

**Attempt all the questions having equal marks:**

**Q1: Explain the Qiyas (Analogical deduction) and Istihsan (Jurists equity).**

**QIYAS (ANALOGICAL DEDUCTION):**

Qiyas or analogical deduction is the fourth source of Shariah that literally means to measure accord or equality. Those issues which have not been dealt with directly by the Holy Quran and Sunnah, nor determined by Ijmaa` or consensus of opinion may be resolved through Qiyas or analogical deduction.

According to the method of Qiyas the ruling of the Quran or Sunnah may be extended to a new problem provided that the precedent and the new problem share the same operative or effective cause (illat).

The illat is the specific set of circumstances that trigger a certain law into action.”

There is technical difference between Qiyas and Interpretation.

In interpretation, the law is applied to those cases that are governed by the language of text whereas in Qiyas, law is applied to those cases which though not covered by the language of the text are governed by the reason of the text. For example, the operative cause for prohibition against alcohol is that it intoxicates the mind. Therefore anything that intoxicates the mind such as narcotics is also prohibited by the use of analogy.

Similarly, Abu Huraira (may Allah be pleased with him) reported that the talaq/divorce pronounced by an idiot and a mentally deranged person is not valid. Therefore, on account of analogy, it was declared that a talaq/divorce pronounced by a minor is also defective having no legal effect.

The Holy Prophet (PBUH) also used Qiyas during his life time on several occasions which verifies its authority. For example, once a companion told the Holy Prophet (PBUH) that his father was having all means needed for performing Hajj but failed to perform Hajj during his life. He inquired from the Holy Prophet (PBUH) if he could perform Hajj on behalf of his deceased father. The Holy Prophet (PBUH) resorted to Qiyas and said, “What would have you done if your father had died leaving a debt?” So it was a consent through Qiyas or analogical deduction.

Analogical deduction was also used during the reign of four orthodox Caliphs. For example the 2nd Caliph of Muslims Hazrat Umar-e-Farooq (May Allah be pleased with him) through Qiyas suspended the punishment of amputation of hand for theft during a serious famine. For reaching upon an analogical induction, it is mandatory that the jurists apply his/her intellectual capacity by pondering over the nitty-gritty of the issue that is having no direct solution in Holy Quran, Hadith and Ijmaa.

So like Ijmaa, Qiyas is also made through Ijtihad by qualified Muslim jurists only and not by all and sundry. When an Analogical deduction is recognized by a large number of qualified jurists, it becomes Ijmaa or consensus of opinion. The modern Muslim jurists are frequently resorting to Ijtihad for finding solution of issues of modern age and this practice would continue till doomsday.

## **ISTIHSAN (JURISTS EQUITY):**

Istihsan literally means to deem something preferable. In its juristic sense, Istihsan is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from literal application of law. Istihsan as a concept is close to equity in western law. However equity in western law is based on natural law, whereas Istihsan is essentially based on divine law. Istihsan is not independent of Shariah, it is integral part of Shariah. Istihsan is an important branch of Ijtihad, and has played a prominent role in adaptation of Islamic law to the changing needs of society. Istihsan has been validated by Hanafi, Maliki and Hanbali jurists. Imam Shafii, Shii and Zahiri Ulama have rejected it as a method of deduction. However, in effect, majority have accepted Istihsan.

It has been mentioned that decision of Umar Bin Khattab to suspend "hadd" penalty (penalty prescribed by the Quran and Sunnah) of amputation of hand during famine is an example of Istihsan. Here positive law of Islam was suspended as an exceptional measure in an exceptional situation.

A major jurist Al-Sarakhsi considers Istihsan as a method of seeking facility and ease in legal injunctions and is in accord with the Quran (2:185). Kamali says that companions (Sahabi) and successors (Tabiun) were not merely literalist. On the contrary, their rulings were often based on their understanding of the spirit and purpose of Shariah. Dr. Hashim Kamali gives a new example. Oral testimony was the standard form of evidence in Islamic law. However, now in some cases photography, sound recording and laboratory analysis have become more reliable means of proof.

Here is a case of Istihsan by which method we can prefer these means of proofs over oral testimony in many cases. Hanafi jurist Abul Hasan al Karkhi defines Istihsan as a principle which authorizes departure from an established precedent in favor of a different ruling for a stronger reason. The Maliki jurists are more concerned with Istislah (consideration of public interest) than Istihsan. They validate Istihsan as more or less similar to Istislah or as a part of Istislah. There is no Qati (definitive) authority for Istihsan in the Quran and the Sunnah. However, verses 34:18 and 39:55 of the Quran have been quoted in support. Similarly a very famous Hadith : "La darara wa la dirara fil Islam" [no harm shall be inflicted or tolerated in Islam] has been quoted in support. Istihsan is closely related to 'ray' (opinion) and Qiyas (analogical deduction). Both in Qiyas and Istihsan, 'ray' is an important component, more heavily in case of Istihsan.

**Many hold that one kind of Istihsan is essentially Qiyas Khafi (Hidden analogy).** They think that Istihsan is a departure from Qiyas Jali (obvious analogy) to Qiyas Khafi. There is another form of Istihsan in which exception is made to the general rule for the sake of equity and justice on the basis of some 'nass' (textual evidence), approved custom, darurah (necessity) or Maslaha (public interest). Al-Shafii has criticized Istihsan on the basis of Quranic verses 4:59 and 75:36. However, these verses are not categorical on the issue of Istihsan. Al-Ghazali has criticised Istihsan but stated that Shafii's recognize Istihsan based on the Quran and the Sunnah. Al-Amidi ( a Shafii jurist) has stated that Al-Shafii also resorted to Istihsan. Modern jurists have stated that the essential validity of Istihsan is undeniable.

**Q2: Ijma is an important secondary source of usul-e-fiqah, discuss briefly.**

## **USUL AL FIQH:**

Usul al Fiqh is the collection of principles pertaining to the methodology for the extraction of Fiqh. The concept of Usul al Fiqh is comparable to adhering to a methodology when conducting a scientific experiment. Similarly, adhering to a methodology in deriving Fiqh (rulings) is referred to as Usul al Fiqh. This methodology provides a way for a person to derive Islamic rulings from the legislative sources in Islam. The collection of principles related to Usul al Fiqh is many:

## **A. Legislative Sources:**

Adopting specific sources to derive laws is a major subject in Usul al Fiqh. The Quran, Sunnah, Ijma as Sahabah (consensus of the companions), and Qiyas (analogical deduction) are four sources in Islam, which are accepted by almost all of the scholars. However, there are other additional sources such as Maslaha al Mursalah (benefit) or Ijma al Ummah (consensus of the Ummah), which are not widely accepted.

## **B. Arabic Language:**

Within the Arabic language, there are rules for understanding the structure of an Ayat or Hadith. The rules of grammar in the Arabic language define the meaning of the Ayat or Hadith. Therefore, understanding the rules of grammar and their application is one use of the Arabic language in Usul al Fiqh.

## **C. Interpreting the text of Quran and Sunnah:**

Unless the text of the Quran and Sunnah is correctly understood, no ruling can be deduced from it. The linguistic structure of the text in Quran and Sunnah varies from one style to another. The rules to distinguish and differentiate between these styles are an important subject in Usul al Fiqh

## **IJMA (CONSENSUS OF OPINION):**

Ijma is the verbal noun of the Arabic word Ajma'a which has two meanings : to determine, to agree upon something. Ijma is considered the secondary source of Shariah after the Quran and the Sunnah. As a proof of Shariah, it is basically a rational proof. An Ijtihad or an Interpretation of one or a few scholars when becomes universal, becomes Ijma.

The classical definition of Ijma, as laid down by Ulama of Usul, is categorical on the point that the universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive Ijma. Only such Ijma are considered binding by early Usuliun (Usul scholars). However universal Ijma are indeed very few. As evidence show, it is extremely difficult to prove Ijma on particular issues, particularly in the case of issues open to Ijtihad or tawil. There is no authentication of Ijma through Isnad (chains of narrators).

The only form of Ijma upheld by majority is the Ijma of Sahabis only. Majority of Ulama of Usul think that Ijma can take place on Sharii and devotional (Ibadah) and dogmatic (Itiqad) matters. For the first time Ijma occurred among the companions of the Prophet (SM). Ijma initially helped unity of the Ummah in some matters. Ijma also ensures correct interpretation as broad consensus is unlikely to take place on incorrect matter. Ijma also enhances the authority of the rule on which there is Ijma. Unanimity of Ulama on an issue of a particular time is a requirement of Ijma.

The agreement must be expressed by clear opinion of all scholars of the time. Ijma must consist of the agreement of all majtahidun. Though many Ulama consider majority to consist Ijma. Any agreement of majority can be a proof but can not be a binding proof because to be binding, it must fulfill the conditions stated in the Ahadith quoted in support of Ijma (which is nothing short of Ijma of all people, at least all scholars.) There is no good ground to exclude any scholar of any school Islam, as long as the school or group itself is not considered outside Islam by the Muslims.

The Ulama have on the whole maintained that the textual evidence in support of Ijma does not amount to conclusive proof. The Ayats quoted in support of Ijma (4:59, 4:83; 4:115, etc.) are not conclusive for Ijma. Imam Gazali says these Ayats are indications, not clear Nass on Ijma. Suyuti's

interpretation is the same. Abduh does not find any Ijma in these Ayat. Al Amidi says, "these give rise to probability (Zann), not positive knowledge".(Ref; Dr. Hashim Kamali, Principles of Islamic Jurisprudence, Islamic Texts Society, Cambridge, U.K). About 10 Ahadith are quoted in support of Ijma. Ahmed Hassan observes that these hadith are inconclusive on Ijma (Ref: Prof. Ahmad Hasan: The Doctrine of Ijma in Islam).

A number of Ulama (including Shafii and Mutazila scholars) have said that Ijma of classical definition is not feasible because of the huge number of the Ummah or its scholars or distances. It is for this reason that Imam Shafii confines the occurrence of Ijma to the obligatory duties only. For the same reason, Zahiris and Imam Ahmad refer by Ijma to the consensus of companions only. Abdul Wahab Khallaf is of the view that Ijma of classical definition is no longer possible in modern times (because of huge number of scholars spread over continents). Khallaf is right. Old style Ijma is no longer possible. You can have only local Ijma, which is useful in lawmaking through Parliament but they can not be (by definition) binding forever.

Ijma are of two types - Ijma al Sarih (explicit Ijma) and Ijma al Sukuti (Ijma by silence). Ijma Sukuti (which occurs when one or a few scholars agree on something and no dissent is known) is not a proof according to a majority of scholars. According to the majority Ijma must be founded in a Textual authority (Quran and Sunnah). There are 3 views on whether Qiyas can be a basis of Ijma or not . Some agree, some disagree, some partially agree (Dr. Hashim Kamali, Principles of Islamic Jurisprudence). Ijma can be transmitted by Ahad or Mutawatir report of scholars.

There is no Mutawatir report of Ijma except those of Ijma of companions. Iqbal gives a proposal to transfer performance of Ijma to the legislative assembly, which is only possible form of Ijma in modern times. Iqbal is right. His ideas require acceptance. However, such Ijma can not be of universal validity nor can it be considered binding (unless made into a local law - which then remains valid until revoked). In conclusion we can say that Ijma can be of limited use only in future.

### **Q3: What are the different sources of Islamic Law? Discuss in details.**

Islamic law is a reference to primary and secondary sources of law and the methodology used to apply law. Islamic law originates in two major sources, namely divine revelation (wahy) and human reason (aql). This dual identity of Islamic law is reflected in Shariah and fiqh.

The former make up the primary sources discussed in part II and the latter is the human understanding and knowledge derived from the primary sources discussed in part III.

### **PRIMARY SOURCES OF ISLAMIC LAW:**

The Arabic term for source in Islamic law is dalil (guide). There are two primary sources of Islamic law: Quran and Sunnah. Quran and Sunnah make up Shariah (pathway), the source of all principles of Islamic law.

### **QURAN:**

The literal meaning of Quran is that which should be recited, read, or studied and refers to the book embodying the revelation from Allah to Prophet Muhammad. There is only one authentic and uniform text of the Quran in Arabic that is in use throughout the Muslim world.

### **SUNNAH:**

Sunnah is roughly translated as the traditions and practices of Prophet Muhammad. There are three types of Sunnah.

- 1) The sayings of the Prophet Sunnah Qawliyyah/Hadith.

- 2) The actions of the Prophet – Sunnah Al Filiyya.
- 3) Sunnah Taqrīriyyah, practices prevailing at the time of the Prophet which he did not oppose or prohibit.

### **HADITH/QAWLIYYAH:**

Hadith/Qawliyyah are the sayings of the Prophet Muhammad. The following sample searches in a library catalog will yield many collections of hadith. Hadith – texts Hadith -- Criticism, interpretation, etc. The six major Hadith collections listed below were collected by Islamic scholars approximately 200 years after Prophet Muhammad's death. These are listed in order of authenticity.

### **SHI'A COLLECTIONS:**

There are also Shi'a Collections of Hadith. A subject search in a library catalog, such as, WorldCat for Hadith (Shiites) will yield many sources. The prominent Shi'a collections include Twelver collections, Ismaili, and Mu'tazili. These can also be used as search terms to locate relevant collections.

### **SECONDARY SOURCES OF ISLAMIC LAW:**

#### **TAFSIR (INTERPRETATION OF QURAN):**

Tafsir (interpretation of Quran) is the science of interpreting and rendering commentary on the Quran, its exegesis. The sources of commentary on Islam are:

- 1) the Quran itself because a verse of the Quran is often used to explain another verse;
- 2) the Hadith. Many of the collections listed above have sections devoted to tafsir;
- 3) accounts of Sahabah, the companions of the Prophet Muhammad;
- 4) accounts of Taibun, the generation that had direct contact with the Sahabah. A few of the prominent Tafsirs are listed below. A search in a library catalog for Tafsir will yield many others.

#### **FIQH (ISLAMIC JURISPRUDENCE):**

Fiqh is the process of deducing and applying Shariah principles. Fiqh is also the collective body of laws deduced from Shariah. Ijtihad (literally striving or exertion) is the process of making a legal decision by independent or original interpretation of the legal sources, the Quran and the Sunnah. Ijtihad is embodied in the works of jurists of various schools of thought.

Fiqh and ijthad are not to be equated with divine revelation and, therefore, they are considered secondary to Quran and Sunnah. There are several methodologies of fiqh, listed below, recognized by Islamic jurists and ijthad occurs in a variety of forms. A subject search in a library catalog for fiqh, Islamic jurisprudence, Islamic law will yield many general collections. More specific sources discussing the methodologies below can be found by searching these terms: ijma, qiyas, istihsan, istihab, urf.

- Ijma (general consensus of opinion from among the companions of Muhammad or the learned Scholars)
- Qiyas (analogical reasoning/deduction)
- Istihsan (juristic preference to ensure equity/public interest)
- Istihab (presumption of continuity)
- Urf (local custom)

#### **MADHHABS (SCHOOLS OF FIQH):**

The nineteen schools of fiqh madhhabs that developed during the first four centuries of Islam has condensed to five of which four are sunni and one shia. The sunni schools are: Hanafi, Maliki, Shafi'I, Hanbali and the shia school is Jafari.

## **GENERAL SOURCES ON ISLAM:**

### **ENCYCLOPEDIAS:**

There are many encyclopedia sets on Islam and Islamic law. Below is a selective list. A subject search in a library catalog for Islamic law. Encyclopedias and Islam -Encyclopedias should retrieve a list of the collections available in the library. Additionally, browsing the collection under the Hicks/Schiller call number, Islam , in Pegasus will retrieve several of these sets. There are also encyclopedias dedicated to subjects within Islam/Islamic law, a few of these are listed below as well.

### **PERIODICALS:**

This is a selective list of periodicals. A subject search in a library catalog for Islamic law .Periodicals will also retrieve a list of periodicals. Another option to locate articles is to search an index. Index to Foreign Legal Periodicals has several Islamic journals indexed. For further information on locating articles, please refer to our research guide, Finding Books and Articles on International and Foreign Law.

## **Q4: Discuss the role of different Muslim schools of thought in codification and compilation of Islamic Law.**

"Difference of opinion among my community is a sign of the bounty of God." - Prophet Muhammad (pbuh)

Islamic law and what it means to be a practising Muslim has changed and developed over centuries of thinking. Following the death of the prophet Muhammad pbuh, there have always been differences of opinion in how best to understand the message of God.

Different interpretations on what Islamic law should be, is reflected in the diverse range of schools of thought or ways of studying and practising Islam.

The common factor among the different groups is the Quran and the recorded sayings and actions of the Prophet (peace and blessings upon him) - Sunnah - as sources of information and guidance. Within Sunni and Shi'a Islam there are six main schools of Islamic law - fiqh:

### **SUNNI SCHOOLS:**

- The Hanbali School is named after Ahmad Ibn Hanbal (d. 855)
- The Hanafi School is named after Abu Hanifa (d. 767)
- The Shafi'i is named after al-Shafi'I (d. 819)
- The Maliki is named after Anas bin Malik (d. 795)

### **SHI'A SCHOOLS:**

- The Zaydi School is named after Zayd Ibn Ali (d. 740)
- The Ja'fari School is named after Ja'far al-Sadiq (d. 765)

There was a sweeping range of opinion in the first three centuries of Islamic history, and at one point, there were over 100 different schools of thought.

## **SUNNI SCHOOLS:**

### **THE HANAFI SCHOOL:**

The Hanafi School is the oldest surviving school of Islamic law, and the one with the largest following.

It originated in Kufa, present day Iraq, but its influence spread to both the Mughal and Ottoman empires and can now be found from Turkey to Central Asia, the Balkans, Iraq, Afghanistan, Pakistan, India, Bangladesh, and as far as Western Europe and North America.

The school's founder, Abu Hanifa, was a trader as a young man. However, it seems he was not well suited to this career .he once demanded to pay five times the asking price from a woman selling silk at the market.

In 763 CE he was imprisoned for refusing to collaborate with a judiciary he considered corrupt. He died in prison four years later.

As well as using the Quran and the Prophet's (pbuh) life as sources of guidance, this group also relied heavily on using logical arguments to find answers to social problems that also fitted in with their understanding of Islam.

### **THE SHAFI'I SCHOOL:**

The Shafi'i School also has a wide influence in Egypt, Indonesia, the Philippines, Brunei, Singapore, Thailand, Sri Lanka and the Maldives.

This school of thought is named after Muhammad ibn Idris al-Shafi'i, a precocious student, who is described by historians as the master architect of Islamic law.

Perhaps his greatest achievement, with the aid of his peers, was to lay down the roots of a common framework for all schools of Islamic thought to follow when producing legal judgements on issues of faith and how it should be practised.

### **THE MALIKI SCHOOL:**

This school is named after Imam Anas bin Malik, 715 CE, who, to support his studies, sold the ceiling beams of his home to buy the necessary books.

He was an unwavering defender of personal freedom, famously issuing a fatwa that stated that no person should be forced to pledge allegiance to the ruling government in Medina, and was heavily flogged for doing so (although the authorities later apologised for their actions).

The Maliki School has its main following in Egypt, as well as having smaller groups of followers in Algeria, Tunis, Morocco, Mauritania, Libya, Kuwait, Bahrain, Dubai and Abu Dhabi, although it originated in Saudi Arabia in the city of Medina. When the Maliki School was formed the word Sunnah did not yet mean the 'traditions' or 'practice' of the Prophet (pbuh) specifically but also referred to the actions of the people of Medina at the time.

### **THE HANBALI SCHOOL:**

The Hanbali School was developed in Baghdad, although today the followers of the school are concentrated mainly in Saudi Arabia and the United Arab Emirates.

The founder of the school, Imam Ahmad Ibn Hanbal, was taught by Muhammad ibn Idris al-Shafi'i, the founder of the Shafi'i School. There is therefore a direct link between the Shafi'i and the Hanbali school.

The Hanbali school derives its rulings almost solely from the Quran and Sunnah, which proves to be popular with groups of people wishing to return to a 'purer' Islam (the Wahabi movement, for instance, emerged out of the Hanbali school). Other influential figures in the school were al-Kiraqi (d. 946), Ibn Qudama (d. 1223).[3], Ibn Taymiyya (d. 1328) and al-Qayyim al-Jawziyya (d. 1350).

### **PERCEPTIONS OF ISLAMIC LAW TODAY:**

For many Muslims the Quran is a book of divine poetry and guidance but it does not contain many Islamic rules.

Talal Asad is an anthropologist at the City University of New York who writes extensively on the subject of religion and says:

"Most Islamic rules are contained not in the Quran ('the recitation'), which Muslims believe to have been revealed by God through Gabriel, but in collections called hadith, which contain the exemplary sayings and doings of Muhammad and his companions."

In the words of the famous Muslim jurist al-Ghazali (d. 1111), Islamic laws should "seek the beneficial and avoid what is bad."

The fourteenth century Hanbali jurist Ibn al-Qayyim al-Jawziyya also agreed with this sentiment: "Every situation in which justice succumbs to tyranny, mercy to cruelty, goodness to corruption, wisdom to foolishness, has nothing in common with the Shari'ah."..