: QUR’ĀN AND HADĪTH).

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Definition of *Tawātur* and *Aḥādī* Transmission of Reports and Their Places in
Validating *Sharī‘ah* Rules.

3.2.1. *Qur’ān* and the Principle of Islamic Jurisprudence.

3.2. 2. *Tawātur al-Qur’ān* (Successive Report of the *Qur’ān*)

3.3. *The Sunnah* and Principles of Establishing *Sharī‘ah* Rules from It.

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

Our discussion in this Module shall centre around the principles of deducting rules from Revelation and Reason sources of *Sharī‘ah* both of which sometimes come under the terminologies *Naql* and *‘Aql* or the *Manqūlāt* and the *‘Aqliyyāt*. In other words, the *Manqūlāt* are the two main primary sources of *Sharī‘ah* which are the Divine Revelation and the Prophetic Traditions. On the other hand, what is termed Reason here are the Secondary sources of *Sharī‘ah* you are already familiar with namely: *Ij-mā‘u*.(Concensus), *Qiyās* (Analogy), *Al-Ijtihād* (Exercise of Reasoning) etc, etc. Our discussion in this Unit begins with the Primary sources.

2.0 OBJECTIVES

At the end of this Unit you should be able to:

- Define *Tawātur* and *Aḥādī* transmission of reports.
- Show the place *Tawātur* and *Aḥādī* transmission occupy in validating *Sharī‘ah* rules.
- Discuss the *Qur‘ān* and the Principle of Islamic Jurisprudence.
- Expatriate upon *Tawātur al-Qur‘ān* (Successive Report of the *Qur‘ān*)
- Elaborate on *the Sunnah* and Principles of Establishing *Sharī‘ah* rules from it.

3.0 MAIN CONTENT

3.1 Definition of *Tawātur* and *Aḥādī* Transmission of Reports and Their Places in Validating Shariah Rules.

Tawātur literally means successive and continuous. Technically, it means, a report which has been transmitted through the first three generations of Muslims by such large number of transmitters as cannot be reasonably expected to agree on falsehood. Any event or evidence transmitted in this manner produces absolute knowledge devoid of conjectures.

The opposite of *tawātur* is *aḥād* (solitary report). Solitary report is a report which was transmitted during the first three generations of Muslims by one or four transmitters only. The *aḥād* transmissions do not hold strong validity for they are by their nature open to suspectability. In other words, *aḥād* is a report transmitted by one or more or two or even more, provided their number falls short of that number required for the *mutawātir* (successive report).

Self Assessment Exercises

- (i) Definition *Tawātur* and *Aḥādī* transmission of reports.
- (ii) Show the place they occupy in validating *Sharī'ah* Rules.

3.2.1. *Qur'ān* and the Principle of Islamic Jurisprudence.

The Qur'ān has been defined as the speech of Allah sent down upon the last Prophet Muḥammad through Angel Jibrīl in its precise meaning and precise wording transmitted by

numerous persons successively (*bi`-t-tawātur*) both verbally and in writing. It is inimitable and uniquely protected by Allah from corruption.

The Book of Allah is the first and principal source of *sharī`ah*, which is closely followed by *Sunnah* of His Messenger. These fundamental sources of the *sharī`ah* are referred to as *nuṣūṣ* or binding ordinances. Information obtained from the *Qur`ān* provides clear cut knowledge (*qaṭi`*). So also is information obtained through *ahadith mutawātir* (recurrent report). Whereas *Aḥād* (isolated report can only provide speculative knowledge) (*ilm ḡannī*).

The primary sources of *Sharī`ah* deal with the permanent and unalterable elements of the *sharī`ah* while the secondary source deals with the dynamic and modifiable aspects of *sharī`ah*.

There are many traditions reported in which the Prophet confirmed the use of *Qur`ān* as the first source of Islamic law. For example when the Prophet appointed Mu`ādh bn Jabal as governor of Yemen, he asked him how he was going to judge if people brought cases to him. Mu`ādh bn Jabal replied that he would consult the Book of Allah for the solution of such problems. If he found answer therein, but if not he would resort to the *Sunnah* of the Messenger of Allah and if he still found no solution, he said, he would not hesitate to use his own *ijtihād* (or exercise of one's reasoning faculty) based on the understanding of the *Qur`ān* and *Sunnah*. The Prophet very much appreciated the answer given by Mu`ādh bn Jabal.

Self Assessment Exercise

Discuss the *Qur`ān* and the Principle of Islamic Jurisprudence.

3.2. 2. *Tawātur al-Qur'ān* (Successive Report of the *Qur'ān*)

The Muslim scholars are in agreement to the effect that the entire text of the *Qur'ān* is *mutawātir* or successively reported. That is, its authenticity is proven by universally accepted testimony. It has been retained both in memory and in written record throughout the generations. Hence, it is necessary for Muslims to abide and work in line with such injunctions whose basis is the *Qur'ān* whose *tawātur* was guaranteed.

On the other hand, the variant readings of some words in a few *Āyahs* (verses), attributed to Abdullah bn Mas'ūd and some other Companions of the Prophet, for example which are not established by *tawātur* is not part of the *Qur'ān*. In the context of penance (*kaffārah*) of a false oath, for example, the standard text provides this to be three days of fasting. But Ibn Mas'ūd's version has it as three consecutive days of fasting. Since the additional element (that is consecutive) in the relevant *āyah* in *sūrah al-mā'idah* (5:92) is not established by *tawātur*, it is not a part of the *Qur'ān* and is therefore of no effect.

The same would apply to other instances of variant readings which is attributed to *Ā'ishah*, the widow of the Prophet concerning the number of breastfeedings which prohibit marriage between the foster sisters and foster male child. *Ā'ishah* limited the suckling to five times.

So also, other variant of readings which are attributed to Abdullah bn Mas'ūd concerning the punishment of theft, and the form of divorce known as *Īlā'* in *sūrah al-mā'idah* (5:38) and *al-baqarah* (2:226) respectively. Since these are only supported by solitary reports (*aḥād*) they do not constitute a part of the *Qur'ān*.

Muslim Scholars differ in opinion concerning the variant readings attributed to the *Qur'ān* whether they are part of *Qur'ān* or not. It is stipulated that the wordings of the Holy *Qur'ān* should be transmitted successively (*tawātur*). Thus, anything that falls short of the above condition of succession of the Qur'anic transmission is not regarded nor considered part of the Holy *Qur'ān*. Such wordings are not used as evidence and not applicable as Islamic injunction. The reason being that these wordings lack authenticity of being the word of Allah. This is the opinion held by the Mālikis school of Law.

Meanwhile, the Shāfi'ī school of law hold the opposite. They hold the opinion that whatever word attributed to the Holy *Qur'ān*, but lacks concurrent (*tawātur*) transmission is not considered a part of the *Qur'ān*. However, its non-concurrent transmission does not prevent it from being a legal evidence that has legal applicability. Thus according to Shāfi'ī and Ḥanafis, the concurrent transmission of the *Qur'ān* is a condition limited only to the reading of the *Qur'ān* and not to the legal ruling. By and large, the proponents of this opinion intend to establish that milk suckling of a foster-male and a foster female five times only prohibit marriage between them. Though, this ruling is established on the basis of unstandardized variant readings. As it is related by A'isha that:

Only ten suckling was prohibited, then abrogated to only five times.

It is in the same vein that the Ḥanafis based their argument on the version of Ibn Mas'ūd in the context of penance (*kaffārah*) of false oath that three consecutive days of fasting is a condition in the observance of the penance. The Hanafis further said if the culprit observes

the fasting on separate days, it will not be sufficient, in other words, the culprit still remains a sinner. This is based on the version of Ibn Mas'ūd which reads:

Then three consecutive days fasting should be observed.

However, the Mālikis refuted this view and said that the additional element (that is, consecutive) is not a part of the Holy *Qur'ān*, because it is not established by *tawātur* and is therefore of no effect.

This is the first sub divisional matters established on the rule of the principles of Islamic Jurisprudence in this line. The rule goes thus, is the concurrent transmission a condition in establishing whether a context is a part of *Qur'ān* or not? The Muslim Jurists unanimously agreed that concurrent transmission (*tawātur*) is a condition in all the context of the *Qur'ān*. Thus, a concurrence of the *Qur'ān* embraces both the concurrent readings and their applicability according to the Mālikis.

Meanwhile, the Shāfi'ī only limit concurrent transmission to reading and not in the establishment of Islamic decision. In other words, according to Shāfi'ī, the non-concurrent transmission of the Qur'anic wordings are applicable in the establishment of legal ruling. According to them, every *āyah* in the *Qur'ān* is evidence in two ways, both in its reading and its applicability for legal ruling.

Self Assessment Exercise

Expatriate upon *Tawātur al-Qur'ān*. Illustrate your points with examples.

3.3 *The Sunnah* and Principles of Establishing Shariah Rules from It.

Sunnah, literally connotes among other meaning, mode, way or conduct of life whether it is commendable or blameworthy.

The Traditionists defined *Sunnah* as “What is reported from the Prophet of his sayings, deeds, silent approval which are applicable to an established law”.

A good example of such report is: *Lā waṣīyyata li`l-wārith, there is no bequest for a heir.*

Sunnah is of various kinds. It may be *qawliyyah* – a saying of the Prophet which has a bearing on a religious question, *fi`liyyah* – an action or a practice of his or *taqrīriyyah* – his silent approval of the action or practice of another.

The Conditions necessary to be fulfilled in establishing Islamic law or jurisprudence matters from Hadith as Second primary source and supplement to the *Qur`ān* is:

that the transmission or the legal evidence upon which the Islamic legal rule is to be established should be of an authentic chain traceable to the Lawgiver, devoid of any defect neither from the text (*matn*) nor from the chain (*Isnād*) point of views. Thus the text (*matn*) is always preceded by a chain of transmitters (*isnād*) which is intended to guarantee its authenticity.

In other words information obtained through *ahadith mutawātir* (successive report) provides clear cut knowledge (*ilm qaṭ`*) whereas *ahādīth aḥādī* (isolated report can only provide speculative knowledge) (*ilm ḡannī*).

Self Assessment Exercise

Elaborate on the *Sunnah* and Principles of Establishing *Sharī'ah* rules from It.

4.0 CONCLUSION

The Conditions necessary to be fulfilled in establishing Islamic law or jurisprudence matters from its primary sources, i.e. the *Qur'ān* and *Hadīth* are:

- (2) That the transmitted source or the legal evidence upon which the Islamic legal rule is to be established should be an authentic chain of transmission traceable to the Lawgiver, devoid of any defect neither from the text (*matn*) nor transmission (*riwāyah*) point of views. Thus the text (*matn*) is always preceded by a chain of transmitters (*isnād*) which is intended to guarantee its authenticity.
- (3) The meaning of the primary source upon which the Islamic legal rule is intended to be established should be explicit, clear and unambiguous.
- (4) The Islamic legal rule should have continuity not repealed but last forever.
- (5) The primary source should enjoy preference over whatever text that contradicts it. If it (the primary source) contradicts other text more reliable and stronger than it is or having equal meaning concerning the intended rule to be established upon it, then such source cannot be said to be good enough to be used as an evidence of legal proof.

5.0 SUMMARY

The Unit identifies and defines the primary sources of *sharī'ah* and divides them into two types namely: *manqūlāt* (the transmitted/revealed sources) and *'aqliyāt* (exercise of reasoning sources).

It emphasizes *tawātur* as major principle for the validation of jurisprudential rules derived from them. It also emphasizes the point that once the rules derived are validated they become binding.

The conditions laid down by the *Usūlīs* (Islamic theorists) for the authentication of rules derived from the primary sources of *sharī‘ah* which are the *Qur’ān* and *Hadīth* constitute the focus of the concluding part of the Unit.

6.0 TUTOR-MARKED ASSIGNMENT

- (i) Define the following (i) *Tawātur* (ii) *Ahād* (iii) *al-Qur’ān* (iv) *Sunnah*
- (ii) Discuss the role of *Tawātur* and *Ahādī* transmission in validating Jurisprudential rules form the *Qur’ān* and *Hadīth*
- (iii) Give relevant examples for your submission.

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UNIT 2: THE ‘AQLIYĀT (REASON : IJMĀ’ : CONSENSUS OF OPINIONS)

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Definition and Basis of *al-Ijmā’*

3.2 Divisions of *Ijmā’*

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References and Further Reading

1.0 INTRODUCTION

The two primary sources of *Sharī’ah* are the *Qur’ān* and the *Sunnah* as presented in the foregoing Units One of this Module. In the following two units we shall discuss two other sources of the Islamic law viz. *Ijmā’* and *al-Qiyās*. As the final sanction for all intellectual activities in respect of the development of *Sharī’ah* comes from no where else but the *Qur’ān* and *Sunnah* of the Holy Prophet these two instruments are regarded as secondary deriving from the legal stipulations from the two primary sources. This unit presents to you an examination of *al-Ijmā’* as one of the two secondary sources of Islamic law to you.

2.0 OBJECTIVE

At the end of this Unit you are expected to be able to

- Define *al-Ijmā'* and give its basis
- Highlight the divisions of *al-Ijmā'*
- Expatiate upon application of *al-Ijmā'* as a source of the *Sharī'ah*.

3.0 MAIN CONTENT

3.1 Definition and Basis of *al-Ijmā'*

Al-Ijmā' is the consensus of juristic opinions of the learned scholars of the Ummah after the death of the Messenger of Allah. *Ijmā'* can also be defined as the consensus of the opinion of the Companions of the prophet (*Ṣaḥābah*) and the agreement reached on the decisions taken by the learned Muftis or Jurists on various Islamic matters.

Almighty Allah Himself encourages seeking the opinions of others on religious matters as is said in the Holy *Qur'ān*:

It is through the mercy of Allah that you are lenient with them. If you are to be hard-hearted, they would have deserted you: pardon them and seek forgiveness for them and seek their opinions in the matters; whenever you decide upon something. Have believe in Allah surely Allah loves those that rely on Him.

Almighty Allah has also said:

Those who answer the call of their Lord, and establish regular prayer
(Salat) and whose affairs are a matter of counsel and spend out of
what we bestow on them for sustenance.

Prophet Muhammad (SAW) also supported the process of *al-Ijmā'* when he says in the *Hadīth*: “***My people would never agree on whoever leads them astray***”

The practice of *al-Ijmā'* can be traced back to the days of the Companions of the Prophet as can be seen from the following examples. Almighty Allah does not state the type of punishment that should be applied to one who drinks alcohol. But the agreement was reached by the consensus of opinions of the *Ṣaḥābah* when Caliph Ali bn Abī Ṭālib said: “he who drinks, get drunk, he who gets drunk, raves; he who raves, accuses people falsely; and he who accuses people falsely should be given eighty strokes of cane according to the injunction of the Holy *Qur'ān*.”

Almighty Allah has said:

“Those that accuse the innocent women falsely, and they do not bring forth four witnesses, flog them eighty strokes of cane and do not accept their witnesses, they are the wrong doers”

Al-Ijmā' owes its origin to the following *Qur'ānic* verses in *Sūrah al-Nisāi*

“*But whoso makes a breach with the Messenger after the guidance*

has come clear to him, and follows a way other than that becoming to men of faith. We shall leave him over to what he has chosen and we shall land him in the fire of hell- an evil refuge”

“O believers, obey Allah and obey Messenger and those in authority among you. If you should quarrel on anything, refer it to Allah and the Messenger”

Consultation (*Shūrā*) and the use of juristic reason (*Ijtihād*) are normal preliminaries for arriving at a binding *Ijmā* ‘. The Rightly guided Caliphs always consulted the *Ṣahābah* whenever a novel issue arose. The caliphate of Abu Bakr was based and run on the process of the *Ṣahābah*.

The following few examples are based on such process of *al-Ijmā* ‘. The validity of a contract for the purchase of goods yet to be manufactured (‘*aqd al-Istisna*’) is based on an *al-Ijmā* ‘.

The normal rule is that a sale of non-existence goods is not valid because of uncertainty. The juristic consensus was aiming at providing a practical solution. In the field of inheritance, for example, it was agreed that if a person is predeceased by his father, then the grandfather participates in the inheritance of the estate with the son taking the share of the father.

It was also agreed that the grandfather is entitled to a sixth of the estate of the propositus. The *Ijmā'* on this issue, is based on a descision attributed by al-Mughirah Ibn Shu'bah (d. 50 A.H.) to the Prophet (SAW).

In the field of family law it was agreed that since the *Qur'ān* prohibits marriage with mothers and daughters then grandmothers and grand daughters (however remoted) by the same token fall within the prohibited degrees.

The minimum period of gestation is six months according to all *fiqh* schools, but an example of lack of *al-Ijmā'* is in fact the disagreement over the maximum period of gestation.

During the caliphate of °Umar b. Al-Khaṭṭāb, Muslims conquered Syria which had a large expanse of fertile land being cultivated. In line with the stipulation in the *Qur'ān* 8:41 and the practice of the Prophet, in most cases the Muslim soldiers demanded that the land be distributed among them. The Caliph sensed the dangers in doing that. In the first instance, the distance between Medina, the capital of the Government, and Syria, was so long that the settlement of the soldiers in Syria would lead to their relocation. Secondly, having settled for cultivating the land, the soldiers' attention would be diverted from defending Islam and the Islamic Empire against external aggression. More importantly, Medina would lose the services of gallant soldiers and accomplished intellectuals who had been assets and pillars of the city.

In the end, the Caliph invited the generality of people versed in the Islamic Law to consider the problem dispassionately. In the end, they took the unanimous

decision that the land be left in the hands of the original owners. In return, they would pay rents the proceeds from which would be used to compensate the soldiers and provide amenities for all the citizens. As from that time, *Kharāj*, rent paid on using Government land, became a source of revenues to the Islamic Government. Thus, he charged ʿUthmān b. Hanīf with the responsibility of administering the conquered land of ʿIrāq, as well as of other places.

The example cited above illustrates how the explanation of the *Qurʾān* and its spirit can influence personal reasoning. It is true that the soldiers, according to the *Qurʾān*, had the right to share the four fifths of booties especially at the time of the Prophet because of their precarious financial condition and proximity of the territories subdued to the seat of the Empire.

Having the spirit of the Law rather than the text to guide one's reasoning also comes into play here. Despite the text of the verse and the Prophet's tradition, ʿUmar has chosen to consider the far implications and the welfare of the society which both the *Qurʾān* and *Sunnah* aim to guarantee. Centuries after that bold decision has been taken, it is to be noted that events so far have proved him right. The territories still remain in the hands of Muslims to date.

Thus, the consensus of the *ʿUlamā (al-Ijmāʿ)* must be based on the Book of Allah, the instructions of the prophet (*Qawlu Rasūl*), the actions and demonstrations of the prophet (*Fi'l Rasūl*). But some actions of the prophet can be of a very special

nature which can not be applicable to an ordinary man. Lastly, the consensus must be based on preachings and speeches of the prophet (*Taqrīrāt al-Rasūl*).

Self Assessment Exercise

- Define *al-Ijmā'* and give its basis

3.2 Divisions of *Ijmā'*

The *Ijmā'* could be divided into three broad categories: *Ijmā' Qawlī* (the verbal consensus of opinion), *Ijmā' al-Fi'l* (consensus of opinion on an action) and *Ijmā' Sukūṭī* (silent approval).

The *Ijmā'* could also be sub-divided into two broad categories: *Ijmā' al-Azīmah* (the regular consensus of opinion) and *Ijmā' Rukhṣah* (the irregular consensus of opinion).

As regards the verbal consensus of opinion, if an issue is raised and all the Jurists assent to it by voicing out their approval, the consensus of opinion is regular. Nonetheless both of them are valid in Islam Law system.

As regards the practical *Ijmā'*, if a Jurist does something and none of the other Jurists challenges him, the *Ijmā'* is regular; but if a Jurist does something, and one or more Jurists question him, the *Ijmā'* is irregular. Nonetheless, both of them are valid as far as Islamic law is concerned.

During the time of Imam Malik and Abu Hanifah, the eligibility of Jurists who could sanction the *Ijmā'* became a matter of controversy. According to some Jurists, it is only the companions of the prophet who were in position to sanction the *Ijmā'*. According the

Shites, however, the *Ijmā'* can only be sanctioned by *Ahlu 'l-Bayt* (the people of the house of the prophet), that is the descendants of Ali and Fatimah, the daughter of the prophet.

According to Imam Malik, the *Ijmā'* can only be sanctioned by the Jurists of Medinah. But as far as the Hanafi school of thought is concerned, the *Ijmā'* can be sanctioned by any qualified jurist irrespective of his geographical place of abode or the religious sect that he belongs to.

The Jurists also disagreed amongst themselves as to the number of the Jurists who can ratify the *Ijmā'*. According to Imams Malik and Abu Hanifa, the number must not necessarily be very great. Some Jurists put the number to three Jurists while some others say that two will suffice the purpose. The Jurist also say that any *Ijmā'* sanctioned by the companions of the prophet can only be repealed by no one else but by the Jurists who lived during their period. But any *Ijmā'* sanctioned by the Jurists who are not the companions of the prophet can be repealed by the Jurists of their generations as well as the jurists of their generation after them are empowered to do so because people consider their opinion as of the same weight in the Islamic legal system.

The jurists say that any *Ijmā'* that has to do with some marginal issue on *Ibādah* (religious worship), must be ratified by every member of the community that is concerned. If a layman says that he does not agree to a matter raised, it must be accepted as invalid. But, on the other hand, if the *Ijmā'* has anything to do with *Mu'āmalāt* which need thorough reasoning, the layman's point of view must not be considered.

The Maliki school considers that the established practice of the people of Madinah (amāl ahl al-Madīnah) provided valid *Ijmā'*. But other schools disagreed on this point. Some Hanbalis (as well as some other Jurists) accept only the agreement of the four Rashidun Caliphs as the only binding *Ijmā'*.

Similarly, other Jurists consider the Fatwas (Jurisdictional opinions and decisions) of the *Ṣahābah* as binding *Ijmā'* for the Ummah. To the Shi'ites, however, the binding *Ijmā'* is that of ahl al-Bait, as well have seen before. Some Hanbali scholars are of the view that *Ijmā'* is not binding if reached more than one generation after the prophet's death, because it is nearly impossible to obtain the express agreement of every single qualified Jurist after that stage of the spread of Islam.

Most jurists have agreed that only an express *Ijmā'* is binding. But the Hanafi Jurists consider the silence of the jurists with regard to the vocal expression of a particular opinion as an effective implied agreement provide that (a) there is an evidence that the silent Jurist were really well acquainted with the issue (b) a reasonable period of time passed after the view was expressed to enable other Jurists to devote sufficient time for research and analysis. If both conditions are met, say the Hanafi Jurists, silence of Jurists amounts to an approval.

No matter the rank of the 'Ulamā' and their thorough deliberations, no amount of *Ijmā'* can abrogate a text (nass) i.e. a provision laid down in the *Qur'ān* and *Sunnah* of the prophet. It should also be recommended that no *Ijmā'* was reached or could have been

reached except after the death of the Holy Prophet, that is after all the texts were revealed or stated, for *Ijmā'* is based on always on the interpretations of the *Qur'ān* and the *Sunnah*.

If any *Ijmā'* is soundly founded on the texts of the *Qur'ān* and the *Sunnah* it can not be repealed by any subsequent consensus; but if the *Ijma*, is merely based on public interest (*Maṣāliḥ Mursalah*), it may be repealed if the public welfare so requires.

In the fourth century of Hijrah era that is the tenth century A.D., some Muslim Jurists took a passive attitude and said that the *Ijtihād* and *Tafsīr* had been exhaustively accomplished by the early scholars of peerless ability.

Later, in the seventh century of Hijrah (the middle of the 13th century A.D.), a great catastrophe struck the Muslim world and the Tartars, headed by Holaku Khan the grand son of Chengis Khan, captured Baghdad and killed the Abbasid Caliph al-Musta'sim on 1258 A.D. the Mumluks who overthrew the Ayyubids in Egypt in 1205 A.D. fought the central Asian invaders and defeated the Mongols on more than one occasion, starting their campaign as early as 1260 A.D. under al-Sultān Nāṣir, a former army commander under the Ayyubids, that the Tartars were finally defeated. During the period when Baghdad was under the mercy of the Nomadic warriors of central Asia, the Jurist in Iraq reached a wrong consensus to close the door of *Ijtihād* which they had not practised much anyway since the tenth century A.D. No one, in fact, had the right to put a stop to the process of *Ijtihād*.

In short, *Ijmā'* is *Hujjah* for all the four schools of Islamic Jurisprudence.

Imam Shafi' has fully discussed *Ijmā'* as one of the sources of *Sharī'ah* in his famous *Risālah*.

The following discourse of al-Shafi'ī throws enough light on *Ijmā'*. He says:

“Someone asked me ‘Do you assert, with others, that the consensus of the *Ulamā'* should always be based on an established *Sunnah* even if it were related (on the authority of the prophet)?” he replied

“That on which the Ulama' are agreed and which, as they assert, was related from the messenger of Allah, that is so. As to that which they may or may not relate as a tradition from the prophet, we can not consider it as related on the authority of the Holy prophet because one may relate only what he has heard, for no one is permitted to relate (on the authority of the prophet) information which may or may not be true. So we accept the decision of the Ulama' because we have to obey their authority, and we know that wherever there are Sunnahs of the Prophet, the Ulama' can not be ignorant of them, although it is possible that some of them are, and we know that Ulama' can neither agree on anything contrary to the Sunnah of the Prophet nor on error”.

Some may ask: Is there any evidence in support of what you hold?

Imam Shafi' replied: Sufyan (b. Uyayna) told us from 'Abd al-Malik b. Umayr from Abd al-Rahman b. Abd Allah B. Masu'd from his father, who said: The messenger of Allah said: “Allah will grant prosperity to His servant who hears my words, remembers them, guards them and hands them on. Many a transmitter of law is no Lawyer himself, and many may transmit law to others who are more versed in the law than they, etc. ”

Self Assessment Exercise

- Highlight the divisions of *al-Ijmā'*
- Expatiate upon application of *al-Ijmā'* as a source of the *Sharī'ah*.

4.0 CONCLUSION

You have learnt in this Unit the definition of *Ijmā'* consensus of opinions, as a source of the *Sharī'ah*, based on the *Qur'ān* and the *Sunnah*. You have learnt how it was practiced at the time of the Prophet, his successors and in the following generations known technically as *Tābi'ūn* (Followers) or *Tābi'ū Tābi'in* (Followers of the Followers) as the case may be. It has also been explained to you how the peculiarities of each centre of learning in the Islamic Empire influenced the concept and practice of *Ijmā'* in each with minor differences here and there.

5.0 SUMMARY

Ijmā', Consensus of Opinions, is the third source of the *Sharī'ah*. Its legitimacy is based on the *Qur'ān* and *Sunnah*. Its application which started informally at the time of the Prophet assumed larger dimensions in the following generations. This was in response to new challenges that arose at the time. *Ijmā'* can be in form of *Qawl* (Speech) *Fi'l* (Practice) and *Sukūt* (Tacit Approval).

It can also be of the whole community, in which case it is binding on all Muslims, or of the learned alone when it relates to technicalities and difference of opinions is allowed.

The concept of *Ijmāʿ* and its application differed from one centre of learning to another especially in relation to details.

TUTOR-MARKED ASSIGNMENT

- How can you prove that the use of *Ijmāʿ* as a source of the *Sharīʿah* is based on the *Qurʾān* and *Sunnah*.
- Comment on the application of *Ijmāʿ* during the time of the Companions.
- *Ijmāʿ* arose from the need to harmonise the divergent opinions of scholars. Explain the reasons why the scholars had to disagree with appropriate examples.

7.0 REFERENCES/FURTHER READING

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UNIT 3: REASON 2: (*QIYĀS* -(ANALOGICAL DEDUCTION)

CONTENTS

1.0 Introduction

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1.0 INTRODUCTION

Unit three presented *Ijmā* 'to you as one of the two secondary sources of *Sharī'ah* - the Islamic law. Its definition, basis, kinds and examples were all expatiated upon for your digest. This unit will focus on *Qiyās* (Analogical Deduction) which is the second of the secondary sources of the Islamic law. To be specific, the unit will present the definition of *Qiyās*, its origin, evolution and application, and contemporary issues relating to it. The legality of *Qiyās* will also be established on the basis of the *Qur'ān* and precedents from the early Muslims.

2.0 OBJECTIVE

At the end of this unit, you are expected to be able to

- Define *Qiyās*
- Give the variant views on the application of *Qiyās* as source of *Sharī'ah*
- Highlight the conditions governing validity of *Qiyās*
- Illustrate application of *Qiyās* with samples

3.1 Definition of *Qiyās*

As an Arabic word, *Qiyās* is a noun derived from the verb “*qāsa*”, meaning he compared, consider the extent, magnitude, depth, etc of something, he determined the extent ... etc. *Qiyās*, therefore, means measurement, measure, dimension, scale, relation, comparison, etc.

As a technical term, *Qiyās* is first met with in the letter of Caliph ʿUmar to Abū Mūsā al-Ashʿarī. Among other things, the Caliph gave instructions that the Governor should learn the “parallels and precedents’ (of legal cases) and then ‘weigh up’ the cases (*qis al-Umūr*), deciding what in his judgement would be the most pleasing to God and nearest to the truth”. Apparently, the Caliph meant that the Governor should exercise personal reasoning in judging cases which are not provided for in the *Qurʾān* and *Sunnah*. To avoid misguided judgments, he should use unanimous decisions or precedents as the basis of his decisions in this respect.

Perhaps, it will be pertinent to produce here the definition derivable from *Sharī‘ah* – the Islamic Law by R.I. Doi. According to him *Al-Qiyās* could be defined in Islamic theological parlance as analogy, or analogical deduction. In other words, *al-Qiyās* is the legal principle introduced in order to arrive at a logical conclusion of a certain law on a certain issue that has to do with the welfare of the Muslims. In exercising this, however, it must be based on *Qur‘ān*, *Sunnah* and *Ijmā‘*.

3.2 Variant views on the application of *Qiyās* as source of *Sharī‘ah*.

Qiyās was introduced as a legal principle by Imam Abū Hanīfah, the founder of the Hanafī school in Iraq. The reason why he introduced it was not unconnected with the intention of curbing the excessive thinking and digression of the people from the Islamic legal point.

During the period of the Abbasids, people engaged themselves in reading various text books on logical philosophy, etymology, linguistics, literatures of various places, foreign text books, which to some extent tended to corrupt their minds and lead them astray. They wanted to apply what they had studied in these foreign text books to Islamic Jurisprudence. Many new Muslim in far away lands had brought with them their philosophical outlook, their culture and even some religious and legal notions in the fold of Islam. Abū Hanīfah introduced *Qiyās* as a measure to curb the excessive thinking and to keep them on check.

However, the Mutazilites like Ibrahim bn Sayyar, and the scholars of Zāhirī school including Ibn Hazm of Andalusia, were among Jurists who opposed the use of *Qiyās*.

In this regard, there are scholars and Jurists who may be termed as anti-*Qiyās* and pro-*Qiyās*. Each and everyone of them brought forth evidence to support his stand.

The following are some of the reasons put forward for rejecting it.

i. The notion that the *Qur'ān* is complete and covers all the areas of human need. The *Qur'ān* itself says:

...And We have sent down to you (i.e. Prophet Muhammad) the Book explaining all things, a Guide, a Mercy and Glad Tidings to Muslims.

... Nothing have We omitted from the Book ... (*Qur'ān* 6:38)

The argument here is that having recourse to *Qiyās* despite the claim made by the *Qur'ān* that it is all-encompassing is to deny the completion, perfection and comprehensiveness of the holy scripture. *Qiyās*, according to this line of thought, is therefore, unnecessary.

ii. The alleged prohibition of *Qiyās* by the Prophet as shown in this *Hadīth*:

The affairs of the sons of Israel have continued to prosper until there multiplied among them the children of the war captives, for these have measured (*qāsū*) what did not exist on the basis of what did exist, and so they have erred and led others into error.

In other words, the downfall of the Israelites was as a result of the “sin” of analogical reasoning committed by those who were not of the thorough Israel stock.

This is another way of saying that *Qiyās* is such an evil that no well-bred person will ever attempt, and that it leads astray.

iii. Difficulty in identifying the *‘Illah* (effective cause):

As the application of *Qiyās* is based on identifying the effective cause (*‘illah*) of the revelation so as to use it to assess and determine the course of handling the problem on hand in form of analogy, it is argued that it is very difficult, if not impossible, to know the causes of the texts especially where they are not explicitly declared. This argument, based on reason, goes further to say that man does not rely on his thought or reason to worship Allah. Indeed, many of the rites may appear unreasonable. If this is the case, on what premises is *Qiyās* based?

In their response to the above, the proponents of *Qiyās* say that:

i. The apparent support of the *Qur’ān* for the use of reasoning:

The *Qur’ān* supports the practice of *Qiyās* thus:

... consider, oh you possessors of sight”

Other verses in the *Qur’ān* where Allah addresses those who reflect (*yatafakkarūn*) or understand (*ya^cqilūn*) as in 10:24 and 30:28 respectively, are also cited in this respect. In effect, the completion of the *Qur’ān* is in the sense of providing guiding principles potentially which the jurists will strive to understand, interpret and apply in the prevailing circumstances. Thus, *Qiyās* is solidly based on the *Qur’ān* as the scripture urges Muslims to reflect, reason and exert themselves to understand.

ii. The support of the *Sunnah for the use of reasoning*: So many Ḥadīths and practices of the Companions support the practice of *Qiyās*. For instance, the Prophet was pleased to learn from Mu^ʿadh bn Jabal, whom he had sent to Yeman, that he would use his personal opinion to judge cases in the absence of guidance from the *Qurʾān* and *Sunnah*. Showing his satisfaction, the Prophet said:

Thanks to God that He has directed the delegate of His prophet
to that opinion in which the Prophet of God finds pleasure.

When Abū Mūsā was sent to the same place, he was instructed not to hesitate to use his personal opinion (*raʾy*) to judge cases if the *Qurʾān* and *Sunnah* did not give necessary information. Companions are also known to have used *Qiyās* to decide many cases after the Prophet. Some of such cases are the election of Caliph to succeed the Prophet and determining the penalty for drinking intoxicants (*Khamr*). With respect to the latter, ^ʿAlī is said to have reasoned.

“When one drinks he gets drunk; and when he gets drunk,
he raves; and when he raves, he accuses falsely”.

That was how the same penalty was fixed for drunkenness and false accusation of infidelity.

iii. The use of probability instead of exact facts when necessary: Inability to understand or know the effective cause (*ʿillah*) of revelation does not necessarily mean that *Qiyās* cannot be based on it. In that case, one has to base one’s action on what is most probable and “probability is sufficient for purposes of conduct”. The opponents

are queried for using *Qiyās* in determining the *Qiblah*, the direction of the *Ka'bah* which they should face in prayer. They are also challenged for using *Qiyās* to determine the amount of compensation for property destroyed. Since the property is already destroyed, there is no basis for determining its exact worth.

The controversy above notwithstanding, *Qiyās* is recognized as a source of the *Shari'āh* by the overwhelming majority of the jurists, with the exception of groups like the Mu'tazilites who cannot even be exonerated from it in practice.

Perhaps, it may serve a good purpose here to make some observations on the arguments put forward by the opponents and proponents of *Qiyās*. It is an established fact that the *Qur'ān* states and is believed to have covered all the areas of man's needs, but this is only by providing the guiding principles. If this argument is not faulty, it threatens the acceptance of all other recognized sources of the Law such as the *Sunnah* and *Ijmā'*. Contrary to this, it is generally known that without these additional and supplementary sources, the whole of the *Shari'āh* would be out of tune with the practical needs of man particularly in the light of the dynamic nature of man's life. That is why the Prophet and the Companions could not but encourage and instruct that *Qiyās* and other forms of *Ijtihād* should be used in response to the dictates of circumstances.

Self Assessment Exercise

Examine the stand taken by both the anti-Qiyas and pro-Qiyas elements on its application as a source of Islamic law.

3.3 Conditions Governing validity of *Qiyās*

Many efforts have been made to ensure proper application of *Qiyās* and to avoid its abuse. Thus, certain guidelines were laid down specifying the conditions to be fulfilled before *Qiyās* can be deemed to have taken place. The rules are elaborate and different, somewhat, from one school of thought to another. The following, however, is summary representing the views accepted by the generality of the jurists:

i. Applicability to general cases as against isolated cases: *Qiyās* must be based on a stipulation or prescription that is general (*‘āmm*), and not of special (*Khass*), application. There are many legislations in the *Qur’ān* and *Sunnah* relating to the various aspects of life which do not apply to every Dick and Harry. An example that readily comes to mind here is the special allowance given to the Prophet in the *Qur’ān* to exceed the maximum number of four wives and to be exempted from some other laws applicable to marriage. The *Qur’ān* specifically mentions that “This is only for you, and not for other believers” (*Qur’ān* 33:50). No caliph or any Muslim ruler, no matter how highly placed, can therefore justify failure to comply with the general rules regulating marriage in Islam on the basis of the special allowance to the Prophet by analogical deduction. Another example is that of combining the *Zuhr* and *‘Aṣr* prayers at *‘Arafāt*, and the *Maghrib* and *‘Ishā’* at Muzdalifah, by pilgrims while on *Hajj*. This practice is compulsory on the special occasion of pilgrimage which cannot be extended to any other one. Ordinarily, combination of prayers (*Salawāt*) is a concession or allowance which one may take the advantage of or otherwise, if one is under the condition to enjoy it.

ii. The cause (*‘illah*) must be known and understood: Justification for analogy is based on the premise that there is an operative cause common to the original case and the one on hand requiring a solution. Before the question of being common or otherwise arises, it must be ascertained that the cause is clearly identified and thoroughly understood. For instance, the *Qur’ān* 5:94 appears to state that the cause for prohibiting intoxicants and gambling is, among other things, that Satan uses them to set those involved in them against one another and prevent them from remembering Allah and observing *Ṣalāt*. This is understood and supported by experience. This injunction can therefore be used for analogy to prohibit anything that may do the same harm as mentioned above. On the other hand, the reason for having a particular number of Rak‘ahs for one *Ṣalāt* and the requirement to read aloud or silently is not given. Thus, these practices cannot be used as a basis for analogy.

iii. Basing the decision on the *Qur’ān*, Ḥadīth or *Ijmā‘*: the *Sharī‘ah* principle *Aṣl*, being the precedent, must be based on an express injunction of the *Qur’ān*, authentic *Ḥadīth* or popular *Ijmā‘*. Any previous case not decided according to these sources of the *Sharī‘ah* is not suitable as a basis for any analogy. This is necessary to avoid digressing from the course of the *Sharī‘ah* in favour of one’s whims and caprices.

iv. The decision arrived at as a result of analogy must not be contradictory to the *Qur’ān* and *Ḥadīth*. The rationale behind the use of *Qiyās* is to be guided by the *Qur’ān* and *Sunnah* in deciding new cases that do not directly come under any of the injunctions. Thus, the spirit of the *Sharī‘ah* should guide the decision. Except something goes wrong,

the decision eventually arrived at should not run counter to the principles laid in the *Qur'ān* or *Ḥadīth*. If it does, the analogy is null and void, and is of no effect.

To conclude with, it would be observed that these conditions were laid down quite a long time ago when the challenges were different from what we have at present. The world is changing everyday. It is necessary to have a critical look at these conditions and see if they can satisfy the modern needs. If not, further *Ijtihād* has to be exercised to bring them up to date. The ultimate conclusion is most likely to be in favour of reopening the gate of *Ijtihād* erroneously believed to have been closed for centuries in certain quarters.

Self Assessment Exercise

Discuss the conditions governing validity of the application of *qiyās* as a source of *Sharī'ah*.

3.4 Examples of *Qiyās*

During the life time of the companions of the prophet they arrived at various decisions on analogical deductions. As for example on the punishment that should be given to a drunkard Ali bn Abī Ṭālib said: **“he who drinks, gets drunk, he who gets drunk, raves; he who raves, accuses people falsely; and he who accuses people falsely should be given eighty strokes of cane”**.

From all that has been said so far, we can infer that there is nothing wrong in using al-*Qiyās* in deriving a logical conclusion in Islamic law in as much as that conclusion does not go against the injunctions of the Holy *Qur'ān* or the *Sunnah* of the prophet.

Another interesting example of analogical deduction is that of the *Qiyās* and Ijtihād by ‘Umar, the second Caliph. He asked the prophet whether a kiss during the fast vitiates the fast even though no organism is reached. The prophet posed a question: “Does rinsing ones mouth vitiate the fast?” Umar replied “No, it was alright to do so”. So the prophet indicated that the fast is similarly not vitiated by a kiss if it is not accompanied by an orgasm.

Similarly, when a Muslim breaks his fast during the Ramadan intentionally, he is obliged to expiate for it in the following manner:

- (a) Manumitting a slave;
- (b) Fasting for two months consecutively in lieu of manumission;
- (c) If his health will not stand 2 months fasting, then he must feed 60 paupers

Another example of *Qiyās* is provided in the case of Bedouin who had a sexual intercourse with his wife during the time of fasting. He went to the prophet and confessed of his sin. The prophet told him that he should give a Kafarah (expiation). The ‘*illah* (effective cause for extending a rule by analogy) was deliberate breaking of fast. Kaffarah (expiation) becomes incumbent upon the defaulter.

Imam Mālik has also given a verdict issued on *Qiyās* by a remarriage of the wife of a missing person after the court has issued a decree deeming him dead, although he subsequently appears, with the remarriage of a divorced wife who has been recalled by her husband into the matrimonial home bond but who has remarried because the recall

was not communicated to her. In both cases the wife observes *Iddah* of death in the first case and the 'Iddah of *Ṭalāq* in the second case. In both cases the woman enters into the second marriage in good faith. Sayyidna Umar had given a *fatwa* that in the case of a woman who was not made aware of the recall becomes the lawful wife of the new husband. Imam Malik said the same applies in the case of the former wife of the missing person as she becomes the legal wife of the new husband.

The prophet was asked by a woman whether she could perform the Hajj on behalf of her aged father. The prophet replied in affirmative just as she may discharge on his behalf a pecuniary debt.

Self Assessment Exercise

Reiterate the above examples to justify application of *Qiyās* as a source of *Sharī'ah*

3.5 Kinds of *Qiyās*

There are two types of al-*Qiyās*: (a) *al-Qiyās al-Jaliyy* (the transparent *Qiyās*) and (b) *al-Qiyās al-Khafiyy* (the hidden *Qiyās*)

With regard to *Qiyās Jaliyy*, alcohol is forbidden on the grounds of its being intoxicant, other new intoxicants can also be equally forbidden in Islam based on this reason.

As regards the *al-Qiyās al-Khafiyy*, Almighty Allah asks us to give out *Zakāt*. It was the prophet who explained how it should be given out. He said among other things, that one goat must be given out as *Zakāt* on every forty goats. Giving a poor man a goat will do him little or no use. Therefore, we are allowed to sell that goat and give him the money. He would appreciate perhaps the money more than he would appreciate the goat.

The *Shī'ah* sect like the *Ithnā 'Ashariyyah* (the twelvers), the Uṣūlīs and the Ibādīte (Kharijite sect) employ the terms *'aql* and *ra'y* for the same concept of *Qiyās*.

4.0 CONCLUSION

In this Unit, you have learnt the definition, importance and basis of *Qiyās* as one of the sources of the *Sharī'ah*. You have also been taught the various arguments in favour or against its application as a source of the Islamic Law. So also you have been introduced to the conditions to be satisfied before *Qiyās* is understood to have been properly carried out and the need to review the conditions in view of the modern dispensation with a view to ensuring that the *Sharī'ah* practices keep pace with the contemporary situation.

5.0 SUMMARY

Qiyās, analogical reasoning, is the fourth source of the Islamic Law. Its legality is based on the numerous verses of the *Qur'ān* that urge Muslims to reflect especially on the Book to understand and apply its teaching appropriately. There are also sayings and deeds of the Prophet and Companions that legitimize the use of *Qiyās* as a source of the *Sharī'ah*. To ensure that it is not abused, certain conditions are required to be satisfied.

Some of them are:

- i) basing it on verses and Ḥadīths that are of general application,
- ii) proper understanding of the spirit and motive of the verses and/or Ḥadīths.
- iii) avoiding using *Qiyās* as the basis for *Qiyās* and
- iv) ensuring that the final decision does not contradict the principles of Islam.

6.0 TUTOR-MARKED ASSIGNMENT

- Define *Qiyās* justifying its application as a source of the *Shari'ah* in the light of the *Qur'ān* and *Sunnah*. Cite cases to illustrate your answer.
- Critically assess the views of the anti-*Qiyās* and pro-*Qiyās* schools and then two kinds of *Qiyās*. Discuss the conditions guiding the application of *Qiyās*.

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UNIT 4: REASON 3 (AL-IJTIHĀD – EXERCISE OF REASONING)

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Definition of the Term: *al-Ijtihād*

3.2 Conditions under which *al-Ijtihād* must not be exercised.

3.3 Knowledge and Moral Qualifications Required of a *Mujtahid*

3.4 Classification of the *Mujtahids*

3.5 Method of Exercising *Ijtihād*

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1-0 INTRODUCTION

In formulating rules of law, the *Sunnīs* (Orthodox Muslims) place high premium on *Ijtihād* in arriving at decisions based on the four sources expatiated upon in this module. Where the Book or the *Sunnah* provides the legal solution to a particular problem, no inference is necessary. However, when there are newly emerging issues and for which neither the Book nor the *Sunnah* provides an equivocal answer, then *Ijtihād* becomes inevitable. In other words, *Ijtihād* is the main instrument for interpreting the

divine message as well as relating it to the aspirations of the *Ummah* to finding solution to laying down rules and regulations for its ever emerging new cases and its pursuit of fair-play, justice, and salvation.

2.0 OBJECTIVES

At the end of this Unit You should be able to

- Give the literal and technical terms of *al-Ijtihād* .
- Enumerate the issues to which *al-Ijtihād* is not applicable.
- Write notes on knowledge and moral qualification of a *Mujtahid*.
- Enumerate three categories of the *Mujtahidūn*
- Describe the method of applying Ijtihad. Give examples.

3.0 MAIN CONTENT

3.1 Definition of the Term: *al-Ijtihād*

The Arabic word Ijtihād technically means an effort or an exercise to arrive at ones own judgement. In its wider *Sharī'ah* sense, it means the use of human reasoning to the elaboration and explanation of the *Sharī'ah* law. It covers a variety of mental process, ranging from the interpretation of texts of the *Qur'ān* and the assessment of Hadiths. *Qiyās* or analogical reasoning then is a particular form of *Ijtihād*, the method by which the principles established by the *Qur'ān*, *Sunnah* and *Ijmā'* are to be extended and applied to the solution of new problems not expressly regulated before.

Al-Ijtihād, therefore, is an exercise of Jurist`s reasoning to arrive at a logical conclusion on a legal issue, to deduce a conclusion as to the effectiveness of a legal precept in Islam.

Imam Muhammad Idris al-Shāfi‘ī has supported the justification for *Ijtihād* by with a verse of the Holy *Qur’ān* to substantiate his conviction over the issue. Almighty Allah said:

“Wherever you go, face the Mosque of Haram, and wherever you are, turn your face towards it.”

Imam Shafi‘ī maintains that if one does not exercise his intellect, he would not be able to know where Masjid al-Harām is. Therefore, Allah Himself indirectly encourages us to exercise our reasoning faculty, a great gift to mankind, to derive a logical conclusion on certain matters.

Self Assessment Exercise

Give the literal and technical terms of *al-Ijtihād*.

3.2 Conditions under which *al-Ijtihād* must not be exercised.

The Jurists have laid down certain conditions under which *al-Ijtihād* must not be exercised:

- (a) *Ijtihād* must not be exercised as to the extent of Allah. It is certain that Allah does exist and attempt to think in his existence or not will lead to disbelief.
- (b) *Ijtihād* must not be exercised as to the truism of the prophets of Allah who were sent by Allah himself and any attempt to argue over the idea of their prophethood is tantamount to disbelief.

(c) *Ijtihād* must not be exercised on the authenticity of the *Qur'ān*..

Self Assessment Exercise

Enumerate the issues to which *al-Ijtihād* is not applicable.

3.3 Knowledge and Moral Qualifications Required of a *Mujtahid*

Before one can assume the role of *al-Mujtahid* he has to be knowledgeable about the religion of Islam, the Sunnah, Fiqh and *Uṣūl-al-fiqh*. He should possess the following qualities:

- (a) He must be very well versed in the study of the *Qur'ān*. That he must know the reason why the verses and chapters of the *Qur'ān* were revealed (*asbābu`n-nuzūl*)
- (b) He must be well versed in the study of the traditions of prophet Muhammad. That is, he must know the distinction between authentic Hadith from the spurious; he must know Hadith Ṣaḥīḥ, (authentic), Hadith Hasan (good Hadith) and Hadith Daif (weak Hadith) and so on.
- (c) He must know the principles of Ijmā' very well.
- (d) He must know the Injunctions of *Qiyās* and the conditions that governs it.

On the other hand, the *Mujtahid* must possess good character apart from academic excellence. Among the moral qualities he must possess are:

- (a) He must be a good and practicing Muslim.
- (b) He must be very pious and law abiding to all the injunctions of the Holy Quran.

- (c) He must not be under the influence of heresies
- (d) He must be just, reliable, trustworthy and pure from iniquitous practices.

Self Assessment Exercise

Write notes on knowledge and moral qualification of a *Mujtahid*.

3.4 Classification of the Mujtahids

The *Mujtahid* can be classified into three broad categories:

a) *Al-Mujtahid fī `sh- Sharī`ah*: These were those who did *Ijtihād* in the matter of *Sharīah*. These were the companions of the prophet till the third century of Islam.

b) *Al-Mujtahid fī `l-Madhab*: These were those who did *Ijtihād* and later founded schools of Jurisprudence.

c) *Al-Mujtahid fī `l-Masā`il*: These are the present day Mujtahids who give *fatwā* or juristic opinions on religious matters.

Self Assessment Exercise

Enumerate three categories of the *Mujtahidūn*

3.5 Method of Exercising *Ijtihād*

Any form of Ijtihād must have its starting point in a principle of the *Qur'ān*, *Sunnah* or *Ijmā'*. In other words, Ijtihād can not be used to achieve a result which contradicts a rule established by any of these three fundamental sources.

Whenever a new case of issue presents itself reasoning by *Qiyās* with an original case covered by the *Qur'ān*, the *Sunnah* or *Ijmā'* is possible provided the effective cause (*illah*) is common to both cases.

As for example, wine is prohibited by the texts, and the *illah* for this prohibition is intoxication. Therefore other intoxicants like spirits and drugs like hemp and marijuana are prohibited by *Qiyās* because they also lead to drunkenness and loss of senses. In this way the prohibition is extended by analogical deduction. The majority of the Muslims, including the four major Sunni schools, accept *Qiyās* and *Ijtihad* to determine Juristic basis for reasoning on an issue:

- a) There should be original subject (*aşl*)
- b) There should be an object of analogy, being a new subject (*far- 'u*)
- c) There should exist effective cause common to both subject (*'illah*)
- d) There should also be a rule arrive at by *Qiyās* (*hukm*)

For example, in the case of prohibition of an intoxicant like gin, the following four cardinal points must exist:

- (i) Wine (ii) Gin (iii) Intoxication (iv) Prohibition

The following are some other examples of exercising Ijtihād in arriving at analogical deduction.

1. In *Surah al-Jum-‘ah* the Quran prohibits the sale transactions after the last call to Jumah prayer. The rule is extended by *Qiyās* to other kinds of transactions and engagements which distract Muslims from attending the Jumah prayer.

2. In the *Sunnah* of the prophet a killer is deprived from sharing in the inheritance of his victim. This rule is extended to the law of *Waṣiyyah* (bequests) as well.

Self Assessment Exercise

Describe the method of applying Ijtihad. Give examples.

4.0 CONCLUDING REMARKS

The Shī‘ah believe that *Ijtihād* is only the prerogative of their Imams who are presumed to be infallible.

In the modern times, Muslim scholars like Jamal Dīn al-Afghānī and his disciple Shaykh Muhammad Abdou tried to justify in the presence of a group of Muslim scholars in Cairo that the importance of reopening the door of *Ijtihād* was an Islamic response to imperialism prevalent in the Muslim world at that time. Muhammad Abduh, Afghani’s disciple gave fresh interpretation of the principles embodied in the divine revelation as a basis for legal reform. Although it engendered violent controversy, the supporters of the fresh Ijtihād argued that the doctrine of the closure of the door of Ijtihād had not been established by an infallible Ijmā‘u as alleged by the opponents of the Ijtihād.

It was argued that any *Ijmā'* of the 'Ulama' in the period of intellectual stagnation and under fear as well as during any foreign domination like that of the Mongols in Baghdad around 1258 A.D. and afterwards could lead to harmful consequences. Therefore, fresh *Ijtihād* was launched in the 19th Century in the public interest and thus it was believed that the door of *Ijtihād* was re-opened and *Ijmā'* reached in Baghdad in the 13th century was repealed. But the question is: was the door of *Ijtihād* ever closed?

From the foregoing, you will agree with me that the door of *Ijtihād* is always widely open. Its basis are in the *Qur'ān* and *Hadīth*; and it only requires that the machinery uphold the relevance and universality of Islam, as a divine religion; and the only way to enable it to be able to cope with newly arising issues and matters.

5.0 SUMMARY

It is obvious that *al-Ijtihād* is an indispensable ingredient in Islam. It is primarily by virtue of the *Ijtihād* of jurists that Islamic law thrives as a body of positive rules. The statement credited to some medieval Muslim jurists that the door of *Ijtihād* has been closed perhaps meant to appreciate efforts already made by the Doctors of Islamic jurisprudence or to control proliferation of its schools.

6.0 TUTOR MARKED ASSIGNMENT

The essence of *Ijtihād* in Islamic law is for a qualified jurist to extract rulings for novel cases. Elucidate on this statement.

Critically assess the role of *Ijtihād* in developing legal system in Islam.

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MODULE 3: MISCELLANEOUS PRINCIPLES

Unit 1: *Iftā'*, *Taqlīd* and *Talfīq*

Unit 2: Miscellaneous Sources

Unit 3: *Al-Qawā'id al-Fiqhiyyah* (Juristic Maxims)

Unit 4: *Daāwā wa`sh-Shuhūd* (Procedure and Evidence)

UNIT 1.... *IFTĀ'*, *TAQLĪD* AND *TALFĪQ*

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 *Al-Iftā'* (Giving Juridical Opinion)

3.2 *Taqlīd* (Adherence to a Particular School of Jurisprudence)

3.3 *Talfīq* (Eclectic Practice)

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

A term usually equated with *Ijtihād* is *Iftā* from which derives the *Mujtahid* and the *Muftī* respectively. In the writings of the Jurists the two terms are used interchangeably; and whatever scholarly credentials the *Mujtahid* must possess the *Muftī* (jurisconsult) should also possess. However, despite the acceptance of *Ijtihād* as a valid process in jurisprudence by majority of Scholars, the practice of following the precedents of other people known as *Taqlīd* is still maintained. Another phenomena related to *Iftā* and *Taqlīd* is *Talfīq* which means practice of eclecticism). This Unit acquaints you with these three aspects of the principles of Islamic Jurisprudence.

2.0 OBJECTIVE

At the end of this Unit you should be able to

- Define *Iftā* and elaborate the *Muftī* and *Mustaftī* relation.
- Discuss the emergence of *Taqlid* in Islamic Jurisprudence
- Itemize the characteristics of the period of *Taqlīd* in Islamic Jurisprudence
- Define and appraise the practice of *Talfīq* in the Islamic Principle of Jurisprudence

2.0 MAIN CONTENTS

3.1 *Al-Iftā*

The Uṣūlīs are agreed that a Muslim is at liberty to adopt the view of any School of law. They usually equate the *Mujtahid* with the *Muftī* (Jurisconsult) who gives legal

judgement to be followed by the laymen. In their writings the two terms are used interchangeably. .Whatever scholarly credentials the *Mujtahid* must possess the *Muftī* (jurisconsult) should also possess.

The latter, according to the majority, must not only be of just and trustworthy character, but he must also be known to take religion and religious matter seriously.

He is a specialist in law who can give an authoritative opinion on points of jurisprudence. His considered legal opinion is called *fatwā*., the plural of which is *Futyā* or *Fatāwā*.

Al-Mustaftī is the person who asks for *fatāwā* from the *Muftī*. Thus, *Iftā* is an institution closely related to the Muslim judicial system and represents a practical expression of the principle of legal advice. It is permissible for any Muslim who is an *āmī* i.e. layman to emulate scholars who attained the rank of *muftī*. The layman is however charged with the responsibility of enquiring about the credentials of the legists that he consults. He should consult the one noted for his religious learning, who is proficient in legal matters, just and of trustworthy character in case there are two or more of them in the locality.

If only one *Mujtahid* or *Muftī* is to be found in the layman's town, he may consult him without conducting such an enquiry. If more than one is available, the majority of the Jurists maintained that he may consult any one of them, with the provision that he establishes the *Mujtahid*'s credentials.

Furthermore the layman must be selective in adopting legal opinion given by the *Muftis*. Similarly he must not hold himself free to make a deduction on his own or according to his personal desires. By so doing he may fall into sinful act due to his inability to grasp the truth

of law in the particular matter of law. It is incumbent upon him to have a *Mujtahid* or *Muftī* from whom he enquires the rightful step that has bearing with legal points. The similitude of a person, who does so, is like someone who interpretes the *Qur'ān* through his personal opinion and the Prophet has said:

Man fassara `l-Qur'ān bira'yihī faqad akhtaa wa in aṣāba.

Whoever interprets the *Qur'ān* by his personal opinion is wrong even his interpretation may be right.

Thus all laymen and non-*mujtahid* Jurists are under obligation to follow the guidance of the *Mujtahid* or *Mufti*. The obligation is further justified by the Companions of the Prophet's practice. Some of them were reported to have been less proficient in legal matters, and they were in the practice of others noted for their legal erudition for their opinion on legal matters

that arose. So also was the Quranic injunction which says:

Fas-alū ahla `dh-dhikr in kuntum laa talamūn.

Ask the people of remembrance if you donot know (Q.6:43)

People of remembrance in the *āyah* refers to the *Mujtahids*.

The complete absence of the erudite Companions disapproval of the practice indicates that they were in unanimous agreement that taqlid (following the *Mujtahid* in his legal decision is perfectly legitimate.

Finally, it is erroneous for a layman to take any religious action without having the knowledge of the legal rule involved in such an act. Such layman is like someone who formulates a legal rule on a matter without knowledge evn though he gets it right but of no legal consequence and not biding on other laymen.

Self Assessment Exercise

Define *Ifiā* and elaborate the *Mufī* and *Mustafī* relation.

3.2. *Taqīd*

(i) The Concept of *Taqīd* in Islamic Jurisprudence

Taqīd as used in Islamic Jurisprudence is an unquestionable acceptance of the legislation of established schools of legal thought of Islamic Jurisprudence. According to the proponents of such doctrine, every decision must be by initiation of legislations of previous scholars and not the reasoning of modern day scholars. “The Encyclopedia of Islam” describes *Taqīd* as the adoption of the utterances or actions of another person as authoritative with faith in their correctness without investigating his reasons.

Taqīd flourished during the reign of the Abbasid Caliph al-Musta’sim through the rise of the Ottoman Empire until its decline. It was also the period of factionalism when all forms of *Ijtihad* were dropped and there was the evolution of Schools of Legal Thought. The schools stood as legal entities resembling sects and the dogma or idea of the individual Schools were promoted by their followers. They blindly followed the schools regardless of the errors that they see. The practice of *Taqīd* coincided with the formation of Schools of Islamic Jurisprudence which arose out of unconditional adherence to particular notable Jurists. During this period, some European laws became gradually introduced into the Islamic laws until it supplanted it. The Scholars of the period

unanimously issued a legal ruling intended to close the door of *Ijtihad* permanently. They argued that all issues in Islamic Jurisprudence have been raised and addressed and therefore felt no need for any form of *Ijtihad*. Hence, *Taqlīd* could also be regarded as the blind following of a school (*Madh had*) and factionalism which has continued even till the present day. After the acceptance of *Taqlīd* by the followers of a particular school, they do not consider themselves capable of engaging in any form of *Ijtihad* any longer. Someone who engages in the practice of *Taqlid* is referred to as a “*Muqallid*”.

The principle of *Taqlīd* could occur in any of the following three forms:-

- i. An ordinary person following a religious Scholar
- ii. An ordinary person following another ordinary person
- iii. A religious Scholar following another religious Scholar

Self Assessment Exercise

Expatiate on the practice of *Taqlid* in Islamic Jurisprudence

(ii) Emergence of and the characteristics of the period of *Taqlid* in Islamic Jurisprudence

The emergence of the practice of *Taqlīd* dates back to the sixth century after the assassination of the last Abassid Caliph Musta’sim and the rise of the Ottoman Empire. This gave rise to corruption in law and influence of the European law over the Islamic Jurisprudence. It was in a bid to stem this tide of European influence and

maintain the laws of pristine Islam that the masses became restricted within the confines of the four existing schools of legal thought of Islamic Jurisprudence. The four schools were considered as divine manifestations and correct representatives of true Islam even though there exist innumerable differences among them. Thus, whoever goes beyond the views or refuses to follow any of the four schools was considered heretical and classified an apostate and this thus promoted the practice of *Taqlid*.

The major characteristics of the period of *Taqlid* in Islamic Jurisprudence are as follows:-

- Everyone must stick to the school of legal thought which he follows and any attempt to transfer from one school to the other accrue punishment to the person by the discretion of a local Judge.
- A ruling was also made specifically by the Hanafi school prohibiting the marriage of a follower of the school to the follower of Shafi' school
- Followers of particular school also refuse to offer *Salat* (canonical worship) behind the Imam of another school
- There were building of separate prayer places in the mosques of communities where two schools exist; this existed even in the *Ka'bah* where separate Imams of separate schools led their followers in separate places within the mosque.

Self Assessment Exercise

1. Discuss the emergence of *Taqlīd* in Islamic Jurisprudence
2. Itemize the characteristics of the period of *Taqlīd* in Islamic Jurisprudence

(iii) Reasons for the practice of *Taqīd* in Islamic Jurisprudence

The practice of *Taqīd* did not just find its way into Islamic Jurisprudence, certain factors were responsible for its evolution and these include:-

- Overdependence on the works of early Scholars of the schools. It was believed that the laws for what had occurred and might occur were already deduced and recorded due to extensive development of Islamic Jurisprudence; hence, there was no need for *Ijtihād*
- The loss of power by the Abbasid Caliphate (which came earlier under the guise of reformers) to the Kings' Ministers many of whom were *Shites* and the empire became broken into mini-states. These people were more interested in private power than religious scholarship.
- Consequent upon the power loss by the Abbasid Caliphate, each of the mini-state broken into follow different schools and thus promoted the doctrines of such school; for example, Egypt followed Shafi', Spain followed *Mālikī*, Turkey and India followed *Hanafī*, *Hijāz* followed *Hambalī*.
- Rulings by many unqualified individuals is also one of the reasons for *Taqīd*. Such people claim the right to make *Ijtihād* in order to twist the religion to suit their wishes and there was then the need to break the yolk of such individuals.

It was in a bid to prevent Islamic Jurisprudence from being tampered with, that reputable scholars closed the doors of *Ijtihad*.

Self Assessment Exercise

Itemize the reasons for Ijtihad in Islamic Jurisprudence

Differences between *Ijtihad* and *Taqlīd*

Ijtihad and *Taqlid* are the two major processes used in Islamic Jurisprudence even though there still exist some major differences between the two of them. The first major difference between *Ijtihad* and *Taqlīd* is that while *Ijtihad* is done by Jurists (since they engage in reasoning), *Taqlīd* is done by the laymen. Such laymen follow the precedents or the opinion of other people without questioning the rationale behind such an opinion.

Secondly, *Ijtihād* requires a personal effort before arriving at a conclusion which promotes scholarship and reformation of laws in real sense but *Taqlīd* is limited to blind following and this thus, leads to stagnation.

Ijtihad gives room for individual reasoning and opinions while *Taqlīd* promotes sectarianism, factionalism and desire for personal glory which has existed even till today.

Self Assessment Exercise

Identify the major differences between *Ijtihād* and *Taqlīd* in Islamic Jurisprudence

3.3 *Talfīq*

Talfīq literally means to make a patch-work or piece together. Technically it means changing the rules and not adhering strictly to one particular School.

The layman who is not qualified to exercise *Ijtihād* may strictly adopt the opinion of a particular school of thought when he deemed it fit or preferable. Some scholars maintain that it is possible for the layman to depart from one school of Islamic law on a particular judicial matter if he so desired and was convinced that the view of other school adopted is stronger than the view of his school of law with respect to the particular point of law other wise he may not do so.

However the majority of the Muslim Scholars remarked that the practice of arbitrarily combining the most convenient opinions from the various schools with the purpose of fulfilling base desires and achieve personal end is prohibited. Thus the layman must not follow any opinion that suits him or which is agreeable to his rule, interests or desires. Rather, he should adopt the opinion he deems, in the footsteps of the *Mujtahid*, to be juristically preponderant. (Culson History of Islamic Law).

It is further argued that one may change the school on point of less regour provided it is not made fun by picking some points from each school according to personal desire. Such a practice according to Shawkani (1993) is considered by some jurists as immorality and sinful and the person involved as *āṣī*, dissolute. (Matlub).

Self Assessement Exercise

Define and appraise the practice of *Talfīq* in the Islamic Principle of Jurisprudence

4.0 CONCLUSION

Iftā' is the process in Islamic Jurisprudence by which a qualified Muslim Jurisconsult uses his independent reasoning based on the three previous sources of Islamic Jurisprudence to give juridical opinions which could be applied by the laymen and the Muslim generality. The opposite of *Iftā'* is *Taqlid* and it is the unquestionable acceptance of the views of another person or school of legal thought in law. The third related juridical theme *Talfīq* is arbitrarily combining the most convenient opinions from the various schools with the purpose of fulfilling base desires and achieve personal end.

5.0 SUMMARY

This unit exposes you to the concepts of *Iftā'*, *Taqlīd* and *Talfīq* and their place in the Islamic jurisprudential processes. It equates *Iftā'* with *Ijtihād* and identifies the reasons for the emergence of *Taqlīd*; the major differences between *Ijtihad* and *Taqlīd*.in Islamic Jurisprudence is equally identified. It discredits *Talfīq* process of adopting jurisprudential opinions.

6.0 TUTOR – MARKED ASSIGNMENT

Write short notes on (a) *Iftā'* (b) *Taqlīd* and (c) *Talfīq*.

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UNIT 2: MISCELLANEOUS SOURCES OF ISLAMIC LAW.

CONTENT

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1 *'Urf wa 'Ādah* (Custom and Practice)

3.2 *Istiḥsān* (Juristic Preference)

3.3 *Istislāḥ* or *Maṣāliḥ Mursalah*

3.4 *Saddu 'dh-Dharā'i* (Blocking the Ways)

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References / Further Reading

1.0 INTRODUCTION

In addition to the two major and primary sources of Islamic Jurisprudence and the other two secondary which are dependent on the two primaries in Islamic Jurisprudence, through the process of *Ijtihad* there arose some other miscellaneous principles. The utilization and recognition of these relevant sources in Islamic Jurisprudence is based on the need for legislation on the day to day activities within the Muslim community. These less significant principles are accepted to cater for situations that are newly arising as

long as they do not go contrary to what is laid down. These other considerably less relevant subsidiaries principles include the following to be discussed in this Unit.

OBJECTIVE

At the end of this Unit you should be able to

- Clarify Islamic position vis-à-vis prevailing custom and practice within a community.
- Discuss the significance of *Istihsān* in the Islamic Jurisprudence.
- Discuss *Maṣlahah* as a principle to be considered in formulating Islamic Jurisprudence.
- Analyze the position of *Istiḥāb* (legal presumption) in Islamic Jurisprudence.

2.0 MAIN CONTENT

3.1 ‘Urf wa ‘Ādah (Custom and Practice)

‘Urf, the known practice and ‘Ādah or Customs are recognised as a subsidiary source by all schools of jurisprudence. The Maliki School attaches more importance to custom than any other schools. But customary rules are valid as long as there is no provision on the matter in the *Qur’ān* and the *Sunnah*. If any of the customs contradict any of the rule of Shariah, they will be considered outside the pale of Islamic Law.

Self Assessment Exercise

Islamic Jurisprudence is not against the prevailing custom and practice within a community. Discuss.

3. 2 *Istihsān* (Juristic Preference)

Juristic preference to one ruling over another was the subject of much controversy among jurists. Al-Shāfi‘ī, for example wrote a chapter in his treatise, a’r-Risālah, in refutation of this mode of legal reasoning, which he perceived as mere employment of personal preference. But other jurists ‘agree that *istihsān* is nothing but a ‘preferred form of legal argument based on *qiyās*, an argument in which a special ;piece of textual evidence gives rise to a conclusion different from what would have been reached by *qiyās* Hallaq gives the following scenario as a typical example of *istihsān*.

If a person, for example, forgets what he is doing and eats while he is supposed to be fasting, *qiyās* dictates that his fasting would become void, for the crucial consideration in *qiyās* is that food has entered his body, whether intentionally or not. But *qiyās* in this case was abandoned on the basis of a prophetic report which declares fasting valid if eating was the result of a mistake .

Self Assessment Exercise

Discuss the significance of *Istihsan* in the Islamic Jurisprudence.

3.3 *Istislāh* or *Masālih Mursalah* has been mentioned indirectly in the Holy *Qur’ān* in the following verses:

“Those who listen to the word and follow the best meaning in it: Those are the ones whom Allah has guided, and those are the ones endued with understanding”

The Exgetes (*Mufasirūn*) have interpreted this verse in two ways. If word in this verse is taken as any word, the clause would mean that good and pious men should listen to all that is said and chosen the best of it for general good-as long as that word is according to the spirit of Divine Message. But if the word is taken here to mean the word of Allah, it would mean they should listen reverently to it, and where permissive and alternative courses are allowed for those who are strong enough to follow the higher course, those endowed with understanding should prefer to attempt the higher course of conduct. For example, it is permitted within limit to punish those who wrong us, but the nobler course is to repel evil with good. We should try to follow the nobler course.

Public interest is also regarded in *Sharī'ah* as a basis of law. The Jurists of different schools have used different Arabic term to describe it. The Hanafīs call it *Istihsān* meaning equitable preference to find a just solution. Imam Malik calls it *al-Maṣāliḥ al-Mursalāh* that is the public benefit or public welfare. The Arabic word *Mursalāh* literarily means to set loose from the texts and *Maṣāliḥ* means welfare. Imam Ahmad bn Hanbal calls it *Istiṣlāḥ* seeking the best solution for the general interest. The Hanbali scholar Ibn Qudāmāh as well as Mālīk jurist Ibn Rushd have occasionally used the term *Istihsān*. It is only the Shāfi'ī school which does not recognise *Istihsān* as a source. According to Imam Shafi', if it is allowed, it can open the door to unrestricted use of fallible human opinions since the public interest, will vary from place to place and time to time.

It should be noted that the precept of public welfare and general interest can really be very helpful particularly in cases which are not regulated by any authority of the Book of Allah, the *Sunnah* of the Prophet or Ijma'. In that case, equitable consideration may

override the result of strict *Qiyās* taking into consideration the public interest. Shāfi'ī jurists have employed *Istidlāl* to achieve similar results by avoiding merely the application of strict *Qiyās*. Istidlal is the process of seeking guidance, basis and proof from the sources although its dictionary meaning is merely an argumentation. With this brief introduction, we shall examine some examples of *Istihsān*.

1. The *bay'ū bi `l-wafā* or the sale subject to any future redemption which can be construed as a kind of mortgage was allowed because of the practical need for such transactions in the interest of public welfare.

2. Islam attaches a great importance to the proper dress of a woman (*sutru `l-`awrah*). No man except her husband can see certain parts of her body. But on account of necessity, a physician may be allowed to medically examine and diagnose a woman in the interest of saving her life.

3. Divorce given in death, sickness (*marād al-mawt*), even though effected as irrevocable *ṭalāq*, it will not deprive the divorced wife from her share in the inheritance. The husband in reality was trying to deprive her of her rights and he wanted to shun his obligations. It was merely the divorce for an escape (*ṭalāq al-fār*). Some *Shāfi'ī* and *Zāhirī* jurists disagree with the majority of *Ulamā'* on this issue. The Hanafi jurists maintain that the entitlements of the divorced wife lasts during her *iddah* period while the Hanbalīs take the view that she will be entitle to participate as long as she has not remarried. The Mālikīs however, accord her the right to participate in the inheritance even if she has remarried provided the deceased did not recover in between the death illness and his ultimate death.

4. The *Hadd* punishment of amputation of hands in case of theft will not be applied even if all evidences proved that it was really committed during the period of famine when no food was available and one was forced to steal. Imam Shāfi‘ī says that he will apply this rule simply because Sayyidna Umar decided a case in this way. He does not think that it was done on the principle of *Istihsān*.

5. The eating of meat which has not been slaughtered according to the Islamic ritual (*dhabīḥah*) permissible where no other lawful food is available.

6. Distruction of lawful food-stuff is not allowed without any special reason. But Sayyidna Umar ordered the spilling of milk mixed with water as punishment that would prevent deceit of dishonest persons engaged in the sale of adulterated milk.

7. The second call of the *Ādhān* for Jumu‘ah prayer was not a practice in the time of the prophet and the two *Rashidūn* Caliphs. Sayyidna Uthman bn ‘Affān, the third Caliph, started it as a reminder for the public benefit.

Imam Malik bn Anas gave several juristic decisions (fatwās) based on *maṣāliḥ mursalah* (public-interest). Some of them are listed as follows:

- a) The Muslim ruler may exact additional taxes from the wealthy citizens in the period of emergency.
- b) A Caliph or a ruler does not have to be the most meritorious claimant, otherwise strife will be inevitable.

- c) Imam Mālik as well as Imam Ahmad bn Hanbal prohibited the sale of grapes, which is otherwise legal, to a wine merchant as he will use them to ferment wine which is unlawful.
- d) The sale of arms during a civil disturbance is prohibited as it may intensify the struggle.

Most of these rules could fit into Hanafi Istihsān or Shafi'ī's *Qiyās*.

Self Assessment Exercise

Discuss *Maṣlahah* as a principle to be considered in the Islamic Jurisprudence.

3.4 Istishāb: Legal Presumption

Istishāb means a rule of evidence or legal presumption of continuance (*Istishāb*) of conditions (*hāl*). In other words, it is the presumptions in the laws of evidence that a state of affair known to exist in the past continues to exist until the contrary is proved. *Istishāb* is accepted by all schools of Islamic jurisprudence as a subsidiary source of the *Sharī'ah*.

There is a presumption of innocence until the guilt is established. This presumption is based on *Istishāb*. There will be a similar presumption of *halāl* things in the absence of its specific prohibition. A debt is presumed to subsist until its discharge is evidenced. Likewise, a marriage is presumed to continue until its dissolution (*ṭalāq*) becomes known.

In the case of *'Ibādāt*, mere doubt does not vitiate the validity of rituals. Supposing a man after ablution entertain a mere doubt as to whether he still has his ablution to perform the prayers, then there is a presumption of purity and ,similarly, if he thinks genuinely that he has performed the correct number of prostrations (*sajdah*) then a mere doubt will not affect his genuine belief.

In the case of an ownership title, a judge will presume ownership from valid title deeds until the contrary is proved. If a person is missing (*mafqūd*), his wife remains his legal wife until the court, after due enquiries issues a decree presuming the contrary, namely death.

Self Assessment Exercise

Analyze the position of *Istishab* (legal presumption) in Islamic Jurisprudence.

3.5 Saddu 'dh-Dharāi'i (Blocking the Ways)

Saddu 'dh-Dharāi'i really means blocking the ways even if the method involved is otherwise legal. In fact, the source of *Sharī'ah* is not much different from the *Maṣālih al-Mursalah*, but it is used by Mālik Jurists and some Hanbalīs under this name. Most of the rules categorised under *Saddu 'dh-Dharāi'i* can conveniently fit into the various subsidiary sources related to public interest or public welfare.

3.0 CONCLUSION

Some other miscellaneous subsidiary principles which are also recognized as bases for formulating Jurisprudential rules in Islam include *Istihsan*, *Istislah* Istislah, or Masalih Mursalsh (all of which connote public interest), Istishab (legl presumption, Sadd dharaii (blocking the ways) urf (Practice and Adah). . The recognition of these principles is based on the fact that they serve as solution to the day to day evolving problems within the community and the content of such sources do not go contrary to what is legislated in the previous sources.

5.0 SUMMARY

This Unit pinpoints the fact that the principles of deriving Islamic Jurisprudence rules are not restricted to sources discussed in previous Units alone. It identifies such subsidiary sources as *Istihsan*, Istiṣḥāḥ, or Masalih Mursalsh (all of which connote public interest), Istishab (legal presumption, Sadd dharaii (blocking the ways) urf wa Adah (Practice and Custom). It itemized these other sources and as well provide illustration which depicts the relevance of each of them to Islamic Jurisprudence in detail.

6.0 TUTOR MARKED ASSIGNMENTS

Enumerate miscellaneous sources of *Sharī'ah* and write short notes on them giving at least examples.

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UNIT 3: JURISTIC MAXIMS (*AL-QAWĀ'ID AL-FIQHIYYAH*)

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Juristic Maxims (*Al-Qawā'id al-Fiqhiyyah*)

3.2 Procedure and Evidence (*A`d-Da'awā wa`sh-Shuhūd*)

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References / Further Reading

1.0 INTRODUCTION

This Unit presents the maxims which play considerable role in the affixation of rules of law (*ahkām*) in relation to their application among the people. The maxims are based on the divine sources of the rules. They played significant roles in the evolution of the Islamic jurisprudential rules and organization of its legal knowledge and principles. Thus the *qawāidu`l-fiqh* is defined as a general rule which applies to all the particulars. The five legal maxims from which other maxims further originated are five. These will be our focus in this concluding Unit of this Course.

2.0 OBJECTIVES

At the end of this Unit, you should be able to

- Analyse the maxim *al-‘Urf wa`l-Umūr bi `l-Maqāšid*.
- Elaborate the jurisprudential maxim *al-yaqīn lā yazūl bi `shakk*.
- Expatriate the jurisprudential maxims:
 - (i) Custom is given consideration.
 - (ii) All that are harmful are to be removed.
- Discuss the maxim : *Shaqqu `l-Umūr tajlibu `t-taysīr* (Hardship causes finding facility).
- Elaborate the implication of the juristic maxim ‘The repelling of mischief is preferred to the acquisition of benefits.

3.0 MAIN CONTENTS

3.1 *Al-‘Urf wa`l-Umūr bi `l-Maqāšid* (Customs and actions are rewarded according to intention).

This maxim is the first of all the principles. It is based on the essential principle that intention and declaration form the fundamental concept of the whole Islamic religious law, be it concerned with worship or with law. It applied originally to acts of worship. Thus the religious obligation is not deemed discharged by outward performance, but when done with a pious intention. Thus an act of worship without intention is invalid, and so it is intention not translated to action. This legal maxim was derived from the

Prophetic tradition: Surely actions shall be judged according to intention and every person is entitled to what he intends.

Hence, according to the custom of the Jurists, intentions accompanied actions. In every action of any person, intention behind the action is the first thing to be considered before ranking it to its appropriate place. Thus the maxim clearly shows the importance of intention. If the intention is good a person will be rewarded accordingly even if the person is unable to carry out the intention. The *Hadīth* of the prophet explains the maxim better:

Self –Assessment Exercise

Analyse the maxim *Al- 'Urf wa 'l-Umūr bi 'l-Maqāṣid*.

3.2 *Al-yaqīn lā yazūl bi 'shakk* (Certainty may not be disproved by doubt.)

This maxim provides that doubt in certainty originates on the part of man and not from *Sharī'ah*. The maxim is supported by the Quranic Verse which reads:

*wamā yatabiu ' aktharuhum illa 'l-zanna,
wa inna 'zanna laa yughni mina 'l-haqq shayā*

(And most of them follow but conjecture. Certainly conjecture can
be of no avail against the truth... Q.10:36.)

Zann in an opinion is suspicion in *Sharī'ah* which is presumption that a change is well founded although the evidence is inconclusive. This means that reality is like certainty. Similar in an instance from *Sunnah* dispelling doubt, Abbād reported from his uncle Abdullah bn Yazid al-Ansārī (RA) He asked Allah's Messenger (S) about a person who

imagined that he has passed wind during *Ṣalāt* -prayer,. Allah's Messenger replied: He should not relinquish his *Ṣalāt*-prayer unless he hears sound or smells odour.

Similarly it was reported by Abu Hurayrah that the Messenger of Allah (S) said: If anyone of you has pain in his abdomen, but is doubtful whether or not anything has issued from him, he should not leave the Mosque unless he hears a sound or senses a smell.

Al-Nawawī while commenting on the Hadith said: This Hadith is one among those Hadiths which laid down the basic principles of Islamic *Sharī'ah*. Here we have been told not to act on doubts, but to hold things valid unless there is some concrete evidence to prove otherwise. Islamic Law does not make a man whimsical but makes him a man of trust and confidence.

To further illustrate the above maxim, it can be infer from it that when someone is known to be sane, he will be presumed such until it is established that he has become insane. The presumption can only be set aside with certainty, not by mere doubt or conjecture.

Similarly, when a person eats in the early morning during the month of Ramadan while in doubt as to the possibility that he might have eaten after the dawn break, his fast in this case remains intact and valid and no belated performance (*qadā*) is necessary by way of compensation. To identify the two elements of the maxims under discussion, namely certainty and doubt in this example, night represent certainty whereas daybreak is the state of doubt, and the former prevails over the latter.

SelfAssessment Exercise

Give the meaning of jurisprudential maxim *Al-yaqīn lā yazūl bi `shakk*. Support your submission with examples.

3.3 *Al-Urf Muhakkamah* (Custom is given consideration)

The third essential maxim is the consideration given to customary practice. The maxim says custom is given consideration when passing religious ruling. This has been discussed briefly under subsidiary sources of *Sharī`ah*.

3.4 *Kullu Dararin Mazāl/Aḍrāru yuzāl* (All that are harmful are to be removed)

This maxim provides that if harm is inflicted on a person by another person, which is unbearable, the victim should prosecute the aggressor. The judge should rule that infliction be removed. The ruler in turn should enforce the judgement so that justice and security will prevail among the citizen. Thus no harm shall be inflicted or reciprocated in Islam. (*lā darār walā dirār*)

However the agrieved person shall look for amicable method in resolving the conflict. But if he is unable to institute legal proceedings against the aggressor, he should handle the matter very gently and through fair method, which is the easiest way, and closer to God-fearing. This is because such a method will promote peaceful social relationship and brother hood.

Self Assessment Exercise

Expatiate the jurisprudential maxims:

- (i) Custum is given consideration.
- (i) All that are harmful are to be removed.

3.5 *Shaqqu `l-Umūr tajlibu `t-taysīr* (Hardship causes giving the facility)

This maxim is based upon the principle that difficulty becomes a cause for facility, and in term of embarrassment it becomes necessary. Many places contains references to this subject. Allah says in the Quran:

Yurīdu bikumu `l-yusra walā yurīdu bikummu `l-`usrā

(Allah desires for you ease and He does not want to make
things difficult for you Q.2:185).

The Prophet's conduct explains at various occasions the same principle. Many concessions granted, such as shortening of prayers for traveller, breaking of fast during the month of Ramadan when a Muslim is ill or on a journey, substitution of water ablution with sand ablution (tayammam), praying while sitting or praying by means of signal etc., etc., are branches of the above maxim.

Thus all the indulgences and reliefs shown by the jurists in matters of religious law and worldly affairs are products of this maxim.

Where a matter is narrow, it becomes wide by means of this principle. That is to say, so far as hardship or *mashaqqah* is experienced in a business or transactions, latitude or indulgence are introduced into the matters.

Self Assessment Exercise

Discuss the maxim : *Shaqqu `l-Umūr tajlibu `t-taysīr* (Hardship causes finding facility).

3.6 *Daf- 'u `l-mafāsīd muqaddam alū jalbi `l-manāfi* (The repelling of mischief is preferred to the acquisition of benefits)

The employment of this maxim by the jurists is replete in their books. The implication is that, to prevent what is harmful is given priority over the acquisition of benefits. If mischief is simultaneously present with benefit, evil should be eliminated first before pursuing what is beneficial. The reason is that two advantages are derivable from the elimination of evil. Because evil does affect adversely and negatively the benefits.

Similarly, if evil is not eliminated from its early inception it is possible that corruption will aggravate and spread all over, then it may lead to other evils worse that might even interfere and stand between the acquisition of both the temporal benefits and those of the hereafter.

Self Assessment Exercise

Elaborate the implication of the juristic maxim 'The repelling of mischief is preferred to the acquisition of benefits.

4.0 CONCLUSION

1. General rules which apply to different particulars in the Islamic Jurisprudence are six:

- (i) Customs and actions are rewarded according to Intention.
- (ii) Certainty may not be disproved by doubt.

- (iii) Custom can be considered for the formulation of rule.
 - (iv) All that are harmful are to be removed.
 - (v) Hardship causes giving facility.
 - (vi) The repelling of mischief is preferred to the acquisition of benefits.
2. The basis of procedure and evidence in the Islamic Jurisprudence is the Prophet Tradition *'al-bayyinatu 'alā`l-mudda`ī wa `l-yamīn 'ala man ankara'*.

1.0 SUMMARY

This Unit contains an enumeration of the six Juristic Maxims on which Sharī`ah rules are based. It analyzes them, expatiates their connotation, revealed their bases from the Qur`ān or Hadith and provide illustrations. In the second section the Unit expatiates upon the the Prophet Tradition *'al-bayyinatu 'ala `l-mudda`ī wa `l-yamīn 'ala man ankara'* as basis of procedure and evidence in the Islamic Jurisprudence.

2.0 TUTOR MARKED ASSIGNMENT

1. Enumerate the six Juristic Maxims on which Sharī`ah rules are based. Write short notes on the following three:

(i) *Aḍrāru yuzāl*

(ii) *Shaqqu `l-Umūr tajlibu `t-taysīr*

(iii) *Daf-`u `l-mafāsīd muqaddam alā jalbi `l-manāfi*

1. Give a comprehensive analysis of the Prophetic Tradition: *'al-bayyinatu 'ala `l-mudda`ī wa `l-yamīn 'ala man ankara'*.

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UNIT 4: NASKH (ABROGATION) *DA'ĀWĀ WA`SH-SHUHŪD* (PROCEDURE AND EVIDENCE)

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 *Al-Naskh* (Abrogation as a Principle of Jurisprudence)

3.2 Procedure and Evidence (*A`d-Da`āwā wa`sh-Shuhūd*)

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 References / Further Reading

1.0 INTRODUCTION

This Unit presents *Naskh* principles in the science of Islamic Jurisprudence. It is brought to a conclusion with an analysis of significance of the Prophetic Statement '*al-bayyinatu`alā`l-mudda`ī wa`l-yamīn`ala man ankara`*'. The onus of proof is on the claimant while the onus is on the defendant to swear on oath.

1.1 OBJECTIVES

At the end of this Unit, you should be able to

- Provide the theory of abrogation as it relates to principles of Islamic jurisprudence.

- Highlight exceptional cases when the theory cannot be applied.
- Highlight the conditions governing its application when it is applicable.
- Explain divisions of abrogation considering the abrogated text.
- Elaborate on the Jurisprudential significance of the Prophetic Statement ‘*al-bayyinatū ‘alā ‘l-mudda‘ī wa ‘l-yamīn ‘ala man ankara’*’.

3.0 MAIN CONTENT

3.1 *Naskh* (Abrogation)

Naskh literally connotes to abolish, invalidate, repeal, revoke or cancel etc. etc. As an Islamic Jurisprudence terminology, it implies abrogation or repeal of a proof of a shariah rule or word by another proof from the *Qur’ān* and *Sunnah*. The substitution or abrogation may be from obligatory injunction (*wujūb*) to permissibility (*Ibāḥah*) or prohibition (*tahrīm*). Thus excludes non-applicability of rule for non-fulfillment of condition or for the availability of a preventive e.g. wealth may not attract zakat taxation for lack of Nisab. *Ṣalāt* – prayer may not be compulsory due to menstruation. These ca not be termed *Naskh*. Meanwhile, the abrogation/substitution may affect only the rule and not the words and vice versa. Furthermore, proofs from other than the *Qur’ān* and *Sunnah* such as Ijmā, and *Qiyās* cannot abrogate or change rule.

Abrogation is a logical phenomenon; and it is one of the principles of the *Sharī‘ah*. This is because all the rules on affairs of man are in the hands of the Sovereign Lord, Allah. He enacts rules for His Servants, out of His Wisdom and Mercy and as He wills, that which

He thinks is in their best interest in this life and in the hereafter. People's welfare differs according to different times and positions. A rule which may be in the best interest of a people at a time may not be so at another time.

'Whatever We abrogate or make you forget We bring something better or similar'; Q. 2:106. 'Now Allah has relieved you' Q... are two examples which substantiate the fact that earlier rules have been changed. An Hadith in the *Ṣaḥīḥ* of Imam Muslim which reports the Prophet as saying: 'I had forbidden you visitation of graves before, you can now undertake graves visitation.' is a testament from the *Hadīth* abrogating prohibition of visitation to graves.

Self Assessment Exercise

What is the significance of the term Naskh from the Islamic Jurisprudence perspective?

Give examples for your submissions where necessary.

Proofs of Rules that cannot be abrogated:

1. Divine Reports (*Qur'an*) cannot be abrogated; it is the rules that can be. This is because abrogation of one of the two reports implies falsehood of the other. Falsehood is an impossibility as regards reports from Allah and His Messenger. However, if the rule comes in form of report, it may be abrogated, e.g.:

If there could be 20 people who can persevere they will overcome 200.

This statement is an injunction. It is thus abrogated in the verse that follows it.

'Now Allah has relieved you; He knows there are weak ones among you, therefore

if there could be 100 who can persevere among you they will overcome 200.

2. Rules that are in the interest of the people at any time and place such as faith and its principles, devotional worships and their principles, good conducts such as truthfulness , modesty, generosity, courage etc., etc.. The rules commanding them cannot be abrogated. So also prohibition of characters that are regarded as despicable at all time and every where such as association of partner to Allah, (*shirk*), infidelity (*kufr*), evil deeds / despicable characters such as falsehood stinginess, cowardice and the like. Their prohibition cannot be abrogated. This is because, *Sharī 'ah* rules are made in the interest of the people and to prevent them from evils.

Self Assessment Exercise

What are the proofs of rules that cannot be abrogated and why?

Conditions Governing Abrogation

The following conditions apply when abrogation is possible:

1. Impossibility of combining the two proofs. Where it is possible to combine the two there should be no abrogation because the two rules can be applied.
2. Coming of the abrogating proof later than the abrogated the knowledge of which could be either through the text or through or the report of a Companion or through the dates. An example of that which is known by the text is the Prophetic saying. I had permitted enjoyment (temporary marriage) with women before; now Allah had forbidden that until the day of *Qiyāmah*. An example of what is known as a result of report from a

Sahabi is Aisha's statement: What was earlier revealed was ten know baby suckling is impediment to marriage then it was abrogated with five. Allah's words: 'Now you have been relieved' exemplifies the one known by chronology the word NOW indicating late coming of this rule. So also if it is mentioned that the Prophet gave a rule before Hijrah and then gave another different from that after Hijrah. Then the second abrogates the first.

3. Establishing (Thubut) of the abrogating proof. The majority of the scholars give the condition that it must be stronger than the abrogated. A successive report cannot be abrogated by the singular ahaadi report even if authenticated. In the soundest of the opinions it is not conditional that the abrogating evidence should be stronger. The reason being that it is the rule that is abrogated and succession of report is not a condition.

Self Assessment Exercise

Mention and expatiate upon conditions to apply when abrogation is possible.

Divisions of *Naskh* (Abrogation)

Considering the abrogated text, Naskh is divided into three kinds:

(1) The first is that whose rule is abrogated but its wording remains. The *Qur'ān* is replete with the examples of these e.g. the two Ayahs of forbearance.

(If there could be twenty persevering among you they will conquer two hundred)

The rule of which has been abrogated by the word of Almighty Allah.

Al-Ana khaffafa llahu ankum waalima anna ffeekum dafan...Wallahu maa 's-sabirin

The reason for abrogating rule and leaving the words is to retain the reword of

recitation and to remind the Ummah about the wisdom in the abrogation.

(2) The second is the cancellation of words and retention of the rule such as the verse of stoning. It is on record in the two most authentic collection of Hadiths in an Hadith of Ibn Abbas (r) that Umar bn Khattāb (r) said: The verse of stoning was one of the verses revealed. We read and digested it. The Prophet stoned and we too stoned after him. I am afraid that as time passes by some may be saying we cannot find stoning in the Book of Allah. They will thus be led astray by abandoning an obligation revealed by Allah. And that stoning is a reality in the Book of Allah against whoever commits adultery if married among men and women when there is proof, or pregnancy or confession.

The word was abrogated without the rule in order to test the Ummah on implementing what they cannot find its words in the *Qur'ān*; and to verify their faith in what Allah has revealed against the condition of the Jews who attempted hiding the text of stoning in the *Tawrah*.

(3)The third is that whose rule and word are abrogated like the ten suckling earlier mentioned in Aisha's report (r).

Abrogation is divided into four kinds considering the abrogating.

The first is abrogating the *Qur'ān* by the *Qur'ān*. The two verses of perseverance illustrate this.

The second is abrogating the *Qur'ān* by the *Sunnah*. This does not exist.

The third is abrogating the *Sunnah* by the *Qur'ān* such as abrogation of *Qiblah* from Bayt al-Maqdis in Jerusalem as recorded in the *Sunnah* with facing the direction of Ka

‘bah as on record in the words of Allah: (Turn your face towards the Haram Mosque and wherever you are turn your faces towards it.

The fourth is abrogating the *Sunnah* by *Sunnah* like his words (S): I have forbade you from drinking wine in vessel, drink in whatever you like but do not drink an intoxicant.

Rational underlying Abrogation

1. Abrogation by enactment of rules that will be better and more useful for the Ummah in this world and the hereafter is in their best interest.
2. Taking legislation to higher level of perfection.
3. Testing the *Mukallaḥīn* on their preparation to accept change from one rule to another and their satisfaction with that.
4. Testing the *Mukallaḥīn* on the duty of giving thanks if the change in the rule is to the lesser; and the duty of patience if the change is to a heavier task.

Self Assessment Exercise

Enumerate divisions of *Naskh* and give the rationale underlying it.

3.2 *Da‘āwā wa`sh-Shuhūd* (Procedure and Evidence)

The term *Da‘āwā* is defined as demand by a person of his right from another in the presence of a judge. The person making the demand is called the *mudda‘ī*, i.e. plaintiff or claimant and the person from whom the demand is made is called *mudda‘ī ‘alayh* or defendant. The plaintiff or claimant is he who says it was, while the defendant is he who says it was not. Proof is demanded from the former on account of the weakness of his side; an oath is demanded from the defendant on account of the strength of his side, as having the benefit of the main principle which is non-liability until proved otherwise.

On the basis of presumptions (*aṣl*) attached by law to the facts in issues (e.g. presumption of innocence in a criminal case or presumption of freedom from debt from a civil suit) the parties to litigation were allotted a free and fair hearing. The former being the party whose assertion ran counter to this presumption (*istishāb*), the latter, the party whose assertion *istishāb* was supported by it. Thus upon the claimant (*mudda ʿī*) falls the burden of proof (*albayyinah*). Where (the claimer) declines to discharge the burden of proof, the *mudda ʿī ʿalayh* (defendant) is offered the oath of denial (*inkār*).

This procedure is based on the Prophet's saying which provides:

al-bayyinatū ʿala ʿl-mudda ʿī wa ʿl-yamīn ʿala man ankara.

The proof lies on the plaintiff and oath must be taken by him who rejects the claims.

Therefore when a *mudda ʿī ʿalayh* (the defendant) properly made ordinary swearing, such as an oath he secured judgement in his favour. If he the defendant failed to take oath, judgement would be given for the *mudda ʿī* (the claimant) provided in some circumstances, he himself is made to take an oath.

Judgement according to the Jurists is given according to manifest evidences and circumstances.

For instance if two persons dispute over the ownership of some objects the situation could be one of the following:

(i) The object of dispute could be in possession of one of them. In either case, it would be that one of them had possessed the object to the exclusion of the other, then the one in

whose possession is the object will be the defendant because possession of the object strengthens his claim to it. What both parties laid claim of ownership of the object should establish his ownership of it and his contact with it up to the time of dispute. This means that each or both of them should produce evidence of ownership. If one of them produces such evidence judgement shall be passed in his favour after the oath party has been given the benefit of self defence to prove his case.

If both of them produce evidence of ownership the judgement shall be passed in favour of the one whose evidence is weightier. But if the evidence of one of them is as weighty as that of the other, the object shall be divided equally between them after both of them have made the oath. However, in the event of dividing the object between them, their shares shall be equal if the proportions to which they claim in the property is equal.

This is the rule according to Abdul (1982) which is also followed in the established courts. When the plaintiff fails to produce sufficient proof to support his claim, then the defence lawyers always make “no-case” submission which means that since the claimant has failed to establish his case the Judge does not need to call on the one from whom the claim is made to defend himself, and the judgement is given without the judge on the defence at all.

Self Assessment Exercise

Elaborate on the Jurisprudential significance of the Prophetic Statement ‘*al-bayyinatu ‘alā ‘l-mudda‘ī wa ‘l-yamīn ‘ala man ankara’*’.

4.0 CONCLUSION

1. *Naskh* is a principle of Islamic jurisprudence connoting abrogation. Rules can be abrogated not the proofs from the divine testaments.
2. (i) Impossibility of combining the two proofs (ii) Coming of the abrogating proof later than the proof of the abrogated rule and (iii) Establishing (Thubut) of the abrogating proof are three conditions governing application of abrogation.
3. There are four kinds of abrogations (i) abrogating the Qur'ān by the Qur'ān (ii) abrogating the Quran by the Sunnah which does not exist (iii) abrogating the *Sunnah* by the *Qur'ān* (iv) abrogating the *Sunnah* by the *Sunnah*.
4. The basis of procedure and evidence in the Islamic Jurisprudence is the Prophet Tradition '*al-bayyinatu 'alā 'l-mudda 'ī wa 'l-yamīn 'ala man ankara*'.

5.0 SUMMARY

This Unit discusses *Naskh* and *Daāwā wa 'sh-Shuhūd* i. e abrogation, procedure and witness. It analyzes them, expatiates their connotation, revealed their bases from the Qur'ān or Hadith and provides illustrations. In the second section the Unit expatiates upon the the Prophet Tradition '*al-bayyinatu 'ala 'l-mudda 'ī wa 'l-yamīn 'ala man ankara*' as basis of procedure and evidence in the Islamic Jurisprudence.

6.0 TUTOR MARKED ASSIGNMENT

1. Give a comprehensive analysis of the Prophetic Tradition: *'al-bayyinatū 'ala 'l-mudda'ī wa 'l-yamīn 'ala man ankara'*.

7.0 REFERENCES / FURTHER READING

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