

Chapter 3

The Origins of Islamic Morality and Ethics

The Objectives of the Religious Law (The Shari'ah)

The Value of Man

Islam differs from many other religions in providing a complete code of life. It encompasses the secular with the spiritual, the mundane with the celestial. Man is the vicegerent of God on earth “Behold thy Lord said to the Angels: I will create a vicegerent (khalifa) on earth” (Q. 2:30). He endowed Adam with knowledge of all things, as the Qur’an relates: “And He taught Adam the names-all of them” (Q. 2:31). The Angels had no knowledge of those things. Accordingly, Adam was on a higher level than the angels. It was for this reason that God commanded the angels to bow in obeisance for Adam: We said to the Angels prostrate before Adam; so they prostrated except for Iblies (Satan, the Devil) who is from the Jinn. “He refused and was arrogant and became a disbeliever” (2:34). Allah said: What prevented you from prostrating (to Adam) when I commanded you? (Iblies) said: “I am better than him. You created me from fire and created him from clay” (Q. 17:12).

The satanic claim to superiority is the source of arrogance. Islam considers it the worst sin since through arrogance all other sins are committed. Adam and his progeny were honored by God, as the Qur’an says: “We honored the progeny of Adam ... and preferred them over many of what We have created with (definite) preference” (Q. 12:70). According to the Qur’an there is no original sin. Adam repented from his mistake of eating from the fruit of the forbidden tree, by the deceit and trick of Satan. (Q. 7:19–23). Adam and Eve both repented and God accepted their repentance, and were forgiven. The Qur’an has recorded what Adam and Eve said to God:

Our Lord, we have wronged ourselves; and if You do not forgive us and have mercy upon us, we will be surely among the losers (Q. 7:23).

God warned the children of Adam not to repeat the mistake of their father and obey the luring of Satan:

O children of Adam, let not Satan tempt you as He removed your parents from Paradise. We have made the devils allies to those who do not believe (Q. 7:27).

In another passage, God warns the children of Adam not to follow Satan (Iblis) as he is their enemy:

Will you take him (Satan) and his descendents as allies other than Me, while they are enemies to you? Wretched it is for the wrongdoers as exchange (Q. 18:50).

Freeing humanity from the original sin, empowering human beings, and giving them full responsibility of their actions is the message of the Qur'an: "Every soul will be held responsible for what it had done" (Q. 74:38)—is the essence of morality and ethics in Islam.

In the previous chapter, the subject of predestination and free will was fully discussed. We now need to turn our attention to the philosophy of Islamic religious law by closely exploring the Purposes of the Shari'ah (maqasid).

The Aims of Islamic Religious Law

The five cardinal essentials of Islamic teachings are:

- (1) Preservation of Faith (din)
- (2) Preservation of Life (al-nafs)
- (3) Preservation of Mind (al-'aql)
- (4) Preservation of Progeny (al-nasl)
- (5) Preservation of Honor (al-'irdh)
- (6) Preservation of Property (al-mal)

Anything that is deleterious to the above should be avoided, and anything that will preserve the above is meritorious and should be done.

Ibn Qayyim [1] said: "Al-Shari'ah fundamentals are built on keeping the interests (masalih) of the people during this life and hereafter. These objectives are built on justice, mercy, wisdom and interest of the creatures. Therefore, any situation which perverts from justice to injustice, from mercy to cruelty, from wisdom and utility to chaos and futility is outside the scope of Shari'ah."

The aims of Shari'ah were discussed fully by Muslim scholars 1,000 years ago. For instance, Imam al-Juwayni (d 478/1185) said: "The aims of Shari'ah are nothing but the interests of the entire humanity [2]." Imam al-Ghazali (d 505/1111) discussed al-maqasid under the principle of the public interest [3]. Imam al-Tufi (d 716/1316) defined public good as the way that fulfills the objectives of the teachings of God and His Prophet, and that public interest may be taken as even more important than what we might understand from textual proof based on Islamic revelatory sources like the Qur'an or the Sunna [4].

The objectives of the Shari'ah could be divided into three parts [4]:

- (1) **Necessities (daruriyat):** These include preservation of faith, life, mind, progeny, property. They are essential for life, religion, and community.
- (2) **Needed Things (hajiyat):** These are needed for the community, or for persons. They can live without procuring them, but they are recognized needs for the welfare of society and individuals.
- (3) **Recommended (tahsiniyat):** They are also needed by the society or individuals to make life more comfortable and, more beautiful, and try to reach the level of satisfaction and happiness for both the individual and society.

Contemporary Muslim scholars discuss three levels for objectives of Islamic teachings [5]:

- (1) **Common aims** which involve the necessities and the needs of individuals and public, and justice, universality, and making things easy when obstacles arise.
- (2) **Partial aims** which search for the telos or rationale of certain texts of the Qur'an or Hadith. An example is the prohibition of wine, the rationale is intoxication, and henceforth any intoxicant substance, e.g., spirits, beer, or even drugs that can cause intoxication are all considered prohibited.
- (3) **Special aims** which seek the interests of children, or wives or family as a whole; or means that will deter criminals from inflicting their crimes; or means that will prevent mismanagement of contracts; or prerogatives of persons or companies that will end in harming the whole community.

Contemporary Muslim scholars stress the interest of the communities rather than the interests of individuals or certain groups. Many would expand their view to humanity anywhere. Instead of the Islamic emancipation of slaves, which is no more relevant nowadays, they stress liberty (freedom), as a wider scope which involves all human beings [6, 7]. Sheikh Mohammed AlGhazali (d 1996) called for making justice and liberty in the forefront of aims of Islamic teachings [8]. Sheikh Yusuf al-Qardawi (born 1926) called for the dignity of humans, purifying the human soul from its vices, the equality of women, building human cooperation for a just non-belligerent new world as the most salient topics of aims of the Shari'ah [9].

It is important to emphasize that intention (niyya) is very important in any deed in Islam. The Prophet said: "Deeds are judged by intention [10]." An action though maybe good apparently, but done with bad intention will be judged by God on the Day of Judgement, and will be punished. On the contrary, if someone intends to do a good deed, but when performing it, he unintentionally produced some harm, then he will be pardoned. The prayer in the Qur'an touches upon this theme: "Our Lord do not impose blame upon us if we have forgotten or erred" (Q. 2/286). The Muslim community should not accept injustice or tyranny. The Qur'an states clearly: "Let there be a community among you who call to the good, enjoin the right and forbid the wrong. They are the ones who have success" (Q. 3:104). In a tradition reported on the authority of the Prophet he said: "The highest form of striving (in God's path, the jihad) is to speak up for truth in the face of a ruler who deviates from the right path [11]." He also said: "If any of you sees something evil, he should set it

right by his hand; if he is unable to do so then by his tongue, and if he is unable to do even that, then within his heart-but this is the weakest form of faith [12].” In addition, he said: “If people see a wrongdoer, but do not try to stop him, it is most likely that God will punish them all [13].”

The point to be stressed is that justice should be the norm in Muslim communities, and if injustice and aberration occur it should be corrected. However, during Islamic history, the despots ruled over with injustice and tyranny. Many revolutions were crushed, as we have alluded to in the previous chapter (revolution of al-Husayn, and his grandson Zaid ibn Ali Zain Abdeen ibn al-Husayn, the revolts of the Kharijites, and so on). The Sunni school discouraged revolutions, since they led to more bloodshed, tyranny, and despotism. However, they legitimized the revolution that was successful.

The Importance of the Preservation of the Five Objectives

(I) Religion: Islam is the religion of all the Prophets and Messengers of God. Islam means submission to God. Since monotheism is the religion of God from primordial times, then it should be defended, expounded and proclaimed. However, there is no compulsion in religion, as the Qur’an declares: “There shall be no compulsion in (acceptance of) the religion. The right course has become clear from the wrong” (Q. 2:256). In another passage the Qur’an says:

And say: The truth is from your Lord, so whoever wills let him believe; and whoever wills let him disbelieve (Q. 18:29). Are you going (O Muhammad) to compel the people to believe? (Q. 10:99). You are not in control of them (Q. 88:22). And do not argue with the People of the Book (Scripture) except in a way that is best... and say: We believe in that which has been revealed to us and revealed to you. And our God and your God is one, and we are Muslim (in submission) to Him (Q. 29:46).

The Qur’an is replete with such verses, which promote freedom of religion. Jews, Christians, Zoroastrians, and Sabians were all given the Freedom of Faith. Similarly Magians, Hindus, and Buddhists and all idol worshipers outside Arabia, were never forced to adopt Islam. The Muslim conquerors of Persia, India, Afghanistan, and Central Asia found different religions, but they were all given freedom of religion and faith. Similarly Muslims conquering Egypt, North Africa, and Sudan gave all these different populations freedom of faith, and even freedom to have their own laws. The head of Jews (Ga’on) was ruling over the Jews in Baghdad and every Muslim capital. Similarly the Patriarch of Alexandria ruled over Copts of Egypt, and Patriarch of Antioch ruled over the Christians of Syria. Not only that they ruled in religious matters, but they also ruled on family affairs, litigations, and over all their mundane affairs if they wished to present their cases to their leaders.

The Qur’an says: When the Jews came to the Prophet to adjudicate in a case of a Jewish woman who committed adultery, the Qur’an responded in these words: “But

how is that they come to you for judgment while they have the Torah, in which is the judgment of God (which was stoning for adultery). Then they turn away, (even) after that; but those are not in fact believers (in Torah)” (Q. 5:43). The Jews said to themselves let us go to Muhammad in this case of adultery. If he gave a judgment other than stoning (which is the rule of Torah) accept it, but if he insists on Torah rule, then abandon it.

And God told the Prophet: “Judge between them or turn away from them. And if you turn away from them-never will they harm you at all. If you judge, judge between them with justice. Indeed God loves those who act justly” (Q. 5/42).

They were given the choice to have their own judges; but if they came to you O Muhammad (PBUH) (or any Muslim judge) then judge with justice. The Jews in Medina had a peaceful pact with the Prophet Muhammad (PBUH), but they didn’t keep their pact. Some of them tried to assassinate him, while others tried to bewitch him and even poison him, but many remained peaceful. A hypocrite stole a shield, and when he was accused of stealing, he threw the shield into his Jewish neighbor’s house, and accused the Jew of stealing the shield. His family supported him, and the Prophet was swayed to believe him when they found the shield in the house of the Jew.

But the revelation came and exposed the whole truth in Chap. 4: 105–113:

We have revealed to you the Book in truth so you may judge between the people by that which God has shown you. And do not be for the deceitful an advocate. And do not argue on behalf of those who deceive themselves. God loves not that who is a sinful deceiver. They conceal their evil from the people, but not from God. He is with them (in His knowledge) when they spend the night conspiring and preparing their unacceptable speech. Here you are arguing on their behalf in this worldly life but who will argue for them on the Day of Resurrection, or who will (then) be their advocate? Whoever does a wrong or wrongs himself but then seeks forgiveness of Allah will find Allah Forgiving and Merciful. And whoever earns (commits) a sin only earns against himself...But whoever earns an offense or a sin then blames it on an innocent (person) he has taken upon himself a slander and manifest sin. Was it not for the favor of Allah upon you (O Muhammad) and His Mercy, a group of them would have misled you. But they do no mislead except themselves and they will not harm you at all.

The innocent Jew was exonerated, and the hypocrite of Medina was incriminated, and the true balance of justice was administered. The Qur’an teaches that even with one’s enemies that one hates. Justice should not be violated.

Do not let the hatred of a people prevent you from being just. Be just that is near to righteousness and fear Allah, for Allah knows well whatever you do (Q. 5:8).

The Qur’an allowed Muslim males to marry females from the people of the Book (Jews and Christians) and allowed their food with the exception of pork and wine. (Q. 5:5). The Prophet himself married Safiyya, the daughter of Huyai bin Akhtab, the Chief of the Jews, who was killed fighting the Prophet in the Battle of Khaybar. The Prophet gave her the choice of accepting Islam so that he could marry her, or remaining in Judaism and he could free her and send her to her relatives. She chose Islam and marriage with the Prophet after she saw his kindness and charity.

She became one of the wives of the Prophet and a mother of all the believers through out the ages.

The ruler of Egypt sent Prophet Muhammad (PBUH) Mariya, the Copt as a concubine. She adopted Islam and joined his house and became the mother of his son Ibrahim who died in early childhood. The court physicians from the time of the Umayyad dynasty in 680 until Muhammad Rashad, the last Caliph of the Ottoman Empire, were mostly Christians, Sabians, or Jews. Very few Muslims became court physicians. These non-Muslim court physicians amassed great wealth and influence. Bacht Yushu, the court physician of Harun al-Rashid (the Abbasid Caliph) had great influence on the caliph, and many ministers and leaders sought his intercession with the caliph. The vizier in the Umayyad dynasty and other rulers in Spain, was on many occasions a Jew or a Christian. Similarly, in Abbasid caliphate many Sabians, Christians, and Jews held important posts in the government. The Fatimids of Egypt (also ruled Syria, Hijaz, and Yemen) were fond of Jews, Christians, and many of their administrators were non-Muslims. Some of these ministers became Isma'ite Shi'ites and became leaders in this sect. Such was Ya'qub (Jacob) ibn Killis who was also the prime minister of the Fatimid caliph al-Mu'iz and his son al-'Aziz (Nizar). Saladdin had in his court many physicians (six Jews, six Christians and six Muslims) their Chief being Musa ibn Maymun (Miamonides).

(II) **Life (al-nafs)**: Preservation of the life of human beings is sacrosanct. "Do not kill the soul which God prevented except in the righteous situation" (Q. 6:32). The Qur'an declares in no uncertain terms:

Because of that We ordained for the Children of Israel that if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land—it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind (Q. 5:32).

Murder is one of the heinous crimes in Islam. Killing an innocent person is tantamount to killing the whole of humanity. Unintentional killing (manslaughter) should be redressed by:

- (a) Diya (literally means compensation for loss) blood fine: which is the value of 100 camels of different ages (or 200 cows or 2000 sheep) to be paid to the the family of the deceased. 'Umar ibn al-Khattab, the caliph, decided it would be 1,000 gold dinars in areas where camels are not available [14]. The compensation should be paid by the adult male members of the tribe (clan) of the killer (aqila), as they should bear with him this heavy burden. If a killer does not have that support then the caliph Omar made the administration to provide that. Muslim scholars today, allow insurance policy, since the tribal support and the caliphal administration are not available nowadays. This applies also to unintentional death or injury in medical practice [15];
- (b) Manumission, i.e., emancipation of a slave. If not available, as is the case today, then;
- (c) Fasting for two consecutive months to show his repentance for causing the death of an innocent person, though unintentionally. Murder, i.e., intentional killing, is punished by capital punishment unless the family or any one of them

agrees to pardon the criminal. “O you who have believed, prescribed for you, is legal retribution for those murdered—the free for the free, the slave for the slave, and the female for the female. But if any remission is made by the brother of the slain, then grant any reasonable demand; and compensate him with handsome gratitude... In law of retribution (qisas) there is saving of life to you, O you men of understanding” (Q. 2:178–179)

Preservation of life entails seeking remedy, and that requires knowledge of medicine. Imam Shafi’i (d 204H/820 CE) said that knowledge (science) has two main branches: One of religion and the second of human body (al ilm ilman ilm al adyan and ilm alabdan). It is incumbent of the Muslim community to produce health professionals, and it is considered a sin for the whole community if they do not produce the required number of healthcare professionals. Ibn Sina (d 428H/1037 CE) in his poem “Al-‘arjuza fi al-tib” defined medicine aim as “preservation of health and restoring it when it is lost [16].” He defined medicine in his textbook “Al-Qanun” as “the science, which studied the body of man in health and disease, its aim being to preserve health, ward off disease, and restore health when it is lost [17]. Abubaker Al Rhazi (d 932 CE) defined medicine as the science, which keeps and promotes the health when it is there, and restore it when it is lost [18].” It is noteworthy that they emphasized the preservation and promotion of health, which was unfortunately neglected to a great extent in modern medicine. Only recently have health authorities started to implement some measures in health preservation and promotion. Curative medicine brings more money, while health preservation and promotion gives the companies and health professionals little money, if any.

Al Izz ibn Abdul Salam, a renowned Islamic jurist (d 660H/1243 CE) in his book “Qawa’id al Ahkam (Basics of Rulings) [19],” said: “The aim of medicine, like the aim of Shari’ah (Islamic law), is to procure the maslaha (utility or benefit) of human beings, bringing safety and health to them and warding off the harm of injuries and ailments, as much as possible.” He also said: “The aim of medicine is to preserve health; restore it when it is lost; remove ailment or reduce its effects. To reach that goal it may be essential to accept the lesser harm, in order to ward off a greater one; or lose a certain benefit to procure a greater one [20].” This is a very pragmatic attitude, which is widely accepted, in Islamic jurisprudence, and it is frequently applied in daily practice in all fields including medicine.

Seeking Remedy [21]

Islam considers disease as a natural phenomenon, and a type of tribulation that expiates sin. However, man should seek remedy. The Qur’an puts it succinctly: “And when I fall ill it is He who cures me” (Q. 26:80). Prophet Muhammad (PBUH) ordered Muslims to seek remedy when they fall ill. He said, “Never Allah sent a disease without sending its cure” (AlBukhari) [22]. He also said, “O servants of Allah, seek remedy for Allah in His glory did not put a disease without putting

for its cure [23],” “Some will know that cure while others will not [24].” He himself sought remedy and described medicaments of his time to his family and followers.

The jurists declared that seeking remedy may be obligatory in life-saving situations, or when there is an infectious disease that will affect the whole community. The person infected cannot abstain from treating his ailment, if it is available. In non-lifesaving situations and when there is no harm of communicable disease, seeking remedy is commendable and encouraged. However, in futile cases, it may be reprehensible (makrooh). It may be haram, i.e., prohibited if it involves sorcery, divination, or talismans as it encroaches on Islamic faith (creed).

It is also prohibited if it involves killing animals, using pork, blood, or alcohol. Only when no alternative medicament is available should these substances be allowed, and it should be prescribed by a trusted Muslim physician [25]. Not only should human life be respected and preserved, but also animals (not used for food) should be treated well and preserved. The Prophet (PBUH) said: “A man went into Paradise because he gave water to a thirsty dog” [26]. Similarly: “A prostitute of Bani Israel was forgiven and entered Paradise, as she gave water to a thirsty dog” [27]. On the other hand, a woman was thrown into the Hellfire because she incarcerated a cat until it died of thirst and hunger [28]. He also said: In every animal with a liver, there is recompense if you do good to them [27].

(III) **Preservation of A’ql (Mind, Intellect, Reason, Sanity)**

The preservation of A’ql (mind, intellect, sanity, reason) is of paramount importance, as with our minds (a’ql) we recognize God (Allah) and recognize the fidelity and sincerity of the Messengers of Allah. We use our minds (intellect, thinking faculty) to comprehend what Allah has sent, and to know the right from wrong. With our thinking faculty endowed by God, we recognized Him, and the world around us and discovered not only our earth, the universe, but above all our Creator.

And in your creation and all the creatures He has spread about, there are signs for people who use their minds (reason) (Surah AlJa’athiya 45/4).

There are signs for people who use their minds (reason) (Surah AnNahl 16/10–12).

The Qur’an has many verses (ayas), which extol using our minds (reason). But alas those who refuse their faculties of reason (intellect, mind, thinking) will be transgressors and abode Hell. “They say: if only we had really listened and used our minds (reason), we would not have been companions of the Blaze” (Surah AlMulk 67/10).

The mind (reason, a’ql, intellect, thinking faculty) should be used to reflect on creatures of the Lord and His signs all over. We are endowed with this great faculty, with which we can acquire knowledge, make inventions and build civilizations, and above all live harmonious life with justice, equity, and fraternity. However, man misuses this great faculty and spreads mischief and does evil. Preservation of a’ql (mind, intellect, reason) is the third most important aim of Islamic teachings. Masking these faculties by liquor or drugs is prohibited and is reprehensible.

Unfortunately, our great faculty of mind could be perturbed and swayed by egoistic, devilish desires, which will end in corruption on land and sea. Anything that will corrupt our minds should be prevented and that will help engender a non-belligerent peaceful just world.

(IV) **Preservation of Property or Wealth:** Wealth should not be squandered. The wealth of the person is in fact the wealth of the community and hence should be spent in the appropriate accepted way by Islamic Shari'ah (law)

The squanderers are the brothers of devils (Surah AlIsra 17/27)

Do not spend wastefully (Surah AlIsra 17/26)

Those who waste or squander their wealth should be prevented from squandering, as the wealth is not for them alone. It is the wealth of the nation: "To those weak of understanding (squandering their fortune), do not give them your property (in fact their property, but the community has to supervise how it is spent), which God made you to supervise; but feed them and clothe them, and speak to them words of kindness and justice" (Surah AlNisa 4/5).

Usually two of the relatives or acquaintances of the squanderer complain to the court and provide evidence of his mismanagement of wealth. The court will study the case, and if the plaintiff is proved right, then the court will take custody of the property (fortune, wealth) and appoint controllers. If such a thing happened to the debacle of 2008, where mismanagement was rife, the world would have been saved from the economic plight and depression. Islam prevents all devious transactions, usury, selling of imagined virtual values, and what is called derivatives. In fact, most financial transactions of the world banks and bourses are considered illegitimate and invalid if controlled by Islamic Shar'iah. Many of the industries will be banned, e.g., wine and spirit industry, breweries, tobacco industry, sex industry, gambling, etc., to name a few of the harmful deleterious industries. The world would be saved economically, financially, health wise, and global peace and justice will be forthcoming.

(V) **Preservation of Progeny:** Anything that is going to harm the progeny or lineage is prohibited. The structure of the family is a cornerstone of society, and marriage is the only recognized institution for procreation. Procreation outside wedlock is not allowed. Fornication, adultery, sodomy, and all sexual perversions are not allowed. Same-sex marriage, incest, child, and wife abuse are all condemned, and appropriate measures taken to prevent such heinous actions and transgressors and perpetrators should be deterred by appropriate punishment. If sexual relations outside wedlock become widespread, then sexually transmitted diseases will increase and new plagues will appear, e.g., AIDS pandemic. Most cases of abortion are done for girls and ladies outside wedlock. Abortion by itself is harmful to the pregnant woman.

Islam allows abortion for certain medical reasons, e.g., serious disease of the expectant mother that makes continuation of pregnancy hazardous to her health or even to her life. Similarly, if there is a severe congenital anomaly, then abortion will be allowed if agreed upon by a committee of gynecologists. This subject will be

discussed in a separate chapter, later on. Anything that affects the progeny, e.g., smoking by parents, especially during pregnancy or lactation is considered prohibited (haram). In fact, smoking tobacco was considered “haram” prohibited, since its appearance in Islamic countries (about 500 years ago) and I (MA) compiled a book on most of these Fatwas until the end of the twentieth century [29]. There is nowadays a consensus among Islamic scholars to consider smoking as “haram” prohibited, as it is deleterious to health and kills 5 million persons annually as claimed by WHO.

Fundamentals of Islamic Jurisprudence (Usul al Fiqh)

All the laws (ahkam = plural of hokom) of Islam are built on the sources of Qur’an, Sunnah. The scholars of Islam if they reach a consensus on a certain point, then it is called ijma and becomes an important source. However, ijma is built on a text of the Qur’an or Sunnah, which may be evident or implied. There are many other sources of different Islamic Schools that we will discuss here after a quick explanation about the Qur’an and Sunnah.

1. **The Glorious Qur’an:** The literal word of God, revealed to Muhammad (PBUH) by the Archangel Gabriel which continued for 23 years (lunar) intermittently from the month of Ramadhan (July 609 CE) when Muhammad (PBUH) reached the age of 40 when he was meditating in the Cave of Hira in a mountain of Makkah (now called Jabel al Noor) until a few months before his death.

The first verse (aya) and Surah was Iqra (Recite/Read) “Read! In the Name of your Lord, Who has created (all that exists). Has created man from Alaqa (morsel that clings to the womb) and your Lord is the Most Generous, Who has taught (the writing) by the pen [the first person to write was Prophet Idrees (Enoch)], Has taught man that which he knew not.” (Q. 96:1–5)

When the Qur’an was collected and compounded this Surah AlAlaq is Chapter (Surah) 96 in the Qur’an. It is not put in chronological order; the arrangement of the verses (ayas) and chapters (Surahs) were done according to the orders of Prophet Muhammad (PBUH) himself, which were directed by the Archangel Gabriel.

The last verse is Surah Al-Ma’ida 5:3: “Today I have perfected your religion for you, and I have completed my blessings upon you, and I have approved Islam for your religion.” Some Scholars of Islam quote Surah 2 Al-Baqarah/Aya 281, as the last aya (verse) of the Holy Qur’an, “And fear a day wherein you shall be returned to Allah, and every soul shall be paid in full what it has earned, and they shall not be treated unjustly.” More than half of the Qur’an (19/30) was revealed in Makkah during the first 13 years. The rest (11/30) was revealed in Medina in the last 10 years of the life of Prophet Muhammad (PBUH). The Qur’an revealed in Makkah were usually short Surahs (chapters) that stressed the dogma of monotheism, the life after death, the Day of Judgment, the salient fundamentals of Islam, while the Qur’an revealed in Medina came in long chapters (Surahs), e.g., AlBaqarah, AlImran, AlNisa, AlMa’ida, and so forth. It has lengthy ayas, regulations of life during war, prohibition of usury, details of how to write and witness

contracts, laws of inheritance, prohibition of Alkhamir (intoxicants), certain foods (pork, carrion, blood, and whatever is slaughtered for idols). It gives more detail for a settled community with a formation of government, jurisdiction, and law.

Prophet Muhammad (PBUH) himself did not write or read, but he ordered a group of companions both in Makkah and Medina to write whatever ayas (verses) or Surahs (chapters) of Qur'an were revealed. Around 40 of the companions (Sahaba) wrote the Qur'an on leather, parchments, tables of stones, ribs of palm branches, and broad big bones (scapulae) especially of camels.

Many of the Sahaba (companions) by the end of the life of the Prophet (PBUH) compounded their own book of Qur'an in leather and pieces of parchment, the most notorious being Ali ibn Abi Talib the cousin of the Prophet and his son in law who married Fatima the daughter of the Prophet (PBUH). He was the first male to adopt Islam, which he did when he was a child of about 10 years, as he was reared in the house of Muhammad (PBUH). Abdulla ibn Ma'soud, an early Muslim from the Mekkan period has also his own collection "Masahah ibn Ma'sood." From Medina, Zaid ibn Thabit and many others were well-known scribes (writers of the Qur'an). Hundreds of Muslims learn the Qur'an by heart.

When Abubakr al Siddiq became Khalifa, after the death of the Prophet Muhammad (PBUH), he waged wars against the Apostates of Arabia, and many of those pious who know Qur'an by heart, were killed in the battles. Omar was afraid that Qur'an would be lost if more of these Sahaba (companions) were killed and suggested the collection of Qur'an, which Abubakr agreed to and did. The whole collection of parchments, leather, bones, etc., were kept with Hafsa bint Omar, one of the wives of the Prophet Muhammad (PBUH). At the time of the third Khalifa Othman ibn Affan, some Muslims read the Qur'an and pronounced it in their own dialect (Arab tribes have as many dialects as their number). Othman collected the Sahaba (companions) and all agreed to write the Qur'an on the pronunciation of Quraish, the tribe of Prophet Muhammad (PBUH) himself.

Uthman commissioned seven copies, and each copy was sent to a certain locality, e.g., Egypt, Iraq Basra & Kofah, Yemen, Makkah, and of course Medina. This final compilation of Qur'an was made in 30H/650 CE. The ayas (verses) of the whole Qur'an are 6,232 and the words 77,934 with 90 Surahs (chapters) classified as Mekkan and 24 (lengthy) as of Medina. The verses dealing with religious ordinances of jurisprudence are around 500 verses only. Any translation of the Glorious Qur'an, in any language, is not considered Qur'an. It is a translation of the meaning of the Qur'an according to the knowledge and acumen of the translator. It never has the sanctity of the Qur'an, and cannot be used for recitation in prayers. Only Arabic language is the language of the Qur'an. All Muslims all over the world recite the Qur'an in Arabic in their prayers, and try to understand the meaning in a translation in their language.

Many Muslims, who even do not know Arabic, learn the whole Qur'an by heart and recite it in beautiful correct recitation!! This is one of the wonders of the Holy Qur'an. God, Exalted be His Name, said: "And We have certainly made the Qur'an easy for remembrance; so is there any who will remember?". (Q. 54:17)

The beauty of the language of the Qur'an is immutable, and its rhythm is suitable for remarkably beautiful recitations, admired by those who even do not know Arabic. The art of calligraphy was created by Qur'an's writers.

The Qur'an is the soul of the Muslim, and the center of his artistic attitudes. At the same time, it is the text from which all the ahkam (rulings) of Islamic jurisprudence are derived from. Only the knowledgeable scholar who is a master of Arabic language, who knows the meaning of every aya (verse), derived from the explanation of the Prophet Muhammad (PBUH), and his companions, and who knows when and where these ayas (verses) were revealed. Knowing the circumstances makes his understanding deep and henceforth his derivation of ahkam (rulings of jurisdiction) proper. He should know the historical appearance of these verses (ayas), so that he will know Naskh (abrogation of certain rules). The prohibition of Khamr (wine) took 3 years in Medina [30]. Alcohol was indispensable in the life of pre-Islamic Arabs. Tensions were high, tribal feuds, and fights were the norm, and for trivial causes, cousin tribes would fight each other to near annihilation. Family was disrupted. The Arabs considered liquor as a source of joy, benevolence, good food, and indispensable tool for keeping good health. A'isha, the youngest wife of Prophet Muhammad (PBUH), was quoted in Al-Bukhari [31] to have said: "If the Qur'an first told the Arabs not to drink wine and not to gamble or perform fornication or adultery, they would have said: "No, we cannot comply." The Qur'an kept putting in their hearts the fear and love of God, the description of the life hereafter with its paradise and Garden of Eden for those who obey, and Hell and its fire for those who rebel, until their hearts softened. Then they were commanded to stop drinking wine, adultery and gambling and they complied with."

Even then wine was not abruptly prohibited. The first verse was in Surah Al-Nahl 16/67, "And the fruits of the palms and the vines, you take therefrom an intoxicant, and provision fair. Surely in that there is a sign for a people who understand." This verse merely contrasted, "A provision fair (Rizqan Hasan) with an intoxicant, thus indicating the difference [32]... The next verse to be revealed on the subject of wine was Surah Al-Baqarah 2/219: "They question you concerning wine and gambling. Say: In both is heinous sin and uses for men, but the sin in them is more heinous than the usefulness." The third verse to be revealed on the subject was when one of the companions (Abdul Rehman ibn Owf) led the congregation in prayers, while he was inebriated. He made hideous mistakes in reciting the Holy Qur'an in his prayers [33]. Surah Al-Nisa 4/43 says: "Oh who believe do not pray when you are drunken until you know what you are saying." As Muslim prayers are all over the day from dawn to night prayers (Isha'), there is little time to drink except after Isha' (night) prayers. That was called by Arabs "Al Ghabuq." Certainly it reduced the consumption of alcohol in Medina. The final blow to wine drinking was delivered when a feast was held between Ansar of Medina and Muhajereen of Makkah was celebrated and Khamr was served. Once intoxicated they started boasting, followed by fighting with the bones of the feast. Later when they were restored to their senses, they were depressed and felt sinful and ashamed. At this point, the Qur'an appeared and announced that gambling and intoxicant liquors

were henceforth prohibited for all Muslims through all ages. Surah AlMa'ida 5/90–91: “Satan wants only to cast among you enmity and hatred by means of AlKhamr (intoxicating liquor) and games of chance (gambling) to turn you away from prayer. Will you not then desist?” They cried: “O Allah we have desisted.”

Anas ibn Malik (the servant of the Prophet said: “When wine was banned, the Arabs were still loving wine, and nothing was more difficult for them than to conform to prohibition. However, they conformed well. Every one of us who had wine at his home brought it out in the street and threw it away. For many days the lanes of Medina swelled of the intoxicant liquor [34].” Ever since that fateful day, Muslims—in general—all over the world have abided by the prohibition, and accordingly they are the least affected by alcoholism problems. Though Muslims constituted different nations and cultures, the majority of them kept their abstinence through the ages. This is due to the gradual prohibition of wine, step-by-step, which in 3 years succeeded to convert the Muslim Arabs who loved wine as a source of joy, magnanimity, courage, and indispensable tool of keeping good health, and using it as a medicament when they got ill. The USA Prohibition Act, the 18th Amendment Act of January 16, 1919 proclaimed “that after one year from ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into or the exportation thereof from the United States and all the territories subject to its jurisdiction thereof for beverage purposes is hereby prohibited” [35, 36]. The US government and law enforcement agencies tried hard to implement this act, but alas after 14 years of prohibition (1920–1933), the 18th Amendment Act was repealed by the 21st Amendment of December 5, 1933 [35, 36]. Alcohol prohibition lost the battle and no attempt to revise the concept of legal prohibition is likely to be tried again in USA or Europe or anywhere in the world except in Islamic countries.

The gradual prohibition of AlKhamr in Medina (3 years) time was amazingly successful, while the USA of the twentieth century miserably failed.

Arnold Toynbee in his book “Civilization on Trial [37]” said: “Islamic spirit... may be expected to manifest itself in...a liberation from alcohol which was inspired by religious conviction, and which was therefore able to accomplish what could never be enforced by the external sanction of an alien law...Here, then, in the foreground of the future we can remark...valuable influences which Islam may exert upon the cosmopolitan proletariat of a Western society that has cast its net round the world.”

Even in the US where prohibition of alcohol has failed, Islam has proven capable of solving this intricate problem. Black Americans are maltreated since the time of slavery. In these circumstances insecurity, poverty, ignorance, crime, alcoholism, and drug addiction were rampant among black Americans, and many of them were beyond treatment and labeled psychopaths and sociopaths. However, the light of Islam entered the hearts of some of them, and they were remarkably changed. They stopped alcohol consumption, drug addiction, and crime and were completely resurrected. Baldwin [38], a well-known black American writer who himself converted to Islam wrote in his book, “The Fire Next Time,” to his fellow black Americans: “Return to your religion (many of them were originally Muslims when

they were snatched from West Africa and brought to the USA). Throw off the chains of slave-master, the devil, and return to the fold. Stop drinking his alcohol, using his dope, protect your women and forsake the filthy swine. I remember my buddies of years ago in the hallways with their wine and their whisky, and their tears, in hallways still frozen on the needle, and my brother saying to me once, if Harlem didn't have so many churches and junkies, there will be blood flowing in the streets.”

And now suddenly people have never before been able to hear this message (of Islam), hear it, and believe it, and are changed... (Islam) has been able to do what generations of welfare and housing projects and playgrounds have failed to do: to heal and redeem drunkards and junkies, to convert people who have come out of prisons and keep them out, to make men chaste and women virtuous, and to invest both male and female with pride and serenity that hang about them like unflinching light.

The miracle had taken place again. The Arabs of Jahiliyyah were changed by the Islamic faith. Similarly, the new converts in USA and elsewhere are changing. The eternal problem of alcohol dependence is being solved today as it was solved 1,400 years ago by a few verses (ayas) of the Qur'an which were revealed in 3 consecutive years, using events that make the effect of the gradual prohibition deep and effective.

If this is called “naskh” abrogation of the Qur'an, then it is a most benevolent and wise order, in order to change and redeem people without need for law enforcement, which fails in the end, as being exemplified by the failure of the Prohibited Act of Alcohol in USA (1920–1933). Now we can understand the advantages of this “naskh” abrogation with this vivid example of alcohol prohibition in the Qur'an. Unfortunately, some Western scholars (called Orientalists) tried their best to criticize the Qur'an for this so called ‘Naskh.’”

The waiting period (the period for which a woman would abstain from remarriage after death of her husband) was mentioned in Surah AlBaqarah 2/240 as one year for which she will have full sustenance. But she was given the choice if she gets out of her deceased husband house, she will lose the sustenance. The repealing verse (aya) was made by the same Surah AlBaqarah Verse 234, which made it only 4 months and 10 days. This explains that the Arab custom for widow idda, was one year, and abrupt change in their custom would cause consternation. Once they had deeper faith, it was changed to the new regulation, which would help the widow to feel for certain if she is pregnant, i.e., quickening which usually occurs at 4 lunar months and 10 days.

Another example of naskh (abrogation, repeal) is the Qur'anic injunction, which orders Muslims to fight their enemy even if the enemy number is 10 times the number of Muslims. Surah AlAnfal 8/65 reads, “O Prophet, urge on the believers to fight. If there be twenty of you, patient men, they will overcome two hundred; if there be a hundred of you, they will overcome a thousand unbelievers for they are a people who understand not.”

It was repealed by the next aya (verse) (Surah 8/66), “Now God has lightened it for you, knowing that there is weakness in you. If there be a hundred of you, patient

men, they will overcome two hundred; if there be of you a thousand, they will overcome two thousand, by the leave of God; God is with the patient.”

Anyhow, the scholar of Islam who can formulate Hokom “rule” should be well-versed and knowledgeable of both Arabic language and Qur’anic studies. He must be also well versed in Sunnah.

II. Sunnah (The Tradition) is divided into

- (a) Sunnah Qawliyah the Sayings of Prophet Muhammad (PBUH)
- (b) Sunnah Fi’liyah, i.e., the deeds and acts of Prophet Muhammad (PBUH)
- (c) Sunnah Taqririyah, e.g., sayings and deeds of others, which reached the Prophet and he approved of it (approvals).

Whatever the Prophet (PBUH) said, did, or approved, was compiled and collected later on in different books of Sunnah. At the time of the Prophet (PBUH) only a few of the Sahaba (companions) wrote some of the Sunnah, i.e., Ali ibn Abi Talib who wrote the amounts of compensations, Abdullah ibn Amr ibn Al-As who wrote many traditions, and Abdullah ibn ‘Umar ibn Al-Khattab who wrote few hadiths.

The Prophet (PBUH) himself was wary not to mix the tradition with the Qur’an. Similarly Abubakr and ‘Umar were more worried, lest the Qur’an be intermingled with Sunnah or Hadith. After 30H/650 CE when ‘Uthman finalized the compilation of the Holy Qur’an, the danger of mixing Hadith with the Qur’an became less likely. It was only at the time of the pious caliph ‘Umar ibn Abd al-‘aziz (101H/703 CE) that the collection of Hadith started, since by this time there was no risk of mixing or mistaking the Hadith with Qur’an.

Imam Malik ibn Anas of Medina (93–179H/d777 CE) wrote his famous book al-Muwatta, which contained more than 300 Hadiths plus his rulings (hokom) in many Fiqh questions. In the third century of Hijra the most well-known Sunni compilations of Hadith appeared. Musnad Ahmed ibn Hanbal contained about 30,000 Hadiths. The compilation was according to the narrator of the Hadith at time of Sahaba (companions of the Prophet [PBUH]). This was followed by Sahih AlBukhari (the most authentic book narrators of Hadith. The compilation of Muslim is better organized than AlBukhari). AlBukhari (194–256H died 870 CE) and Muslim (206–261H/d875 CE), were contemporaries; and both travelled widely to investigate meticulously the correctness of the narratives and the authenticity of the chain of transmitters (isnad). The Sunan of Tirmithi, Abu Da’ud, AlNasa’i and ibn Maja appeared in the fourth century of Hijra.

To the Shia the leading compilation is Al-Kafi by Mohammed bin Yaq’ub Al-Kulayni (d329 H). The chain of narrators is different from the Sunni group, usually including Ahl Al-Bait, i.e., the descendants of Ali and Fatima. But there is great similarity in the substance of Hadith (Al Mat’n) in all Islamic sects, viz, Sunni, Zahiri, Zaidi, Ja’fari, and Ibadi. There are of course some differences in the substance, but they are usually minor ones, especially regarding Fiqh (jurisprudence). The differences are more salient in some aspects of dogma (already discussed in the previous chapter). The Science of Hadith (Ilm AlHadith) emerged to scrutinize the

chain of narrators, i.e., Sanad, and the substance of the Hadith, i.e., AlMat'n. The chain of narrators (4 or 5) from AlBukhari or Muslim or Ahmed ibn Hanbal (and somewhat more by those coming a century later), goes back to the Prophet (PBUH) himself. If the Sahabi (companion) of the Prophet (PBUH) is dropped the Hadith is called Mursal, i.e., of weak narration, unless supported by other Hadiths.

The Musnad Variety Falls into Three Varieties

- (1) Mutawatir, i.e., narrated “uninterruptedly” by several narrators on the authority of the Prophet, followed by several narrators down to the compiler, i.e., Al-Bukhari, Muslim, Ahmad ibn Hanbal, and so on. These are considered the most authentic as it is related by a group of narrators in each epoch of time. Accordingly, it becomes certain that the report is from Prophet Muhammad (PBUH), or the act has been done by him, e.g., the five prayers.
- (2) Mashhur (well known) which was narrated by more than one narrator, but not reaching in number that of Mutawatir.
- (3) Khabar Al-Wahid, i.e., narrated by one of the companions and then by one or two of the following class until it reaches the compiler.

These are also divided into sahih (correct) or hasan (good) or da'if (weak) and refuted. In matters of dogma, the Qur'an and Mutawatir tradition are obligatory to follow, while in jurisprudence and actual verdict, on different subjects, the mutawatir, mashhur, and khabar al wahid are used; but the chain of narrators must be accepted in a khabar al-wahid (narrated by one person in each class of narrators).

III. **IJMA** is defined as the juristic consensus of all competent jurists after the death of the Prophet (PBUH). It was possible to have all Sahaba (companions) scholars in Medina at the time of Abubakr, 'Umar and part of the time of 'Uthman. Afterwards, the Sahaba dispersed in many places, e.g., Egypt, Syria, Iraq, Persia, etc., and some claim that ijma after the time of the Sahaba is almost impossible to reach as the Muslim Scholars were in widely scattered places, and their consensus was difficult to reach. Many jurists including Hanbalis and others accept the agreement of the four righteous caliphs (the Rashidun) as tantamount to binding ijma. Others considered the followed fatwas of the Sahaba (juridical opinions) as ijma. Imam Malik considered the practice of Medina people since the time of Abubakr, the 1st Caliph (Khalifa) to his time, as a legitimate source of Islamic jurisprudence, as the people of Medina, lived with the Prophet and Sahaba, and their practice tallies with this important source. Therefore, Amm-aal Ahl AlMadina “The Practice of Medina People” is a legitimate source for Imam Malik. Other jurists, for instance, Imam Shafi, did not agree to that, and the practice of Medina people should be supported by Qur'an, Sunnah or ijma to be considered as a source. Jurists agreed that an expressed ijma is binding (if there is an expressed agreement of every single qualified jurist). However, Hanafi jurists considered the silence of the jurists to a particular opinion as an effective implied agreement if the silent jurist is acquainted with the issue and sufficient time has passed to research and express his opinion [39].

Both consultation and using juristic reason (ijtihad) are normal preliminaries for arriving to a binding consensus. The Kholafa Rashideen, the four righteous caliphs,

(Orthodox Caliphs) consulted the Sahaba on whatever a novel issue that arose. If they all agree to one opinion, then it is considered ijma that has to be accepted by all coming generations of jurists. However, if ijma is on an issue of war and peace, or of a political situation that is going to change, it is not considered binding for future generations of jurists.

IV. Qiyas (Analogy, Syllogism)

Dr. Isam Ghanem in his concise book “Outlines of Islamic Jurisprudence” [39, 40] discussed the Qiyas lucidly and succinctly. I will quote him here:

In its widest sense, the use of human reason in the elaboration of the law was termed ijthihad (“effort” or “exercise” of one’s own judgment) and covered a variety of mental processes, ranging from the interpretation of texts to the assessment of the authenticity of Traditions. Qiyas or analogical reasoning, then, is a particular form of ijthihad, the method by which the principles established by the Qur’an, Sunna, and ijma’ are to be extended and applied to the solution of problems not expressly regulated therein. Qiyas (analogical deduction) must have its starting point in a principle of the Qur’an, Sunna, or ijma’ and cannot be used to achieve a result which contradicts a rule established by any of these three primary material sources.

When a new case or issue presents itself, reasoning by analogy with an original case covered by the Qur’an, the Sunna or ijma; is possible provided the effective cause of ‘illa is common to both cases, e.g., wine is prohibited by the texts, and the ‘illa” (cause) is intoxication. Therefore, spirits are prohibited by qiyas because they also cause drunkenness. So the prohibition is extended by analogy.

The majority of Muslims, including the four major Sunni schools, accept qiyas as a legitimate method of deducing rules of law. Indeed Caliph ‘Umar in his famous letter to his Judge? Qadi in Kufa (Iraq), Abu Musa al-Ash’ari, wrote “Study similar cases and evaluate the situation by analogy,” which is a clear direction to judges to reason by analogy where applicable. The Prophet approved Mu’adh bin Jabal’s use of judicial opinion where no text in the Qur’an or the Sunna covered the point in issue.

V. 59, S. al-Nisa’ (Women—Chap. 4) reads: “Obey God and obey the Messenger and those in authority among you. If you should quarrel on anything refer it to God and the Messenger”. The istidlal or guidance provided is that if no rule obtains, then go back to the texts to deduce a rule.

V. 43, S. al-‘Ankabut (The Spider—Chap. 29) reads: “And these similitudes We put forward for mankind, but none will understand them except those who have knowledge (of Allah and His Signs, etc.). (Q. 29:43)

Thus the four pillars of qiyas are:-

- (1) An original subject (asl)
- (2) The object of the analogy, being a new subject (far’)
- (3) The effective cause (reason) common to both subjects (‘illa)
- (4) The rule arrived at by qiyas (hukm)

e.g.,

- (a) wine
- (b) whiskey
- (c) intoxication
- (d) prohibition

This is the Hanafi position. Other schools invoke the hadith “all intoxicants are Khamr” (related by Ibn ‘Umar and compiled by Abu Da’ud and Ahmad). In other words spirits and beer are prohibited by the hadith as far as most schools are concerned.

The following are leading examples:

The Qur’an (V. 9, S. al-Jum’a—Friday—Chap. 62) prohibits sale transactions after the last call to the Friday prayer. The rule is extended by qiyas to other transactions which distract Muslims from the Friday prayer.

The hadith deprives a killer from sharing in the inheritance of his victim. This rule is extended to the law of bequests. English law developed the same rule by case law.

Jurists also talk of categories of qiyas. Thus where the ‘illa is more evident in the new case the rule is more applicable to it than to the original case. Where the cause is less evident, then the rule is extended only if the similarity is sufficient to justify the extension of the rule (hukm). This is simply a matter of degree or relativity, e.g., the ‘illa in the case of whisky is stronger than that in the original case, wine, and so the rule is extended and applied a fortiori.

The Zahiri School does not recognize qiyas (analogy) as a source of Islamic Jurisprudence. The Shiite Jaafri School do not accept Qiyas, though they accept a similar source, which they call aql (reason). Similarly the Ibadiyya use what they call ra’y (opinion = reason). Both in fact use Qiyas under a different name. Some of the Mu’tazila, like Ibrahim bin Sayyar, refused Qiyas like the Zahiris (including ibn Hazm of Andalusia).

We have discussed the sources of Islamic religious law above in brevity and now we will discuss the other subsidiary sources for Islamic Jurisprudence briefly.

Subsidiary Sources

These subsidiary sources concentrate on public interest (utility) viz istihsan (Hanafi School) and al-Masalih al-Mursala (Maliki School). Another source is Sadd ul-Dhara’i, i.e., blocking ways and means that will cause change or evasion of Shari’ah rules. Istishab, i.e., accepting what is already there, e.g., the legal presumption of innocence until the proof of guilt is established. All things are halal and allowed in the absence of prohibition, and so forth. Urf is the custom of any group or community; and is accepted unless it violates a clear “nass,” i.e., a verse of the Qur’an, or Hadith (sayings of the Prophet (PBUH) or ijma (of the companions of

the Prophet (PBUH) or all the scholars of Islam on a certain issue and so forth). Fatwa al-Sahabi is the decision of the companion of the Prophet.

The laws of the People of the Book, which was not abrogated by Islamic teachings, could be used as a source of Islamic jurisprudence. Not all the Schools of Islamic Jurisprudence agree on all these subsidiary sources, but the differences are minor. The Hanafi School use what they call Istihsan while the Maliki use the “AlMasaleh alMursalah,” both of which look after public interest and accept utility. All the schools accept al Urf. The Fatwa of alSahabi: (Decision of the Companion) could be chosen from several Fatwa’s of different companions. Even then the jurists are not obliged to follow the Fatwa’s of the companions, unless the consensus is reached (Ijma) and then becomes obligatory to follow.

Al Maslaha and al-Masalih al-Mursalah*

Al-Maslaha (the public and personal interest) is a major aim in Islamic teachings. It is not limited to this life, but to the hereafter. All the Islamic jurists who wrote on Usul al Fiqh (the principles, bases or fundamentals of Islamic Jurisprudence) wrote extensively on Maslaha. However, Imam Malik (d 179 AH/896 CE) of Medina was the first to write on al-Masalih al-Mursalah which takes care of public interest.

We will first discuss very briefly the Maslaha, and then discuss al-Masalih al-Mursalah (unspecified or unrestricted interests).

Abu Al Ma’ali al-Juwayni (d 478 AH/1085 CE) wrote his book, “al Burhan fi usul al Fiqh” (The Proof in the Fundamentals in Islamic Jurisprudence). “He was the first to introduce the theory of levels of necessity in a way that is similar to today’s familiar theory”, as Dr. Jasser Auda says in his book “Maqasid alShari’ah as a Philosophy of Islamic Law” [41]. He suggested five levels and the purpose (aim) of Islamic Law which are: The Protection of Faith, Souls (life), Minds (aql), Private Parts (al ourat) and Property (al mal). He also wrote another book called Ghiyath alUmam (The Salvage of Nations) which concentrated on Usul al Fiqh (Fundamentals of Islamic Jurisprudence) and Maqasid AlShari’ah (The Aims of Islamic Teachings) [41].

Abu Hamid al Ghazali (d 505 AH /1111 CE) [41]

Al Ghazali, the student of al-Juwayni was even more prominent than his mentor. He wrote profusely on Usul and alMaqasid in his books, “alwageez, alwaseet, albaseet and alMustasfa (the purified source). He was the one who put the necessities of maqsid (aims of shari’ah) as preservation of (1) faith (2) soul (life) (3) mind (4) offspring (progeny) (5) property, which are similar to his teacher al-Juwayni, except that he replaced alawrat (private parts) with offspring.

Al Ghazali differentiated between the true masalih and the imagined masalih (almawhumah) [41]. AlGhazali said: “Maslaha means fulfilling what Shari’ah was meant for: The purpose of Shari’ah is preservation of (1) Deen (faith) (2) Nafs (soul

or life) (3) Aql (mind) (4) Nasl (offspring), (5) Mal (property, wealth). Anything that threatens them is mafsadah (corruption) and warding off is maslaha [42].

Al-Izz ibn Abdul Assalam (d 660 AH /1209 CE) [41] is another great jurist of Islam. His book, “Qaw’id al Ahkam fi Masalih al Anam” is a very important reference on the subject of Masalih, Maqasid, and Mafasid. Besides extensive investigation of the concepts of maslaha (interest) and mischief or corruption (mafsada), al-Izz ibn Abdul Assalam linked the validity of rulings to their purposes. He said, “It is unlawful to overlook any common good or support any act of mischief in any situation, even if you have no specific evidence from the script, consensus or analogy [41].”

Ibn alQayyim (d 748 AH /1347 CE) [41]

Ibn alQayyim in his book, “I’lam alMuwaqqi’in an Rabi alAmeen” [43] said: “Shari’ah is based on wisdom and achieving people’s welfare in this world and the afterlife (hereafter). Shari’ah is all about justice, mercy, wisdom, and good. Thus any ruling that replaces justice with injustice, mercy with its opposite (cruelty), common good with mischief or wisdom with nonsense is a ruling that does not belong to Shari’ah, even if it is claimed to be so according to some interpretation” [43].

Abu Ishaq al-Sha’tibi (d 790 AH /1388 CE) [41]

Al-Sha’tibi built on al-Juwayni and al-Ghazali structure of necessities, but he was the most extensive writer on maqasid (aims of Shari’ah) up to recent times. His book, “al Muwafaqat fi usu’l alShari’ah (Congruencies in the Fundamentals of Shari’ah) is the classic reference in this subject. AlSha’tibi considered the maqasid (aims) as an integral part of the Fundamentals of Islamic Jurisprudence (Usu’l al fiqh). He even considered almaqasid as the fundamentals of religion, basic rules of the law, and universals of belief (usu’l aldin wa qaw’aid alShari’ah wa Kulliyat al milhah) [44].

Al-Shatibi considered the purpose (aim) of Shari’ah is to secure the interest (maslaha) of the individual and community, which he put under the three titles (1) Essentials (Dharurat) (2) Needs (Hajayat) (3) Luxuries or complementaries (Tahsinat). We have already discussed these above.

Al-Tufi (d 716 H /1316 CE) a Hanbali jurist who gave Maslaha precedence even over the implication or some understanding of the specific script and defined alMaslaha as what fulfils the purpose of legislation [45]. Many jurists wrote extensively on Maslaha (public and private interest and on unrestricted interest (al-Maslaha al-Mursalah). The search for public interest is given different names in different Mazhab, e.g., Hanafis call it Istihsan, Malikis call it Maslaha Mursala (singular) or Masalih (plural) and the Hanbalis call it istislah (seeking the best solution for the general interest). The Malikis, e.g., Ibn Rushed (Averros) and Hanbalis, e.g., Ibn Qudama occasionally use the term Istihsan (like the Hanafi’s) [39].

Al-Shafi’i rejects this source as he takes the view that it could open the door to the unrestricted use of fallible human opinion that many contradict the clear texts of Qur’an and Sunnah. Shafii jurists say that they look after maslaha (public interest) and avoid mafsada, even when the matter is not mentioned either in the Qur’an or

Sunnah, by using Qiyas (analogy, syllogism) especially if they do not stick to the strict regulations and rules of Qiyas [39]. All the rules and regulations put by a Muslim government, which are not arrived at by the studying of the Qur'an, Sunnah, Ijma, or Qiyas could be resolved by resorting to alMasalih alMursalah (the unrestricted, unspecified public interest). For example, the traffic laws are easily brought under the Masalih alMursala.

The Malikis relaxed the degree of moral probity (adala) required of a witness in communities where the strictly desirable degree is exceptionally rare [39]. The hadd (law) of amputation for theft is not applied even if all the evidence and criteria are satisfied provided there was famine which forced people to steal. The Shafii would apply the same rule, because Omar (the 2nd Caliph) ruled not to amputate thieves at the time of famine. The Shafii accepts the Fatwa of Sahabi (Companion of the Prophet (PBUH) but not by way of Istihsan or Maslaha Mursalah [39]).

The important thing in accepting Maslaha Mursalah or Istihsan that it should not in any way contradict an ordinance derived from the Qur'an, Sunnah, or ijma. The eating of meat, which has not been slaughtered in accord with the rules, is only permissible where no other food is available; the extreme example being the eating of animal corpses in dire need and starvation. However, the human corpse is not allowed to eat, as some jurists deemed it a poison [39]. If Muslim prisoners of war are used by the enemy as a shield, then it is allowed to aim at them their arrows, if the enemy is going to cause disastrous defeat for the Muslim community, and if there is no other way of avoiding the Muslim prisoners. But if the Muslim community is not in danger then it is not allowed to kill the Muslim prisoners used as a shield by the enemy.

'Umar ibn al-Khatib ordered the spilling of the adulterated milk, as a punishment that would prevent deceit, and the sale of adulterated milk. 'Umar also erected state prisons. These are clear uses of almasalih almursalah. Malik gave several fatwas which are based on public interest [39], e.g., (1) The Muslim ruler may exact additional taxes from the wealthy in emergencies and time of need (2) the Khalifa (Caliph) does not have to be the most meritorious claimant, otherwise strife will be inevitable.

Murad Hoffman in his book, "Islam the Alternative [46] commented on Maslaha used by Islamic jurists by the following: "It is clear that Islamic Law thus remained flexible enough to take into account the requirements of public interest, but it was also open to reception of some pre-Islamic customs."

Istihasan: is used by the Hanafi School which means equitable preference or seeking the most just solution. It is defined as equitable preference to find a just solution. It is the preference of a ruling other than the one arrived by qiyas (analogy), when the rule is found to be harsh or contrary to the custom [47]. The Istihsan needs not to contravene a text of the Qur'an or Sunnah or ijma.

Examples of Istihsan [39]

Bay' al-Wafa (a sale subject to future redeem was allowed because of the practical need for such transaction). The prospective borrower sells his property back when he repays the price. The borrower gets by way of loan the price (to be repaid) and the lender gets the use of the property as a consideration or a quid pro quo [39]. The

physician is allowed to see the private parts even of a woman if there is a need in order to examine her and treat her.

A divorce in death or sickness does not deprive the wife from her share in the inheritance, because the husband is trying to evade his obligation. The divorce is called the divorce of an escapee. The Hanafis maintain that entitlement of the divorcee last during the idda (the husband died before she finished her idda, i.e., the waiting period). The Hanbalis maintain that she will be entitled even after idda, if she is not remarried; while the Malikis accord the right to participate in the inheritance even if she is remarried provided the praepositus (the dying husband) did not recover in between the illness and his ultimate death [39].

Istishab: means legal presumption of continuances or the rule of evidence. The presumption in the laws of evidence that a state of affairs known to exist in the past continues to exist until the contrary is proven. The legal presumption of innocence until the proof of guilt is established is based on Istishab [39]. Things are presumed halal (allowed) in the absence of prohibition. A debt is presumed to subsist until its discharge is evidenced. A marriage is presumed to continue until its dissolution becomes known.

Doubt does not vitiate the validity of ibadat, e.g., if a man is certain that he made ablution, but doubts that he passed a flatus, he can do prayers without redoing ablution. A judge (Qadi) will presume ownership from valid deeds until the contrary is proven. Similarly if a person is missed in war or long travel and no news are coming he is called “mafqu’d,” his wife remains tied to matrimonial bond until the court issues a decree to the contrary, namely death after due enquiries. All the Islamic Schools of Fiqh accept Istishab, with minor differences in the details.

Urf and A’da

Urf embodies custom tradition, local habit, and trade or professional code. In litigations over negligence or medical errors, the professional code, and the opinion of the specialists in the field will identify negligence from expected side effects of the medical or surgical treatment. Similarly, when there is a difference of opinion between the expenses of certain operation or medical management, the Urf (custom) in that country and location will be resorted to Urf is also recognized by all Schools of Islamic Jurisprudence. All customary (Urf) are valid as long as there is no provision in the matter in the texts (Qur’an or Sunnah) or other primary sources. The cardinal rule being that urf must not contradict any other clear rule of Islamic Law.

Examples of Urf

- (1) Presents by a fiancé to his fiancée do not form part of dower.
- (2) In partnership deeds, if the shares are not specified, then there is a presumption of equality.
- (3) In the sale of immovable property the title to buildings, trees, etc., on the land passes to the buyer.

Actually in all professions there was a head of that profession (part of muhtasib functions) who would decide what the Urf (custom) decided when there were differences. Contracts to manufacture (fabricate) furniture or build a house will be controlled by the Urf decided, when there is difference, by the guild or the muhtasib (the Supervisor of the markets) or umda (mayor). The Maliki School gives more rope to custom than the other Schools of Fiqh, but all of them accept Urf as a valid source unless it contravenes a clear Islamic Law of the Qur'an, Sunnah, or Ijma.

Sadd al-Dhara'i

Al-Dhara'i literally means causes, reasons, or means. Sadd: means closing the door or removing the cause. The blocking of ways in the face of evasion of the Shari'a rules to prevent the achieving of illegal ends, even if the method involved is legal is the essence of Sadd al-Dhara'i [39]. It is in a way similar to al-Maslaha al-Mursalah which sometimes closes the door and sometimes opens the door to keep Shari'ah Law.

Examples of Saad alDhara'i:

- (1) The paying of ransom to free Muslim prisoners of war is permitted and encouraged, even though such payments boost the finance of the enemy.
- (2) The paying of specific money annually to the enemy in order to keep peace with him, when the enemy is much stronger than the Muslim government. However, the Muslim government or community must strive to build its forces, so that it can repel the enemy and stop paying levies to him.
- (3) The prohibition of the cursing of idols and false gods of other religions that will be retaliated by cursing of Allah.
This last example is clearly an Islamic, Qur'anic injunction.
- (4) An official in the Islamic government is not allowed to receive gifts from the public, as long as he is in office. Any gift is considered as a bribe.
- (5) Monopolies of essential commodities is not allowed.
- (6) The digging of a well in the way of people without putting walls or barriers on it, is not allowed as it may cause children or animals to fall in it. During night there should be some light so that people do not tumble over it.

There are many other examples such as biya alajal, i.e., buying a certain good (car or house) at a higher fixed price, if it is to be paid in installments over a certain time (1 year or more). The increment of the price may look like usury (interest), but it is not. The owner will lose some benefit if he sells the house or car, and the ownership will be transferred to the buyer.

He will not be able to regain his property, even if the buyer failed to pay the remaining installments. The court will decide on the matter and if the buyer is capable of paying, he will be forced to pay, but if he is not capable of paying he will be helped by the community or government from zakat or other sources.

Shar'min Qablana (The Laws of Previous People of the Book)

The laws of previous People of the Book may be accepted when there is no other source that we can use to arrive at a decision. Most of the laws of Moses in Torah (Nomos) are either accepted clearly by the Qur'an or Sunnah or abrogated [48]. If there is no other source, e.g., Ijma, Qiyas, or the subsidiary sources, then it is allowed to use the law of the People of the Book, if it is not abrogated by Islamic teachings.

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40. Isam Ghanem is a friend who got his M. Phil Law London. He was a lecturer in Law, Polytechnic of Central London and in Nigeria, and a Magistrate of the Superior Court Aden. He wrote many books and published many papers in Law Journals. He died suddenly after a heart attack in Yemen on the 3rd of August 2012 (15th Ramadhan 1433). His untimely death is a loss to Yemeni Scholars. His father was a well known Poet of Aden and a Scholar, his brother Shihab is a well known Poet in UAE who published many diwans of poetry and became famous after translating many poems from Arabic language to English poetry and vice versa. His other elder brother Qais is a Consultant, Pediatric Neurologist in Canada, and also a Poet in both Arabic and English. Nizar his younger brother is a Family Physician and Lecturer in Public Health, but he is well known for his studies of South Arabian-Sudanese-African music and dances. All the family members are brilliant
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