Objective Jurisprudential Research Papers

ʿIlm ʾUṣūl al-Fiqh
(Science of the Principles of Islamic Jurisprudence)

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In the Name of Allāh,
the Most Merciful, the Most Compassionate

All praise is due to Allāh and blessings and peace upon the Messenger of Allāh (peace and blessings be upon him). Since then:

Lecture One

Definition of the Science of *ʾUṣūl al-Fiqh* (Principles of Jurisprudence)

Scholars have differed in their perspective on how to define this type of terms. Some stated that it is an independent *ʿalam* (propre noun), even though it appears as a *murakkab* (compound) term—like the name ʿAbd Allāh, in which one does not consider the two words "ʿAbd" and "Allāh" independently.

Others argued that it is a *murakkab ʾiḍāfī* (compound construct) made up of two words—*ʾUṣūl al-Fiqh*—or three: *ʿIlm ʾUṣūl al-Fiqh* (the science of the principles of jurisprudence). As for *fiqh*, it is defined as: the knowledge of the practical *sharʿī* (Islamic legal) rulings derived from their detailed evidences.

The word "*ʾaṣl*" (principle/origin) is used in *sharʿī* terminology to indicate several meanings:

1. ***ʾAṣl* as opposed to *farʿ* (branch/subsidiary):** For example, the father is the *ʾaṣl* and the son is his *farʿ*; grapes are the *ʾaṣl* and wine is the *farʿ* derived from them; wine is the *ʾaṣl* and *nabīdh* (fermented drink) is its *farʿ*.
2. ***ʾAṣl* meaning the dominant or preferred:** Such as the statement: the literal meaning is the *ʾaṣl* compared to the *majāz* (figurative meaning); or, the Qurʾān and *Sunnah* are the *ʾaṣl* over *qiyās* (analogical reasoning).
3. ***ʾAṣl mustaṣḥab* (a presumption principle):** For instance, the default for one who performed *wuḍūʾ* is that he remains in a state of purity; and, *al-ʾaṣl barāʾat al-dhimmah* (the presumption of non-liability), meaning that a person is not considered responsible for others' rights unless there is evidence. Therefore, a person is not required to prove his innocence; rather, the burden of proof is upon the claimant.
4. ***ʾAṣl* meaning a foundational rule or basis:** As in the *ḥadīth*, "Islam is built upon five [pillars]"; or the expression: "Consuming carrion is against the *ʾaṣl*," meaning that it is only permitted as an exception.
5. ***ʾAṣl* meaning an evidence or proof:** As in the saying, "The *ʾaṣl* of this ruling is such-and-such verse or *ḥadīth*."

The final meaning—*'aṣl* as an evidence—is the one intended in this compound construct. However, evidences are of two types: *kulliyyah* (general/universal), which are the concern of *'Uṣūl al-Fiqh*; and *tafsīliyyah* (detailed/specific), which pertain to *fiqh* and the science of *khilāf* (legal disagreement).

So, what is the definition of *'Ilm 'Uṣūl al-Fiqh* (The Science of the Principles of Jurisprudence)?

It is: The science concerned with the evidences of rulings and the knowledge of their indications to those rulings in a general sense.

The Difference Between *al-Fiqh* and *'Uṣūl al-Fiqh*:

There is a distinction between *al-Fiqh* (Islamic jurisprudence) and *'Uṣūl al-Fiqh* (Principles of Jurisprudence), including the following:

1. The domain of *al-Fiqh* concerns *al-'aḥkām al-taklīfiyyah* (charging legal rulings), while the domain of *'Uṣūl al-Fiqh* concerns *al-'aḥkām al-waḍī'iyyah* (correlative rulings), i.e., those which Allāh has instituted in His legislations, rendering them as proofs, causes, or conditions.

The five *'aḥkām taklīfiyyah* are: *wājib* (obligatory), *mandūb* (recommended), *mubāḥ* (permissible), *makrūh* (abominable), and *ḥarām* (forbidden).

The *'aḥkām waḍī'iyyah* are: *'asbāb* (causes), *shurūṭ* (conditions), and *mawāni'* (hinderances). Rulings are established through the presence of causes and conditions and are nullified by the presence of hinderances or the absence of causes and conditions.

2. The subject matter of *al-Fiqh* is the *mukallaf* (legally accountable individual) in terms of what rulings apply to him—such as the rulings of prayer, pilgrimage, fasting, sales, and leases.

The subject matter of *'Uṣūl al-Fiqh*, on the other hand, is the evidence and what universal rulings are established through it. For instance, *qiyās* (analogical reasoning) that is not restricted to a single case.

Example: Consider the verse of Allāh: "O you who believe! Let not a people ridicule another people…" [Al-Ḥujurāt 49:11].

The *faqīh* (jurist) would say: the verse indicates a prohibition against mocking others and thus serves as proof of the prohibition of mockery, whether by words or actions.

The *'uṣūlī* (legal fundamentalist) would examine the phrase *"Yā 'ayyuhā alladhīna 'āmanū"*—(O you who believe)—asking whether this address is specific to the Muslims or includes all people, implying that even non-Muslims are addressed by the distinctive rulings of the Islamic *Sharī'ah*.

He would also analyze the imperative verb *"yaskhar"* (to ridicule): Does the prohibition here indicate *taḥrīm* (prohibition) or merely *karāhah* (unrecommendation)? He would derive from the context a general principle that applies to other texts, such as: "A *nahy* (prohibition) indicates *taḥrīm* (forbiddance)"—based on the clause *"bi'sa al-ismu al-fusūqu ba'da al-'īmān"* (Evil is the name of sinfulness after faith) [Al-Ḥujurāt 49:11], where the act was named *fisq* (sinfulness).

3. The concern of the *'uṣūlī* lies with two things: the universal ruling and the universal evidence—and we shall discuss in detail the difference between them. The *faqīh*, however, is primarily concerned with particular evidence.
    - Universal evidence includes general types of proofs under which particulars fall, such as: *'amr* (command), *nahy* (prohibition), *'āmm* (general), *muṭlaq* (absolute), *al-'ijmā' al-ṣarīḥ* (explicit consensus), *al-ijmā' al-sukūtī* (implicit consensus), *qiyās manṣūṣ 'illatuhu* (analogy with a stated effective cause), and *qiyās mustanbaṭ 'illatuhu* (analogy with a deduced effective cause).
    - Universal rulings are general classifications under which particular legal rulings fall, such as: *wujūb* (obligation), *taḥrīm* (forbiddance), *ṣiḥḥah* (validity), and *buṭlān* (invalidity).
4. The realm of *'Uṣūl al-Fiqh* is concerned with the authority of the legislator and law-maker, while the realm of *al-Fiqh* pertains to the authority of the law-maker, judge, and accountable individual.

Exercise:

The verse: *"It is made lawful for you to be intimate with your wives during the nights of fasting... and eat and drink until the white thread of dawn becomes distinct to you..."* [Al-Baqarah 2:187]

How does the *faqīh* view this verse, and how does the *'uṣūlī* view it?

- **The jurist's (*faqīh*) perspective:**

He sees in this verse the permissibility of eating and drinking until the onset of dawn and that there is no obligation to abstain from food and drink earlier. One who eats or drinks up to dawn has a valid fast. Likewise, he sees the verse as establishing the permissibility of intimacy during the nights of Ramaḍān to prevent the mistaken notion that intercourse is forbidden throughout the month.

- **The *'uṣūlī*'s (legal fundamentalist) perspective**:

He analyzes the command *"kulū wa-ishrabū"* ("eat and drink"): Does this command indicate obligation (so that fasting at night would be forbidden), or mere permissibility—and what is the evidence for either opinions?

He also considers the *dalālat al-mukhālafah* (indication of contrast) and its validity as a universal legal principle, based on the phrases *"ḥattā yatabayyana lakum"* ("until it becomes clear to you") and *"'uḥilla lakum"* ("it has been made lawful for you").

Lecture Two

Definitions of the Science of *ʾUṣūl al-Fiqh*

The Difference Between the Definitions of the Majority and the Shāfiʿīs for *ʾUṣūl al-Fiqh*:

The *Jumhūr* (majority) of scholars—from the Ḥanafīs, Mālikīs, and Ḥanbalīs—define *ʾUṣūl al-Fiqh* (Principles of Jurisprudence) as:

"It is the knowledge of the universal rules which lead to the deduction of the practical *sharʿī* (Islamic legal) rulings derived from their detailed evidences."

The word *qawāʿid* (rules) is the plural of *qāʿidah*, meaning a universal proposition that applies to many particulars—such as: *"A command implies obligation."*

The Shāfiʿīs, however, define it as:

"The knowledge of the universal evidences of jurisprudence, and how to analyze them, and the state of the legal analyst."

From the above definitions, we can derive the following exclusions:

- The knowledge of the rulings of *fiqh*, the rules of grammar, rhetoric, and causes of legal disagreement; because these are not part of the evidences themselves.
- Non-*sharʿī* evidences, such as legal statutes, rational proofs, or sensory observations, are excluded.
- Particular evidences—such as the statement: "There is no bequest for an heir"—are excluded.
- Doctrinal and moral rulings, such as "Truthfulness is a virtue" or "Lying is a vice", are excluded as well.

The Difference Between *ʾUṣūl al-Fiqh* and *Qawāʿid Fiqhiyyah* (Legal Maxims):

Previously, we mentioned that what are called universal evidences are the *'uṣūl*, and universal rulings are the *qawā'id*. Both are within the scope of *'Uṣūl al-Fiqh*. But what is the difference between them?

- **Example of an *'aṣl***: "A command implies obligation," "A prohibition implies forbiddance," "A command does not imply repetition."
- **Example of a *qā'idah***: "Hardship brings ease," "Harm must be eliminated."

Both categories apply to many particulars.

Key Differences:

1. **Subject Matter**:

'Uṣūl al-fiqh deals with the evidence; *Qawā'id fiqhiyyah* concern the *mukallaf* (legally accountable individual).

2. **Degree of Universality**:

'Uṣūl al-fiqh are universal rulings applicable to all their particulars; *Qawā'id fiqhiyyah* (legal maxims) are dominantly applicable, though exceptions exist in some cases and particulars—hence the saying: "Every rule has its exceptions" or "Exceptions confirm the rule."

Scholars excluded five major legal maxims from this exceptionality; they are considered universal in scope:

- *Al-yaqīn lā yazūl bi al-shakk* (Certainty is not removed by doubt)
- *Al-ḍarar yuzāl* (Harm must be eliminated)
- *Al-mashaqqah tajlib al-taysīr* (Hardship brings ease)
- *Al-'ādah muḥakkamah* (Custom is legally authoritative)
- *Al-'umūr bi maqāṣidihā* (Matters are judged by their objectives)

3. **Order of Derivation**:

'Uṣūl al-Fiqh, according to most fundamentalists, precedes the branches of *fiqh*, as it exerts control over them and must logically come first.

In contrast, legal maxims are subsequent—they are mentally and practically derived from extensive *istiqrā'* (induction) of many individual rulings which then produce the maxim.

4. **Functionality and Scope**:

Legal maxims serve the universal objectives of the *Sharī'ah* and reflect its underlying wisdom.

In contrast, *'Uṣūl al-Fiqh* does not directly engage with *maqāṣid al-sharī'ah* (objectives of Islamic *Sharī'ah*); rather, it concerns abstract proofs that could even apply outside of Islamic law to secular legal systems.

Exercise:

Extract from the verse of Allāh what it indicates in terms of *fiqh, 'uṣūl*, [and legal maxims]: "O you who believe! Fulfill [your] contracts." [Al-Mā'idah 5:1].

- ***Fiqh***: The obligation to fulfill contracts and all their implications, such as delivery, payment, and so on.
- ***'Uṣūl***: The command form in the verse (*"fulfill"*) indicates obligation, and there is no justification to interpret it as a recommendation.
- ***Qā'idah***: "The default ruling in contracts is validity and binding force."

Lecture Three

Characteristics of the Science of *ʾUṣūl al-Fiqh*

1. ***ʿIlm Miʿyārī* (Normative Science):**

That is, it serves as a *mīzān* (standard) by which *sharʿī* reasoning and argumentation are evaluated. Its core subject matter revolves around right and wrong in legal reasoning.

2. ***ʿIlm Istiqrāʾī* (Inductive Science) :**

It is based on the observation and analysis of how *sharʿī* texts and evidences indicate meanings—*istiqrāʾ* (induction) being the opposite of *intiqāʾ* (selective citation). For example, this includes the analysis of commands, prohibitions, indication of indefinite expressions, indication of exceptions, and other modes of indication.

3. **Connected to *Sharʿī* Texts:**

Its primary sources are *samʿī* (transmitted) evidences—namely, the Qurʾān and the Sunnah of the Prophet Muḥammad (peace and blessings be upon him).

4. **Concerned with Linguistics and Semantics:**

It engages with linguistic structures and their implications—such as *khabar* (declarative) and *inshāʾ* (performative expressions), the various legal implications of *inshāʾ*, and all matters related to formulation and denotation.

5. **Connection Between *ʾUṣūl* and *Furūʿ***:

There is an inseparable link between *ʾuṣūl* (principles) and *furūʿ* (subsidiaries). Whether one begins with established *ʾuṣūl* and applies them to *furūʿ*, or begins with *furūʿ* that give rise to a certain *ʾaṣl*, both approaches affirm this relationship. Al-Shāṭibī said in *Al-Muwāfaqāt* (The Reconciliations): "Any issue outlined in *ʾUṣūl al-Fiqh* that has no practical application in jurisprudential subsidiaries or in legal etiquette—or does not aid in such— its inclusion within the science of *ʾUṣūl al-Fiqh* is baseless."

6. **An Intermediary Science**:

'Uṣūl al-Fiqh serves as a mediating discipline between the universal objectives of the *Sharī'ah* and their particular subsidiary evidences.

Lecture Four

The Relationship Between Logic and *'Uṣūl al-Fiqh*

'Ilm al-manṭiq (Science of Logic) is often referred to as *'Ilm al-Mīzān* (Science of Criterion), because it serves as a standard for evaluating arguments and proofs. Ibn Sīnā (Avicenna) called it "the servant of the sciences," while Al-Fārābī referred to it as "the chief of the sciences." Its etymology is disputed. Some trace it to the "*nuṭq*" (pronunciation) of Arabic. Others argue that the term was translated from Latin and later adapted for this science in Arabic usage. If derived from *nuṭq*, then it refers to articulation, the grasp of universals, or the rational soul. This field of knowledge strengthens articulation, uses and refines the grasp of universals, and completes the function of the rational soul. Thus, the term *manṭiq* became associated with this field of knowledge.

Logic has various definitions. Ibn Khaldūn defined it as: "The rules by which one can distinguish between correct and incorrect definitions of essences, and [between] valid [and invalid] proofs that produce convictions."

Al-Jurjānī said: "It is a primary device that, when observed, protects the mind from error in reasoning."

Controversy: Was *'Uṣūl al-Fiqh* Influenced by Logic?

Much debate has surrounded the question of whether the science of *'Uṣūl al-Fiqh* was influenced by [Greek] logic, especially since logic historically predates it and overlaps in purpose, tools, and outcomes.

However, it would be of interest to me to say that this issue of mutual influence has been exaggerated. Human knowledge is naturally interconnected and interdependent. Islam itself has laid down general principles for such debates:

Allāh Almighty said: "And let not the hatred of a people prevent you from being just..." [Al-Mā'idah 5:8].

The Prophet (peace and blessings be upon him) said: "Wisdom is the lost property of the believer—wherever he finds it, he is most deserving of it."

Hence, it is not shameful to acquire knowledge from others, and we may even benefit from it more than its producers. This has occurred throughout history. Similarly, others have adopted principles of some sciences from us and developed them further than we did. This mutual exchange of knowledge is not a flaw.

Manifestations of Logic in *'Uṣūl al-Fiqh*:

Books of *'Uṣūl* are rich in logical terminology, such as:

- *Ḥadd* (definition), *ṣūrah* (intellectual picture), *qaṭ'* and *ẓann* (definitiveness and uncertainty), and *al-'ilm al-ḍarūrī wa al-muktasab* (necessary vs. acquisitive knowledge).
- We also notice the phenomenon of using structured logical argumentation by raising objections and responding to them.
- Practicing reasoning through logical evidences, such as the Speculative Isolating of the Effective Cause (*al-qiyās al-sharṭī al-munfaṣil* or *sabr wa-taqsīm*).

This method involves:

- Listing all conceivable attributes in the source case,
- Invalidating most of them as the *'illah* (effective cause).
- Leaving one remaining valid effective cause.

Example 1: Qur'ānic Argument:

Allāh Almighty said: "Were they created out of nothing? Or were they the creators [of themselves]?" [Al-Ṭūr 52:35].

Those people who are mentioned in the verse denied Allāh as the One God based on possible effective causes: they came into being by chance or they created themselves; or they were created by another Creator. Once the first two possibilities are refuted, only the third remains.

Example 2: Guardianship in Marriage

Possible reasons include: virginity, protection of women, women's vulnerability, men's *qiwāmah* (custody). [One investigates these possible effective causes until the most valid cause is affirmed].

- The science of principles of Islamic jurisprudence and the science of logic share the same logical formula, i.e., the logical sequence of a set of argumentations. For instance, adopting *al-qiyās al-ḥamlī* (Categorical Syllogistic form) which consists of two premises and one conclusion.

The scholar of *manṭiq* would say:

- Every miser is a coward.
- Every coward is deprived.
- ∴ Every miser is deprived.

The scholar of *'Uṣūl al-Fiqh* would say:

- Every intoxicant is wine.
- Every wine is prohibited.
- ∴ Every intoxicant is prohibited.

Lecture Five

The Origin of *ʿIlmʾUṣūl al-Fiqh*

Like most sciences, *ʿIlm ʾUṣūl al-Fiqh* (The Science of the Principles of Islamic Jurisprudence) began in its early stages as a practical and applied discipline more than a theoretical or codified one. In this lecture, we will attempt to outline the intellectual development associated with key stages in Islamic heritage.

First: During the Prophetic Era:

This science appeared in practical applications, such as:

- The Prophet Muḥammad (peace and blessings be upon him) employed *qiyās* (analogical reasoning) in certain instances. One example is his statement to the person who asked about his deceased father's vow: "Have you considered: if your father had a debt and you paid it on his behalf, would that benefit him?" He replied: "Yes." The Prophet (peace and blessings be upon him) then said: "Then fulfill Allāh's debt, for Allāh is more deserving of fulfillment."
- Another example is his saying (peace and blessings be upon him): “In a man’s sexual intercourse [with his wife] there is *ṣadaqah* (charity).” On being asked whether a reward would be given for satisfying one’s passion, he said, “Tell me; if he were to devote it to something forbidden, would it not be a sin on his part?” They replied: Yes. Then, he added: “Similarly, if he were to devote it to something lawful, he would have a reward.”
- The Prophet (peace and blessings be upon him) also approved the *ijtihād* (independent intellectual effort) of the Companions (may Allāh be pleased with them), such as:
    - What occurred during the incident of Banū Qurayẓah.
    - The response of Muʿādh (may Allāh be pleased with him) when asked: "On what basis will you judge if a case is brought before you?"
    - The *ijtihād* of two men who performed *tayammum*, with one repeating the prayer and the other not.

- The reasoning of ʿAmr ibn al-ʿĀṣ (may Allāh be pleased with him), who cited the verse:"And do not throw yourselves into destruction with your own hands" [Al-Baqarah 2:195].

Second: In the Era of the Companions:

It also continued in an applied form, manifesting in several aspects:

1. Prioritizing the Qurʾān and *Sunnah* over other sources in deriving legal rulings.
2. The emergence of *ijmāʿ* (consensus) as a legal proof, such as their consensus on compiling the Qurʾān and on certain matters of inheritance.
3. Applying the principle of *naskh* (abrogation) to clarify rulings. For instance, Ibn Masʿūd (may Allah be pleased with him) issued a *fatwā* that the *ʿiddah* (waiting period) of a pregnant woman ends with the shorter of two terms. He said: "Do you impose on her a burden and then not grant her a *rukhṣah* (concession)? Sūrat Al-Nisāʾ, the shorter one [Al-Ṭalāq], was revealed after the longer one."
4. Employing *qiyās* (analogical reasoning) upon identifying the *ʿillah* (effective cause).
   An example is the ruling deduced by ʿAlī ibn Abī Ṭālib (may Allāh be pleased with him) that the one who drinks alcohol is to be lashed eighty times, stating: "A man, when he drinks, becomes intoxicated; and when he is intoxicated, he raves; and when he raves, he slanders. So, his punishment is the same as the slanderer—eighty lashes." [The slanderer is someone who accuses another of fornication]
5. Considering *al-maṣlaḥah al-mursalah* (unrestricted public interest). For example, ʿAlī (may Allāh be pleased with him) issued a ruling to hold artisans liable for damages and said: "People will not be reformed except by this."

Other examples include the compilation of the Qurʾān, the addition of a second *ʾādhān* (call to prayer), and the decision not to collect *zakāh* on implicit wealth such as currency and trade goods—unlike visible wealth like crops and livestock.

6. Emphasizing rational understanding and *al-qiyās al-iqtirānī* (normal analogy). This is reflected in the famous letter of ʿUmar ibn al-Khaṭṭāb (may Allāh be pleased with him) to Abū Mūsā al-ʾAshʿarī (may Allāh be pleased with him), in which he wrote: "Observe understanding! Observe understanding in what troubles you in your chest when you do not find it in the Book or the Sunnah. Then recognize the similarities and parallels. Analogize matters accordingly and adhere to what is closest to Allāh and most akin to the truth."

This letter contains two foundational principles of *ʾUṣūl al-Fiqh*: *qiyās* (analogical reasoning) and *tarjīḥ* (preference), both of which are central pillars in this discipline.

Third: The Era of the Followers and the Great Imāms:

In this era, matters began to expand, and into the sources of legislation entered the practices of the Companions, their independent intellectual reasoning, and their applied analogies. As a result, jurisprudential schools branched out accordingly. Thus, we found *Madrast al-Raʾy* (School of Opinion) and *Madrast al-ʾAthar* (School of Tradition), each with its own foundational principles to which it adhered.

We found, for instance, Imām Mālik prioritizing the practice of the people of Madīnah over *ḥadīth al-āḥād* (solitary reports); We found the Ḥanafīs requiring *shuhrah* (renown) in matters of *ʿumūm al-balwā* (necessitated prevelations); We found Al-Shāfiʿī rejecting *istiḥsān* (juristic preference) because, in his view, it is legislation based on personal whims; We found that each *madhhab* (jurisprudential school) had its foundational principles upon which it structured its rulings, and we saw this reflected in their detailed jurisprudential applications and methods of intellectual deduction.

Fourth: The Era of Codification:

Researchers have differed regarding who was the first to compile a dedicated work in the science of *ʾUṣūl al-Fiqh*:

- The Shīʿah held that the first to author in this field was Imām Muḥammad al-Bāqir, but they did not reveal this compilation.

- Ibn al-Nadīm argued that the first to author in *ʿIlm al-ʾUṣūl* were Imām Abū Yūsuf Yaʿqūb and Imām Muḥammad ibn al-Ḥasan.
- The majority opinion is that the first authored work in this science was *Al-Risālah* [The Treatise] by Imām al-Shāfiʿī.

The correct view is that no comprehensive book establishing the foundational principles of *ʿIlm ʾUṣūl al-Fiqh* precedes *Al-Risālah*, and what some referred to may have been scattered teachings found in *al-ʾuṣūl al-sittah* (The Six Foundational Books)) among the Ḥanafīs or within the teachings of the Imāmī school.

Kitāb al-Risālah:

Kitāb al-Risālah began as several chapters that Imām al-Shāfiʿī wrote in Makkah al-Mukarramah, which he used to refer to as *al-kitāb* or *kitābī* ("the book" or "my book").

Later, when he visited Baghdad, Imām ʿAbd al-Raḥmān ibn Mahdī requested him to compose a book on the meanings of the Qurʾān and Sunnah, *nāsikh waʾl-mansūkh* (the abrogator and abrogated), and *ḥujjiyyat al-ijmāʿ* (the authority of consensus). Al-Shāfiʿī then rewrote it as a treatise for Ibn Mahdī, and it came to be known as *al-Risālah*.

When he settled in Egypt, he rewrote it once again and dictated it to Al-Rabīʿ ibn Sulaymān, making it a preface to his book *Al-Umm* [The Exemplar].

For this reason, Al-Rāzī said: "Know that the attribution of the science of *ʾUṣūl* to Al-Shāfiʿī is like the attribution of the science of logic to Aristotle, and like that of the science of *ʿarūḍ* (Arabic Prosody) to Al-Khalīl."

Al-Shāfiʿī followed *Al-Risālah* with several other works in *ʾUṣūl*, including:

- *Jimāʿ al-ʿIlm*[1]: To establish the authority of *ḥadīth al-āḥād* (solitary reports) and the obligation to act upon them.
- *Ibṭāl al-Istiḥsān*[1]: Because, to him, *istiḥsān* is an unregulated principle.

[1] Printed along with *Al-Umm*.

- *Ikhtilāf al-Ḥadīth*[2]: A book written to reconcile apparently conflicting *ʾaḥādīth*.

The Era of Codification (continued):

It is important to mention here that the codification and compilation of *fiqh* preceded that of *ʾuṣūl*, because *fiqh* is the substantive material, while *ʾuṣūl* is the evaluative criterion.

There are several methods of compilation in the science of *ʾUṣūl al-Fiqh*:

First: The Method of *al-mutakallimīn* (Theologians) or the Shāfiʿī Method:

The main feature of this method is the formulation and refinement of principles and rules. It defines the rules of this science through a theoretical lens. Thus, this method does not concern itself with legal rulings; rather, whatever is supported by reason and established by proof is accepted as a principle and a rule, regardless of whether it agrees or disagrees with the jurisprudential subsidiaries.

Second: The Method of *al-fuqahāʾ* (Jurists) or the Ḥanafī Method:

The defining feature of this method is that it derives principles from jurisprudential subsidiaries. Therefore, when they encounter subsidiaries that conflict with a principle, they adjust the principle to accommodate as many subsidiaries as possible.

Third: The Method of *al-mutaʾakhkhirīn* (Later Scholars):

This method combines the two previous methods, recognizing that each of the earlier methods has its limitations. The first is overly theoretical, even positing hypothetical cases with no practical jurisprudential reality. The second leans heavily toward jurisprudential disagreement and is closer to legal maxims than to *ʾuṣūl*.

This combined method is built on two foundations:

- Establishing the principle or foundational maxim.

[1] Printed along with *Al-Umm*.

[2] Printed along with *Al-Umm*.

- Connecting it to the jurisprudential subsidiaries that stem from it, while identifying the subsidiary exceptions that do not fall under the principle and clarifying the reasons behind these exceptions.

This method includes scholars from both earlier methods.

The Most Important Books in *'Uṣūl al-Fiqh* According to the Shāfiʿī Method:

In addition to the books of Imām al-Shāfiʿī, we find:

1. *Al-Muʿtamad* by Abū al-Ḥusayn al-Baṣrī al-Muʿtazilī (d. 436 AH)
2. *Al-Burhān* by Abū al-Maʿālī al-Juwaynī (d. 478 AH)
3. *Al-Mustaṣfā* by Abū Ḥāmid al-Ghazālī (d. 505 AH)
4. *Al-Maḥṣūl* by Fakhr al-Dīn al-Rāzī (d. 606 AH)
5. *Al-'Iḥkām fī 'Uṣūl al-'Aḥkām* by Sayf al-Dīn al-Āmidī (d. 631 AH)

The Most Important Books in the Ḥanafī Method:

1. *Al-'Uṣūl* by Abū al-Ḥasan al-Karkhī (d. 340 AH)
2. *Al-'Uṣūl* by Abū Bakr al-Jaṣṣāṣ al-Rāzī (d. 370 AH)
3. *Ta'sīs al-Naẓar* by Abū Zayd al-Dabūsī (d. 430 AH)
4. *Taqwīm al-'Adillah* by Abū Zayd al-Dabūsī (d. 430 AH)
5. *Al-'Uṣūl* by Fakhr al-Islām al-Bazdawī (d. 482 AH)
6. *Al-'Uṣūl* by *Shams al-'A'immah* Al-Sarakhsī (d. 483 AH)

From Other than the Ḥanafīs:

1. *Tanqīḥ al-Fuṣūl* by Shihāb al-Dīn al-Qarāfī (d. 684 AH)
2. *Al-Tamhīd* by Jamāl al-Dīn al-ʾIsnawī (d. 772 AH)

The Most Important Works in the Method of the Later Scholars:

1. *Badīʿ al-Niẓām* by Ibn al-Sāʿātī al-Ḥanafī (d. 694 AH)
2. *Tanqīḥ al-'Uṣūl* by *Ṣadr al-Sharīʿah* al-Bukhārī (d. 747 AH)

3. *Jam' al-Jawāmi'* by Tāj al-Dīn ʿAbd al-Wahhāb al-Subkī (d. 771 AH)
4. *Al-Taḥrīr* by Kamāl al-Dīn Ibn al-Humām al-Ḥanafī (d. 861 AH)

Recent Works in *'Uṣūl al-Fiqh*:

1. *'Irshād al-Fuḥūl* by al-Shawkānī (d. 1250 AH)
2. *Tashīl al-Wuṣūl 'ilā 'Ilm al-'Uṣūl* by al-Maḥallāwī al-Ḥanafī (d. 1920 CE)
3. *'Uṣūl al-Fiqh* by Shaykh ʿAbd al-Wahhāb Khallāf (d. 1375 AH / 1955 CE)
4. *'Uṣūl al-Fiqh* by Shaykh Muḥammad Abū Zahrah (d. 1394 AH / 1974 CE)

Lecture Six

The Sources of Islamic Legislation

The meaning of *sources* is: the methods and means through which one arrives at knowledge of the ruling. They are also referred to as *'uṣūl al-tashrī'* or (the origins of legislation) *dalā'il al-tashrī'* (the evidences of legislation).

A *source* is that from which other things branch off and from which they originate. Just as a well or a river is a source of water — where people draw water — the source of legislation is what provides the evidence through which the ruling is known.

The sources of Islamic legislation expanded until some enumerated more than twenty of them.

Classification of the Sources of Legislation:

The sources of legislation can be classified based on various considerations:

1. Based on Consensus Regarding Them:

They are divided into:

- Agreed-upon sources, accepted by all *'Uṣūl* scholars and jurists without notable dispute.
- Disputed sources, over which *'Uṣūl* scholars and jurists have differed in terms of acceptance and rejection.

The agreed-upon sources are four:

The Qur'ān, the Sunnah, *'Ijmā'* (consensus)[1], and *Qiyās* (analogical reasoning)[2].

The disputed sources include:

Istihsān (juristic preference), *Istiṣḥāb* (presumption of continuity), *maṣāliḥ mursalah* (unrestricted public interests), *'urf* (custom), *Shar' man qablana* (laws of

[1] Excluding the *mu'tazilah*.

[2] Excluding the *Ẓāhirīs*.

previous nations), *qawl al-ṣaḥābī* (the opinion of a Companion), and *sadd al-dharā'i'* (blocking the avenues of evil).

2. Based on *naql* (Transmission) and *'aql* (Reason):

- *Maṣādir naqliyyah* (transmission-based sources): those based on transmission and authentic narration from one to one, and thus precede the *mujtahid* in time. [*mujtahid* is a scholar who is qualified to practice independent intellectual reasoning].
- *Maṣādir 'aqliyyah* (reason-based sources): those requiring intellectual effort and reflection, and thus follow the *mujtahid* in time.

Transmission-based sources include: The Qur'ān, the Sunnah, *'Ijmā'*, *'urf*, *Shar' man qablanā*, and the practice of the Companions.

Reason-based sources include: *Qiyās*, *maṣāliḥ mursalah*, *istiḥsān*, *istiṣḥāb*, and *sadd al-dharā'i'*.

There is a relationship of interdependence between these two types: the transmitted narration requires reason for reflection and understanding, and the rational reasoning requires a transmitted narration as a foundational material.

3. Based on Independence and Dependency:

Some of these evidences are independent in and of themselves, while others are dependent or based on other sources.

Independent sources: The Qur'ān, the Sunnah, *'Ijmā'*, *'urf*, and the opinion of the Companion.

Dependent sources: *Qiyās*, *istiḥsān*, and *sadd al-dharā'i'* — these sources reveal the ruling rather than establish it.

The Agreed-Upon Sources of Legislation:

First: The Noble Qur'ān:

It is the speech of Allāh, revealed to our master Muḥammad (peace and blessings be upon him), in Arabic, transmitted through *tawātur* (wide recurrence), recorded

in the *muṣḥaf*, and recited as an act of worship. It begins with Sūrat al-Fātiḥah and ends with Sūrat al-Nās.

Exclusions from this definition:

- *The speech of Allāh*: to exclude the speech of anyone else, including Prophets. Thus, it excludes *ḥadīth qudsī* [divine tradition], which consists of the Prophet's (PBUH) words and expressions, and the Sunnah, which comprises the Prophet's (PBUH) words, actions, and approvals. It also excludes the speech of angels when it is not a revelation from Allāh.
- *Revealed to our master Muḥammad (peace and blessings be upon him)*: this excludes speech revealed to others like Mūsā and ʿĪsā, and also excludes Allāh's internal, self-subsistent speech.
- *In Arabic wording*: this excludes foreign-language expressions, even if they are literal translations of the Qurʾān — e.g., *Khudā, Rasūl-e-Khudā, Khud ān khānah*. What matters is the usage of the term in the Arabic language at the time of revelation — not its etymological origin — as in *istabraq* (brocade) or the names of Prophets.

For this reason, Allāh attributed it to Arabs: "Indeed, it is a reminder for you and your people." [Al-Zukhruf 43:44].

- *Transmitted through tawātur*: this excludes anything passed on via *shuhrah* (renown) or *ʾāḥād* (solitary reportss), like Prophetic *ḥadīths* and historical reports of past nations. *Tawātur* of the Qurʾān means successive, consistent transmission of the entire generation from one generation to another — not merely a specific number of individuals in each generation. That is, the entire generation of Companions transmitted it from the Prophet (peace and blessings be upon him) , and the Followers from the Companions, and so forth.

Therefore, anything not transmitted by an entire generation is not considered a part of the Qurʾān, even if reported as a commentary, such as all types of *qirāʾāt shādhdhah* (non-canonical Qurʾānic readings), whether interpretive, abrogated, or based on dialectal and linguistic variants.

- *Recited as an act of worship*: i.e., in a manner specific to the Qur'ān — such as recitation in prayer, or the multiplied reward for its recitation. This excludes *ḥadīth qudsī*, which is not valid for recitation in prayer, and excludes verses whose wording was abrogated, as they cannot be recited in prayer either.
- *Recorded in the muṣḥaf*: an additional restriction, excluding anything that does not conform to the ʿUthmānic *rasm* (codex), and excluding verses whose wording was abrogated, as they are not written in the *muṣḥaf*.
- *It begins with Sūrat al-Fātiḥah and ends with Sūrat al-Nās*: another additional restriction — not a primary one — used to exclude invocations added at the end (e.g., *du'ā' al-khatm*) and to indicate consensus on the order of the *sūrahs*.

Therefore:

- A literal translation of the Qur'ān, even if exactly literal, is not a part of the Qur'ān, as it lacks the Arabic wording. Only one narration differs on this — attributed to Imām Abū Ḥanīfah (may Allāh be pleased with him) — wherein he did not consider the Arabic wording a required condition for *Qur'ānicity*.

(The correct opinion within the Ḥanafī *madhhab* is that Imām Abū Ḥanīfah later retracted this view.)

- The *qirā'āt shādhdhah* (non-canonical Qur'ānic readings) are not considered a part of the Qur'ān. They may be cited for *istīnās* (supportive reasoning), but not for religious devotion.
- As for "*Bismillāh al-Raḥmān al-Raḥīm*", the great scholars differed regarding its status: is it a verse or not? The correct opinion is that it is a verse only in Sūrat al-Fātiḥah. Its inclusion in the *muṣḥaf* is for separation between *sūrahs* or for bringing blessings.

Other Reflections on the Qurʾān:

1. The Qurʾān's Indication of Rulings:

Although the Qurʾān — as previously defined — is *qaṭʿī al-thubūt* (authentic clear-cut text), its *dalālah* (indication) varies:

- *Qaṭʿī al-dalālah* (clear-cut indication): that which bears only the sole obvious interpretation. Example: verses of inheritance, *ḥudūd* (legal punishments), and expiations.
- *Ẓannī al-dalālah* (speculative indication): that which permits multiple meanings and allows for *ta'wīl* (interpretation). These are abundant in the Qurʾān.

Example: The word *al-qurū'* [plural of *qur'* — which could mean menstruation or the period of purity].

2. The Text in Terms of Brevity and Elaboration:

Qurʾānic text is divided into:

- *Mufaṣṣal* (elaborated): Such as those related to inheritance, beliefs, and messengers. These are not open to *ijtihād*.
- *Mujmal* (brief): General principles and universal values, which are subject to *ijtihād* by scholars.
- *Muḥtamal* (combined): Partly brief, partly elaborated. Example: "As for the male thief and the female thief." [Al-Māʾidah 5:38]. The ruling (cutting the hand) is elaborated, but the term *sāriq* (thief) is brief — who qualifies as a thief? Is the hand cut due to theft solely? Is the hand cut after the first offense? All these matters are mentioned briefly, but they require elaboration.

To Benefit from the first source of legislation, One Must Know:

1. The Arabic language, its derivations, and common usage in word and deed at the time of revelation.

2. Recognizing *'asbāb al-nuzūl* (circumstances of revelation) to understand the specific texts versus the general ones.
3. Recognizing *naskh* and *mansūkh* (the abrogating text and the abrogated one).
4. The explanatory Sunnah that clarifies the Qur'ān.

Lecture Seven

The Sources of Islamic Legislation – The Sunnah

Second: The Sunnah:

Linguistic definition:

Linguistically, the word *sunnah* means a followed way or an ongoing practice, whether good or bad.

The word may appear in its absolute form or in a compound form, such as: *sunnat al-ʹArab* (the practice of the Arabs), *sunnat al-ʹajam* (the practice of the non-Arabs), *sunnat al-ʾahl al-ḥadīth* (the practice of the traditionalists), *the sunnah of such-and-such*, etc.

Terminological definition:

The definition of *Sunnah* varies depending on the discipline and the scholar's perspective:

1. Definition According to the *Muḥaddithūn* (Traditionalists):

The Sunnah is: The sayings, actions, tacit approvals, physical characteristics, and moral qualities of the Prophet (peace and blessings be upon him), along with all reports about him — whether they occurred before or after his Prophetic mission.

Some of them expanded the term to include *marfūʹ* (Prophetic reports), *mawqūf* (Companions' reports), and *maqṭūʹ* (Followers' reports), thus encompassing sayings and actions of the Companions and the Followers.

2. Definition According to the *ʾUṣūliyyūn* (Fundamentalists):

The Sunnah is: The sayings, actions, and tacit approvals of the Prophet (peace and blessings be upon him) that serve as evidence for legal rulings.

In this context, the *Sunnah* is the second source of legislation, coming after the Noble Qurʾān.

Accordingly, the following are excluded from the Sunnah in the view of the *ʾUṣūliyyūn*: His sayings and actions that were specific to him, as these are not valid

bases for general legislation; and his noble physical characteristics, as these are specific attributes and not legislative in nature.

3. Definition According to the *Fuqahā'* (Jurists):

In the context of Islamic jurisprudence, the term *Sunnah* is used in two primary senses:

1. As the opposite of *wājib* (obligation): It refers to what is *mandūb* or *mustaḥabb* (recommended), i.e., actions for which a Muslim is rewarded if performed, but not punished if omitted.
2. As the opposite of *bid'ah* (innovation): For example, *sunnī* divorce vs. *bid'ī* divorce, or *sunnī* oath vs. *bid'ī* oath. As the scholars have said: "No people introduce an innovation except that they abandon a *Sunnah* of equal measure."

Exercise:

Classify the types of Sunnah according to the various perspectives of the scholars based on the following narrations:

- "The Prophet (peace and blessings be upon him) was the most handsome of people in face and the best in character. He was neither excessively tall nor short." [Al-Bukhārī and Muslim]
- "The Messenger of Allāh (peace and blessings be upon him) prayed the ʿĪd prayer before delivering the sermon, without any *'ādhān* or *'iqāmah*." [Muslim]
- "When the Messenger of Allāh (peace and blessings be upon him) passed away, he was placed upon his bier. People entered in groups and prayed over him, and no one led them in prayer." [*Al-Muṣannaf* by Ibn Abī Shaybah]

In this context, we adopt the definition given by the Fundamentalists. The following is its explanation:

- *His sayings*, such as: "Actions are only by intentions."
- *His actions*, such as his description of how he performed *wuḍū'* (ablution), *ṣalāh* (prayer), and *ḥajj* (pilgrimage). The Prophet (peace and blessings be

upon him) directed us to follow his actions, saying: “Take your rituals from me.” “Pray as you have seen me pray.”

- *His tacit approvals*, such as his approval of performing *tayammum* (dry ablution) on a cold night, and his approval of Muʿādh’s methodology in issuing *fatwās* and judgments.

Excluded from the Fundamentalists' Definition of Sunnah:

1. All that occurred before the Prophetic mission, because it was not part of legislation — unless the Prophet (peace and blessings be upon him) later approved it after the advent of his mission, such as his approval of the *Ḥilf al-Fuḍūl* (League of the Virtuous).
2. His natural, human *ʾādāt* (behaviors) such as standing, sitting, walking, sleeping, eating, and marital relations — unless he explicitly indicated a legislative intent, like eating with the right hand.
3. Actions based on human experience, such as hiding in the cave for three days, traveling in the opposite direction during the Hijrah, engaging in trade or agriculture, military leadership, and descriptions of medicines.
4. Actions specific to him, such as marrying more than four wives, accepting marriage without a dowry, and *wiṣāl al-ṣawm* (continuous fasting).
5. Actions related to specific times, places, or circumstances that are not replicable due to differing contexts, such as:
    - *Tawāf* on camelback, and allowing ʾUmm Salamah to do the same.
    - Refusal to set fixed market prices, as in the *ḥadīth* of ʾAnas: “Prices increased during the time of the Messenger of Allāh (peace and blessings be upon him), so people said, ‘O Messenger of Allāh, fix the prices for us.’ He replied: ‘Indeed, Allāh is the One who sets prices, who withholds, who gives, and who provides. I hope to meet Allāh with none of you claiming against me an injustice in blood or wealth.’” [Recorded by the authors of the *Sunan* except Al-Nasāʾī]
    - Wearing a turban, not lengthening his lower garment, wearing white, and wearing an *ʾizār* (waist-wrap).

Lecture Eight

The Relationship of Abandonment to the Definition of the *Sunnah*

Linguistic meaning of *tark* (abandonment):

Tark in Arabic refers to abandonment and leaving something aside. For example, *taraktu kadhā* means “I did not do such and such.” In the *ḥadīth*: "You do not abandon anything for the sake of Allāh, the Exalted, except that Allāh Almighty gives you something better in return." [Recorded by ʾAḥmad and Al-Bayhaqī].

The meaning of *tark* in the textual sources can be expressed in other ways, including *ʾiʿrāḍ* (turning away) and *wadaʿ* (leaving).

For *tark* to be valid in the Islamically legal sense, it must involve something that is within the capacity of the person to do. This is because abstention from an act due to inability is not legally regarded as *tark*. For instance, someone who does not wash a severed hand during *wuḍūʾ* (ablution) is not said to have “abandoned” washing it—there is no act of washing at all due to the absence of a limb. Thus, performing an action requires capability, and likewise, abandonment must be of something one is capable of doing.

Furthermore, *tark* requires thoughtful intention. That which a person fails to do unintentionally is not considered *tark*. For example, the things a sleeping person refrains from are not called abandonments, such as not speaking while asleep—it is unintentional.

Hence, *tark* refers to an act which the Prophet (peace and blessings be upon him) intentionally did not perform while being capable of performing it.

This excludes:

1. What he abandoned unintentionally, such as the actions of a sleeping person.
2. What he abandoned due to forgetfulness.
3. What he abandoned due to inability, such as performing the impossible or creating bodies.

Categories of What the Prophet (peace and blessings be upon him) Abandoned:

1. What he abandoned due to custom – such as his abstention from eating *ḍabb* (lizard). He said: "It was not in the land of my people, so I find myself averse to it." [Recorded by Al-Bukhārī and Muslim].
2. What he abandoned out of forgetfulness – such as when he forgot a *rakʿah* of the ʿAṣr prayer, and when reminded, he said: "I am only a human being—I forget as you forget. So, if I forget, remind me."
[Recorded by Muslim].
3. What he abandoned out of fear that it would become obligatory – such as his abandonment of praying *Tarāwīḥ* in congregation continuously.
4. What he abandoned due to potential hardship – such as in the case of *siwāk* (tooth-stick) or delaying the ʾIshāʾ prayer.
5. What he abandoned out of fear of great harm – such as in the case of not rebuilding the Kaʿbah upon the foundations of ʾIbrāhīm (peace be upon him), or his abstention from killing the hypocrites to avoid strife, or his refusal to name them in order to prevent accusations, suspicion, and discord among Muslims.
6. What he abandoned while relying on its inclusion in the general command to do good under the scope of: "And do good so that you may succeed." [Al-Ḥajj 22:77]. An example is his irregular observance of the *Ḍuḥā* prayer, even though he recommended it. In the *ḥadīth* of ʾĀʾishah (may Allāh be pleased with her): "The Messenger of Allāh (peace and blessings be upon him) did not consistently perform the *subḥat al-ḍuḥā*..." [Recorded by Al-Bukhārī and Muslim]. That is, he did not make it a regular practice. His not maintaining it regularly does not indicate forbiddance of maintaining it regularly, as it falls under the general acts of righteousness.
7. When he performed an act in one specific form and abandoned other forms – such as his fasting on his birthday and on the day of ʾĀshūrāʾ without preparing special food, organizing celebrations, inviting relatives, or making

it a holiday. Or such as writing the Qur'ān on parchments but not compiling it into a single bound volume.

8. What he abandoned because it did not occur to him or it was not customary in his time – such as not using a pulpit until it was suggested to him, not wearing a suit, necktie, or traveling by airplane—these were not present in his era.

9. What he did at one time and then abandoned – such as his invocation against Riʿl and Dhakwān. In the *ḥadīth*: "He supplicated against them for a month, then stopped." [Recorded by Al-Bukhārī and Muslim].

10. What he abandoned due to future considerations – such as refusing to set prices, or his refusal to curse the polytheists, as he said: "I was not sent as one who curses. I was only sent as a mercy." [Recorded by Muslim].

11. What he abandoned because it was prohibited for him – such as taking from the wealth of charity, or eating onions and garlic. He said: "Eat, for I converse with one whom you do not converse with." [Recorded by Al-Bukhārī and Muslim]. Also, his abstention from listening to the flute.

12. What he abandoned due to abrogation of the ruling related to it – such as *wuḍū'* after eating food touched by fire, visiting graves (initially prohibited), or standing for a funeral (which he used to do and then stopped).

13. What he abandoned in certain instances while performing it in others – such as not raising his hands during the Friday *khuṭbah*, even though he raised them while supplicating at *Ṣafā* and *Marwah*, at ʿArafah, in the *istisqā'* (prayer for rain), and when throwing the *jamrāt* (pebbles).

14. What he intentionally abandoned in the domain of worship – such as not giving the *'ādhān* for the ʿIīd prayer, and not praying before or after it, similar to the prayer of *istisqā'*.

Lecture Nine

The Relationship Between *Tark* (Abandonment) and *Muqtaḍā* (Prerequisite), and *Māniʿ* (*Hindrance*)

***Muqtaḍā* (prerequisite)** refers to what leads to a certain action, such as the call to prayer to inform people of the time of prayer.

***Māniʿ* (hindrance)** refers to an obstacle that hinders or prevents an action, such as the state of *ʾIḥrām* which prevents hunting, even though hunting is originally lawful, or the marriage of a woman which prevents the same man marrying her sister, even though marriage is originally lawful.

If we consider the logical division of the two elements (i.e., the prerequisite and the hindrance), we find that it can be divided into:

1. Actions that have a prerequisite and no hindrance.
2. Actions that have a prerequisite, but there is a hindrance.
3. Actions that have no prerequisite and no hindrance.
4. Actions that have no prerequisite, but there is a hindrance.

– For actions that have a prerequisite and no hindrance, they are most of the Prophet's (peace and blessings be upon him) actions or commands, such as his command for the call to prayer to inform people of the prayer time, which had a prerequisite and had no hindrance because there was no equivalent to it in other religions, unlike the bell or trumpet, which were used by other religion adherents.

– For actions that have a prerequisite but there is a hindrance, examples include the Prophet's (peace and blessings be upon him) desire to perform *tamattuʿ* during *ḥajj* but he was hindered by bringing his sacrificial animal with him, his refusal to rebuild the Kaʿbah out of fear of conflict, and his refusal to kill the hypocrites out of fear of turning people away because he would be killing his Companions.

– For actions that have no prerequisite and no hindrance, examples include the classification of the rules of Quranic recitation in the form that appeared in

later centuries, and the division of branches of knowledge such as *Ḥadīth*, *Fiqh* and its *ʿUṣūl*, and *ʿIlm al-Kalām* (Science of Theology). All of these things had no prerequisite during the time of the Prophet (peace and blessings be upon him) for he was still alive, yet there was no hindrance for them because they are like technical tools that emerge over time.

- Finally, actions that have no prerequisite, but there is a hindrance. An example of this is the sale of a free person, as mentioned in a *qudsī ḥadīth*: ―Allāh said: "I am the opponent of three on the Day of Resurrection… and among them is a man who sold a free person and ate its price." [Recorded by Al-Bukhārī].

Most of the newly emerging matters fall under this category. It contradicts a general principle or valid secondary evidence, so even if it did not occur during the time of the Prophet (peace and blessings be upon him) due to the absence of a prerequisite, it is prevented due to the existence of a hindrance whether it occurred or not.

Examples of this include performing the *nafl* prayers during a time of prohibition, where there is no prerequisite for it with the existence of a hindrance.

Another example is the distribution of the conquered lands among the conquerors. During the caliphate of ʿUmar, he refused this distribution for Iraq and the Levant because he believed it would let a few people possess the lands and the future generations would have no share.

After this detailed presentation of abandonment, prerequisite and hindrance, we can divide the Prophet's (peace and blessings be upon him) abandonments, the prerequisites, and the hindrances as follows:

First: Types of Abandonments:

1- Abandoning an established matter: where something is established or possible to be performed, yet the Prophet (peace and blessings be upon him) abandoned it, such as abandoning the call to prayer for ʿIīd and taking from charity money for himself. This type is the focal point in the Sunnah and its relationship with abandonments.

2- Abandoning an unestablished matter: related to something that is originally unestablished or impossible to perform, such as the Prophet (peace and blessings be upon him) abandoning prayer on a ship because he never traveled on it, or abandoning the creation of physical bodies because it is not within his ability. This type is outside the scope of discussion and cannot be used for evidence.

Second: Types of Prerequisites:

- As for the prerequisite for a certain action, it may be related to a religious command or to another reason, such as the prerequisites related to human instinct:

1- Religious prerequisite: such as conveying the message, promoting the Islamic *Sharīʿah* or meeting the needs of Muslims. A clear example of this is the Prophet's (peace and blessings be upon him) instruction that he gave in his noble last will.

2- Human instinctive prerequisite: such as eating when hungry or sleeping when tired.

The religious prerequisite is considered in Islamic legislation, while the human instinctive prerequisite has no consideration in Islamic legislation.

Third: Types of Hindrances:

When it comes to hindrances, we find that there are multiple categories and many considerations, which are detailed as follows:

1- Consideration of Continuity:

The hindrance may be **temporary**: it disappears over time or with the disappearance of the cause of hindrance, such as the hindrance of rebuilding the Kaʿbah.

The hindrance may be **permanent**: it is related to a stable prohibitive ruling, such as abandoning *zawāj al-muʿah* (temporary marriage) or marrying two sisters or the Prophet's (peace and blessings be upon him) abandonment of marrying his niece through nursing, even though she was his cousin.

The temporary hindrance cannot be used as evidence for prohibition after its time or reason has elapsed.

2- Consideration of Generality and Specificity:

The hindrance may be **specific** to the Prophet (peace and blessings be upon him) or his pure household and his wives, such as abandoning taking from the money of charity, and the mothers of the believers abandoning to expose themselves to people.

The hindrance may be **general**, encompassing the Muslim community, as we mentioned earlier with temporary marriage and other instances.

As for the specific hindrance, it cannot be used as evidence for prohibition because it is specific to the Prophet (peace and blessings be upon him) or to those who are specified, such as refraining from giving gifts to the judge while there is a recommendation of mutual gifting in general. As for the general hindrance, it is subject to consideration.

3- Consideration of Relevance:

The hindrance may be **religious**, which is contrary to an established principle in Islamic *Sharīʿah*. There are many examples of this that have been mentioned before.

It may be **personal**, such as not eating the lizard because it was distasteful to him or not listening to the flute played by the shepherd out of morality.

As for the personal hindrance, it has no relevance to the Sunnah or prohibition, while the religious hindrance is subject to reasoning.

4- Consideration of Clarity:

Some hindrances are **explicitly stated** by the Prophet (peace and blessings be upon him) while others are **implicitly left**. The latter is subject to the application of *ijtihad* (independent reasoning) in order to deduce their effective causes.

The explicit hindrance: such as abandoning the use of a toothbrush for every ablution or prayer out of fear of causing hardship, or delaying ʿIshāʾ prayer for the same reason.

The implicit hindrance: such as not announcing the call to prayer for the ʿĪd prayer and the prayer for seeking rain although they are similar to the Friday prayer in seeking congregation. It can be said that he abandoned it out of a religious motive or to distinguish between obligatory and recommended prayers, or

that he abandoned it with what is not repeated frequently [i.e., ʿĪd prayer and prayer for rain], while performed it with what is repeated frequently [i.e., Friday prayer].

Another example of this includes not declaring his successive leader which is another implicit hindrance. It could be said that he abandoned it to avoid the continuation of leadership by that successor even if circumstances change, or to activate the principle of *shūrā* (consultation), or to not make leadership an inherited monarchy from a previous ruler to the next heir.

As for the explicit hindrance, it cannot be changed or interpreted, while the implicit one is subject to reasoning. If its effective cause is still valid, it remains an established hindrance, but if its effective cause is subject to interpretation and change, then this hindrance can be surpassed, as Abū Bakr did when he selected ʿUmar as the next caliph.

Lecture Ten

The Difference Between the Essence of an Action and its Form

The essence of an action is the action itself, while its form is the way in which the essence is expressed or performed. For example, when we say: “I bought a new, bound, cheap book,” we find that the essence is the book, while the form is the various descriptions that express the essence from multiple angles. We notice that the essence is only one, as in *tamyīz* (specification) in Arabic grammar which is not applicable to multiplicity. However, the form can accept multiple expressions of one essence, as in *ḥāl* (condition) in Arabic grammar. In the previous example, “new,” “bound,” and “cheap” are all conditions of one essence, which is the book.

Understanding this introduction is very important in putting things into context, meaning that proving the essence of something with a specific form does not necessarily require adherence to that form without others, especially in the absence of explicit exception or limitation.

For example, it has been established that the Prophet (peace and blessings be upon him) recommended reciting the *tasbīḥ* a certain number of times after each prayer, and it was also reported that he used to count on his fingers, as in the *ḥadīth* of ʿAbdullāh ibn ʿAmr: "I saw the Messenger of Allah (peace and blessings be upon him) counting the *tasbīḥ* on his fingers, with his right hand." [Recorded by Abū Dāwūd].

Similarly, using fingertips in reciting *tasīḥ* was narrated. Yusayrah bint Yāsir narrated that the Messenger of Allāh (peace and blessings be upon him) said to us: "Stick to reciting *tasīḥ*, *tahlīl*, *taqdīs*, and count them using your fingertips as they will be questioned to witness." [Recorded by ʾAḥmad, Abū Dāwūd and Al-Tirmidhī].

Here, the essence of the action is reciting the *tasbīḥ* a certain number of times, and this requires a counting tool. However, the counting tool is not the same for all situations, as we saw in the previous two narrations. In one of them, the finger was mentioned, which is possible to refer to fingers in reality or metaphorically by expressing something whole but intending a part of it which is the fingertip. In the

other narration, the fingertips were literally mentioned, which are the final parts of the fingers that include the nails. The recitation of *tasbīḥ* is the action, while the fingers and the fingertips are tools and forms for performing the action.

This is what the Companions of the Prophet (peace and blessings be upon him) understood, so it was reported that they used to recite the *tasbīḥ* using their fingers, using pebbles and date pits, and using what can be used for counting, even Ibn Ḥajar and Al-Siyūṭī reported that the Prophet (peace and blessings be upon him) saw them doing that and approved it.

The same applies to ablution, which is an action that has various forms, such as letting someone pour water for oneself, scooping water by oneself, pouring water over oneself, or submerging oneself in water, and using tools such as a jug, faucet, or water container. All of these are tools and forms.

For an action to be considered in the scope of Islamic legislation, it must meet one of two conditions:

1- It must be mentioned by a clear text, such as reciting the *tasbīḥ* after each prayer.

2- If there is no clear text, it must refer to a general principle, such as the general mention of *dhikr* (the remembrance of Allāh) in the verse: "Remember Allāh with much remembrance." [Al-ʾAḥzāb 33:41].

As for the form, it has different conditions:

1- It may be a specific form without negating others. In this case, the form is valid in all its variations, except for what contradicts the Islamic legislation, such as the previous example of the *tasbīḥ* and such as covering the private parts, which may have various forms, even if not specified in the Islamic legislation.

2- It may be a specific form with the negation of others. In this case, it is not permissible to expand beyond the mentioned form and contradict the specified form, such as announcing the obligatory prayer, which can only be done by the call to prayer because the Prophet (peace and blessings be upon him) rejected other forms, or the burial of a martyr who must be buried immediately without washing him.

Is *tark* (abandonment) an action?

In the books of *'uṣūl al-fiqh*, *tark* can be referred to as *kaff* (avoidance). The fundamentalists differed regarding whether *kaff* is an action or not.

The majority view is that *kaff* is an action, and it is a mental action, as mentioned by Al-Subkī, Al-Maḥallī, Al-Shāṭibī, Ibn al-Ḥājib, Al-Sarakhsī, and others.

However, some scholars held the view that *kaff* is a pure absence of an action and not an action. Among them is Abū Hāshim al-Jubbā'ī as mentioned in *Jam' al-Jawāmi'*.

The correct view is that we cannot consider every *tark* or *kaff* as an action. For example, a blind person refraining from looking at something prohibited is not an action that deserves reward, as it is an act of something that does not exist for the doer. Similarly, a *majbūb* (a male whose reproductive organ is cut off) refraining from committing adultery is not an action deserving of reward.

Therefore, the type of *tark* that can be considered an action must have two conditions: intention and capability. As the old saying goes: *Zuhd* (asceticism) should be with existence [of means of pleasure], not with their absence.

Therefore, abstaining from something due to forgetfulness, error, or neglect is not an action, and abstaining from something due to disability or incapacity is not an action.

With all the above considered, we can define *tark* as follows: "**Abandoning a general, existent, religiously prescribed, and reasonable action with intention.**"

The word "**action**" excludes oral speech because abandoning speaking is silence.

The word "**general**" excludes things made specific to the Prophet (peace and blessings be upon him) like not taking from charity money.

The word "**existent**" excludes actions that were not performed at the proper time, such as praying on an airplane.

The word "**religiously prescribed**" excludes abandoning something due to customary habits.

The word **"reasonable"** excludes actions that are impossible to perform, such as creating physical bodies.

The phrase **"with intention"** excludes abandoning something out of forgetfulness, error, or neglect.

This definition of *tark* in this context includes what the Prophet (peace and blessings be upon him) abandoned for an explicit or an implicit effective cause and what he abandoned temporarily or permanently, each with its own ruling.

Lecture Eleven

The Difference Between Abandonment, Silence and Delay of Explanation

We defined *tark* earlier as abandoning a general, existent, religiously prescribed, and reasonable action with intention.

Thus, *tark* is a passive action that applies to actions rather than words.

On the other hand, *sukūt/sakt* means silence, which is the act of abstaining from speaking while having the ability to do so. It is the opposite of speaking and utterance and can also mean remaining still, as in the verse: "And when Mūsā's anger remained still…" [Al-ʾAʿrāf 7:154], meaning it was frozen. It has other meanings which also refer to avoid speaking or acting.

The jurists gave *sukūt* (silence) multiple definitions for various considerations, but we can define it as follows: "**It is a passive state that does not indicate intention unless there is a necessity and evidence.**"

Therefore, the jurists produced the following legal maxim: “silence cannot be attributed to a person as a statement, but in the case of a necessity, it can be considered a clarification.”

This means that *sukūt* is different from *tark* in that *tark* applies to actions while *sukūt* applies to words. The previous maxim indicates that silence is not held as a statement according to Al-Shāfiʿī’s view because silence is a passive action. However, the second part of the legal maxim is also important, as silence can be considered an explanation in light of limitation to certain circumstances when explanation is needed. For example, the Prophet’s (peace and blessings be upon

him) silence on the issue of the *'ādhān* and *'iqāmah* for the ʿĪd prayer indicates that they are not established as legitimate acts in these two situations, as he performed what was obligatory for the ʿĪd, including the prayer and the sermon, but remained silent on other acts. His silence indicates limitation to the obligatory acts he performed. Therefore, remaining silent in a situation that needs explanation accounts for limitation, unlike *tark* which needs no explanation. Thus, the Prophet (peace and blessings be upon him) prohibited asking questions about what the Islamic legislation remained silent on. He said: "Lawful things are what Allāh made lawful in His book while prohibited things are what Allāh made prohibited in His book. As for what Allāh did not mention [as lawful or prohibited), it is a blessing. So, accept from Allāh His blessing…" [Recorded by Al-Dāraquṭnī in his *Sunan*].

Delay of Explanation:

The delay of explanation is to not mention further explanation of a certain matter.

A legal maxim states that it is not permissible for the Legislator to delay the explanation beyond the time of need, because this would lead to nullifying the right of the legally accountable person to know the truth. Imposing something general and absolute on the legally accountable person while having the intention of being specific is a shortcoming that is not valid for the Legislator.

Allāh says: "O Messenger! Convey everything revealed to you from your Lord. If you do not, then you have not delivered His message." [Al-Mā'idah 5:67]. He also says: "And We have sent down to you [O Prophet] the Reminder, so that you may explain to people what has been revealed for them…" [Al-Naḥl 16:44]. It is not reasonable to ask the legally accountable person to perform the Ẓuhr prayer without explaining to him the method of prayer, including the number of *rak'ahs*, recitation, bow and prostrate, and other things that determine the validity of the action.

Therefore, if explanation is needed at a certain time, but the Prophet (peace and blessings be upon him) did not mention that explanation, his silence indicates that the unexplained matter is neither demanded nor a part of legislation. This is a significant principle in Islamic jurisprudence.

The most that can happen is delaying the explanation during the time of the legislative speech, not the time of need. He may reveal to people a general matter at first, and then when he commands them to do it, he explains it in detail. Allāh says: "So when We have recited a revelation [through Jibrīl to you], then follow its recitation. Then upon Us is its clarification [to you]." [Al-Qiyāmah 75:18-19]. He also says: “and pay the due [rights] on the day of its harvest…" [Al-ʾAnʿām 6:141]. Then, when the time for action approached, the Messenger of Allāh explained to them the measures and types of the due rights.

The legal maxim "*the impermissibility to delay the explanation beyond the time of need"* is a stable legal maxim agreed upon by the fundamentalists.

The difference between *tark* (abandonment) and the delay of explanation, given that both are actions, is that the former may be done by the Legislator, while the latter is not done in the position of Legislation.

Therefore, it is not reasonable to mix up between *tark* and the delay of explanation, because this confusion would lead to claiming that what the Prophet (peace and blessings be upon him) did not do is not permissible, because if it were good, he would have mentioned and explained it. We have already mentioned that the delay of explanation can occur when mentioning the permissible or the forbidden; elaborating and clarifying the brief; specifying the general; restricting the absolute; and all that gives a meaning other than its apparent meaning. However, all of this cannot be established through *tark*.

For example, someone may say: Celebrating the noble birth of the Prophet (peace and blessings be upon him) is not permissible because the Prophet (peace and blessings be upon him) did not explain it, and delaying the explanation is not permissible for him. Rather, it should be said: It is permissible because if it were forbidden, he would have mentioned it among the forbidden things for the same reason, which is the necessity of not delaying the explanation.

The Ruling of *Tark*:

After the previous presentation, we come to an important question: What does abandonment indicate? Does it indicate forbiddance or permissibility? And are there any exceptions?

Before I answer, I would like to mention that the abandonment referred to here is the Prophet's (peace and blessings be upon him) abandonment of a general, existent, religiously prescribed, and reasonable action with intention. Examples of this include his abandonment of compiling the Qurʾān into one book, or his abandonment of rebuilding the Kaʿbah on the foundations of Prophet ʾIbrāhīm (peace be upon him), or his abandonment of the call to prayer for ʿĪd prayer, or his abandonment of categorizing knowledge and establishing their clarifications and definitions, such as the definition of *bidʿah* (religious innovation), and his abandonment of setting a calendar for the Arabic months, and so on.

The correct view that is consistent with the overall evidence and does not lead to contradictions is that the abandonments of the Prophet (peace and blessings be upon him) do not have a single ruling. It may be that he abandoned something because it is prohibited, or because it has a temporary effective cause that disappears over time or circumstances, then the matter returns to its default permissibility. It may be that the abandonment is due to the action not being appropriate at that time, so he delayed it for its proper time, not because it is prohibited. It may be that he abandoned something for the sake of avoiding confusion during his lifetime and after his death. Likewise, it may be that the abandonment is due to the anticipated hardship, and so on with other reasons for abandonment.

Therefore, if some abandonments are justified with an effective cause while others are purely worship-related, we cannot equate them all under a single ruling. For example, we cannot say that the default ruling is that abandonment indicates prohibition, or that the default ruling is that abandonment indicates permissibility. Rather, the correct view is that abandonment, which is a passive action, is subject to an active ruling of permissibility, prohibition, or something between them. This view that is consistent with the overall evidence states that the ruling of abandonments needs elaboration, and it can be categorized into three possible rulings:

First: Avoidance in its two forms: *taḥrīm* (forbiddance) and *karāhah* (abhorrence).

Second: *ʾibāḥah* (permissibility).

Third: Permission in its two forms: *wujūb* (obligation) and *nadb* (recommendation).

The forbiddance includes, for example, the call to prayer for ʿIīd prayer or the prayer for rain.

The abhorrence includes, for example, prolonging the *khuṭbah* (sermon) or prolonging the recitation in a congregational prayer in the presence of children or those with physical excuses.

The permissibility includes, for example, setting prices for goods.

The recommendation includes, for example, using calculations to determine prayer times and the beginning of months, dividing the Qurʾān into quarters and parts, categorizing knowledge and defining its terms, expanding in Qurʾān exegesis and collecting the traditions of the Prophet (peace and blessings be upon him), studying logic and philosophy, and so on.

The obligation includes, for example, codifying the general rulings derived from the Qurʾān and Sunnah; appointing judges, *fatwā* (verdict) issuers, and scholars; combating those who corrupt religion like the Khawārij; compiling the Qurʾān into one book; studying *ʿilm al-rijāl* (the science of biographical evaluation) and *ʿil al-riwāyah* (the science of transmission) which require *ʿil al-jarḥ wa al-taʿdīl* (the science of criticism and praise of narrators); using gates and boundaries for the Two Holy Mosques; and other matters that the Prophet (peace and blessings be upon him) did not do despite being obligatory.

Evidence that abandonment does not have a single ruling:

There are many pieces of evidence supporting what we have just mentioned, including both textual and rational evidence:

First: The Noble Qurʾān:

- Allāh Almighty says: "Whatever the Messenger gives you, take it. And whatever he forbids you from, leave it." [Al-Ḥashr 59:7]. This verse proves the right of the Prophet (peace and blessings be upon him) of giving commands, which implies obligation or recommendation. It also gives him the right of establishing a prohibition, which implies forbiddance or abhorrence. As for what he does not

mention as a command or a prohibition, it becomes probable. If someone intends to make what is not mentioned in the verse fall under the category of prohibition, it becomes an unsupported interpretation of the text, as if he is claiming that the text means that what the Prophet (peace and blessings be upon him) forbids or abandons is prohibited, which is an aggressive fabrication on behalf of the Legislator and an accusation of deficiency of the text where the explanation is needed.

Someone might argue that prohibition can occur in different forms, including direct command, action, determining consequential punishment, and abandonment, and that if there was any good in the abandoned action, the Prophet (peace and blessings be upon him) would have performed it.

The response to this is that this is a confusion between *sukūt* (silence) and *tark* (abandonment), which also contradicts the principle of delaying explanation. The Prophet's (peace and blessings be upon him) silence in situations that need explanation and instruction indicates that his silence carries an indication. This is evident in his abandonment of *ʾādhān* during the ʿĪd prayer, which is a situation that needs clarification. He did not allow people to make an *ʾādhān* or an *ʾiqāmah*. This indicates that the *ʾādhān* and the *ʾiqāmah* are not legitimate here in this situation that needs clarification. It cannot be said that he abandoned the *ʾādhān*; rather, it should be said that he did not mention it at the time of clarification because silence in situations that need clarification indicates exception.

The second response to this argument is that this understanding contradicts the clear-cut statement of the Qurʾān, which says: "and He has already explained to you what He has forbidden to you…" [Al-ʾAnʿām 6:119].

How can silence provide explanation? To illustrate this, let us consider a clear example:

- There is a *ḥadīth* that is narrated by Ibn ʿUmar about hearing the sound of a flute, in which the Prophet (peace and blessings be upon him) placed his fingers in his ears and asked Ibn ʿUmar: “Do you hear anything?” until the sound of the flute ceased." [Recorded by ʾAḥmad and Abū Dāwūd].

In this situation, the Prophet (peace and blessings be upon him) refrained from listening to the flute himself, but he did not prohibit Ibn ʿUmar from listening to it,

as indicated by his question: “Do you hear anything?” Moreover, the Prophet (peace and blessings be upon him) did not go to the flute player and order him to stop, which would have made the ruling of forbiddance clear to everyone. It is inconceivable to say that the Prophet (peace and blessings be upon him) abandoned listening to the flute because it is forbidden, while using Ibn ʿUmar to prevent himself from engaging in the prohibited act and letting Ibn ʿUmar do that prohibited act. It is inconceivable that he would let the person who is doing this prohibited act engage in it without clarifying the ruling at a time when clarification is needed. Since the Prophet (peace and blessings be upon him) did not do that, his abandonment of listening to the flute is specific to him alone not the flute player nor the listeners.

- Allāh Almighty says: "He is the One Who created everything in the earth for you." [Al-Baqarah 2:29]. He also says: "He [also] subjected for you whatever is in the heavens and whatever is on the earth—all by His grace." [Al-Jāthiyah 45:13].

These verses and their like clearly indicate that the default ruling for things is permissibility, and the majority of things are permissible unless exceptionally prohibited. The only exceptions are those that are specified. Otherwise, general statements would have no indication. Claiming that any abandonment, which is a passive action, accounts for forbiddance leads to claiming that the default ruling for things is prohibition, arguing that abandonments are not specified too.

However, Allāh Almighty says: "and He has already explained to you what He has forbidden to you…" [Al-ʾAnʿām 6:119]. Explanation requires clarification and notification, both of which are active actions. As for abandonment, it is a passive action that does not serve as evidence on its own. It lacks the context in order to attribute a ruling to it. If there is no context that attributes a ruling to the abandonment, it is a favor from the Legislator that falls under the default state of permissibility.

This is also supported by Allāh’s statement: "Say, [O Prophet,] —Come! Let me recite to you what your Lord has forbidden to you…" [Al-ʾAnʿām 6:151]. This verse means that the Legislator clarified all prohibitions which have not been left unspoken.

Second: The Sunnah:

- The Prophet (peace and blessings be upon him) said, as narrated by Abū Hurayrah: "What I have forbidden for you, avoid. What I have ordered you [to do], do as much of it as you can." In another narration, it is stated: "Leave me as long as I have said nothing to you." In another narration, it is also stated: "as long as you have been left." [Recorded by Muslim].

- Abū Hurayrah (may Allāh be pleased with him) also reported: "Leave me as I leave you, for the people who were before you were ruined because of their questions and their differences over their prophets. So, if I forbid you to do something, then keep away from it. And if I order you to do something, then do of it as much as you can." [Recorded by Al-Bukhārī and Muslim].

In these narrations, the Prophet (peace and blessings be upon him) mentioned that the ruling on things is based on a command or a prohibition, and he did not mention a ruling for what he remained silent about or left unaddressed, relying on one of three things:

It is based on the default ruling of permissibility, or it is connected to a command for having the same *ʿillah* (effective cause), or it is connected to a prohibition for having the same effective cause. However, if it were connected to a prohibition, he would have mentioned it.

Considering abandonment as evidence of prohibition is an improper interpretation of these texts and is inconvenient for the conveyer of the divine message and the *Sharīʿah*.

- ʿAbdullāh ibn ʿAmr reported: "Every prophet before me had an obligation to guide his *ʾummah* towards what he knew was good for them and to warn them against what he knew was harmful for them." [Recorded by Ibn Mājah and Al-Nasāʾī].

This *ḥadīth* indicates that actions are related to two matters: guidance towards good and warning against evil. Abandonment is not one of them because it is a passive action, and it is inconvenient for the Prophet to abandon something out of prohibition without clarifying its prohibition, as he said: “Every prophet before me had an obligation.” Therefore, his duty is to clarify, not to remain silent.

A similar *ḥadīth* states: "Whatever Allāh has made lawful in His Book is lawful, and whatever He has forbidden is forbidden, and whatever He has remained silent about is a mercy."

Third: Statements of the Companions:

If we look at the actions of the Companions, whether as a collective community or as individuals, we do not find that they considered the Prophet's (peace and blessings be upon him) abandonment of a matter as an indication of forbiddance. Otherwise, they would have established this rule either through their statements or actions. On the contrary, we find that they did things while acknowledging that the Prophet (peace and blessings be upon him) did not do them at all or did them but in a different manner.

The following is some of their statements:

- ʿAbdullāh ibn ʿUmar narrated that it was said to ʿUmar ibn al-Khaṭṭāb: "Will you appoint your successor?" ʿUmar said: "If I leave the matter undecided, it is true that somebody who was better than I [i.e., Allah's Messenger (peace and blessings be upon him)] did so. If I appoint a Caliph (as my successor) it is true that somebody who was better than I (i.e., Abū Bakr) did so." On this, the people praised him." [Recorded by Al-Bukhārī and Muslim].

In this narration, it is mentioned that the Prophet (peace and blessings be upon him) left a matter whereas his successor did the opposite without any harm. If the Prophet's (peace and blessings be upon him) abandonment indicated the forbiddance of the action, the Companions would have been the first to follow.

- Another example is the compilation of the Qur'ān, as narrated by Al-Bukhārī and others. Initially, Abū Bakr objected to it because the Prophet (peace and blessings be upon him) did not do it. The narration indicates that Abū Bakr said to ʿUmar: "How can you do something that the Messenger of Allāh (peace and blessings be upon him) did not do?" ʿUmar replied: "By Allāh, this is a good project." ʿUmar kept on urging me to accept his proposal till Allāh opened my chest for [accepting] it."

The same thing happened to Zayd ibn Thābit when he replied to Abū Bakr, "How can you do something which the Messenger of Allāh did not do?" He [Abū Bakr]

said: “By Allāh, that is a good project.” Abū Bakr kept on urging me to accept his proposal till Allāh opened my chest for [accepting] it.

This narration indicates reflecting on things that the Prophet (peace and blessings be upon him) did not do and practicing *itjihād* to decide the ruling. If the matter is good and does not contradict the Prophet’s tradition, it is permissible or even recommended to do it. Otherwise, leaving it takes preference. This understanding is derived from Abū Bakr's statement: “until Allāh opened my chest for [accepting] it.” How would Allāh open Abū Bakr's chest to accept a forbidden matter?!

There are many similar examples in the actions of the Companions (may Allāh have mercy on them) such as ʿUmar's change of the system of the distribution of gifts which was contrary to what was practiced during the time of the Prophet (peace and blessings be upon him) and Abū Bakr. When ʿUmar was asked about it, he said: “I will not treat someone who fought against the Messenger of Allāh (peace and blessings be upon him) the same as someone who fought alongside him.” Regarding ʿUmar ibn Abī Salamah, when ʿUmar ibn al-Khaṭṭāb was asked about him, he said: “Let the one who seeks help through a mother like ʾUmm Salamah come, and I will help him.”

When ʿUmar’s son, ʿAbdullāh, asked ʿUmar about the gift he gave to ʾUsāmah ibn Zayd, ʿUmar said: “[I gave him more] because he was dearer to the Messenger of Allāh (peace and blessings be upon him) than you, and his father was dearer to the Messenger of Allāh than your father."

Hence, ʿUmar (may Allāh be pleased with him) adapted a system in distributing spoils of war contrary to the system applied by the Prophet (peace and blessings be upon him) and Abū Bakr. He did not consider their abandonment of the system he applied as evidence for action or abandonment. Not to mention that the distribution of spoils of war or gifts is related to the rights of Muslims, and ʿUmar's action was his own *ijtihād* before the Companions.

Fourth: Rational Evidence:

1. Absence is the default state of things, but occurrence is incidental. Abandonment is the absence of action. Therefore, abandonment is a form of absence, and absence has no ruling because we judge things based on their actual form, which is

incomprehensible with absence. If absence does not indicate a ruling, then abandonment, which is essentially the same, does not indicate a ruling in itself.

2. It is agreed upon among the Fundamentalists in their definition of the *Sunnah* that it includes the sayings, actions, and approvals of the Prophet (peace and blessings be upon him). Abandonment is not one of these. In order for an abandonment to be part of the *Sunnah* according to the previous definition, it must be that the Prophet's (peace and blessings be upon him) abandonment is directed to a religiously prescribed, and reasonable action with intention. Otherwise, the mere lack of doing something does not qualify as abandonment in an absolute sense.

3. Considering abandonment as an unexpressed passive action makes it probable. This means that its ruling and effective cause are probable. Forbiddance must be based on established, improbable evidence. One of the fundamental principles of *ʾuṣūl al-fiqh* is that *probable evidence is outside the scope of argumentation*.

4. The number of the abandoned actions by the Prophet (peace and blessings be upon him) is more than his performed actions due to the constraints of time, place, and circumstance. Considering the abandoned actions as prohibited or assuming that prohibition is the default ruling behind abandonment leads to restricting numerous cases within few ones, the expansive matters within limited ones and the changeable situations within stable ones. This leads to causing severe distress to people; constraining and fossilizing the Islamic rulings; stagnating the progress and development of time; and depriving the Islamic *Sharīʿah* of its essential aspects, namely flexibility and compatibility with people’s interests which are numerous and various.

Lecture Twelve

Sources of Legislation – *ʾijmāʿ* (Consensus)

Third: *ʾijmāʿ* (Consensus):

Linguistically, *ijmāʿ* carries several meanings, among them:

- Determination upon a matter: Allāh Almighty says: "Then resolve upon your plan and [call upon] your associates." [Yūnus 10:71] — i.e., determine it firmly.
- Agreement: *ʾajmaʿa al-nās*, i.e., the people agreed unanimously upon something without disagreement. Allāh Almighty says: "So when they took him away and agreed to put him into the bottom of the well..." [Yūsuf 12:15].

Terminologically, *ʾijmāʿ* is:

The unanimous agreement of the *mujtahid* (competent independent) scholars of a particular era from the *ʾummah* of Islam concerning an Islamically legal ruling, after the death of the Prophet (peace and blessings be upon him).

Let us analyze the components of this definition:

- **Unanimous Agreement**: This implies joint participation, not individual opinion. This participation includes verbal consensus, practical implementation, tacit approval, and even silence in contexts where speaking is expected.
- ***Mujtahid* scholars**: This confines consensus to qualified scholars, excluding the general public and *muqallidūn* (incompetent scholars and people). The conditions of *ijtihād* must be met.
- **Of a particular era**: That is, those present in the same time period. This indicates that it is not required for the consensus to span across all generations; rather, the agreement of the scholars of that specific time is sufficient—not just some of them.

- **From the *ʾummah* of Islam**: Thus, agreement by members of other religious communities is not considered binding—even if correct—unless it is affirmed by Muslim scholars. For example, the prohibition of slavery cannot be considered *sharʿī ijmāʿ* unless agreed upon by the scholars of Islam.
- **On an Islamically *sharʿī* (legal) ruling**: This excludes consensus on non-legal matters, such as:
    - Linguistic consensus: e.g., that *thumma* indicates delay, and *fāʾ* indicates immediacy.
    - Rational consensus: e.g., the origination of the world, or mathematical problems like 1+1=2.
    - Worldly consensus: such as those in architecture.
    - Experimental consensus: e.g., that water boils at a certain temperature.
- **After the death of the Prophet (peace and blessings be upon him**: Since he is the one who directly receives and delivers revelation and legislation.

Therefore, for *ʾijmāʿ* to be *sharʿī* (Islamically legal):

The issue must be presented to all *mujtahidūn* of that era. If they unanimously agree upon a specific ruling, their agreement constitutes *ʾijmāʿ*.

Examples:

1. The unanimous agreement on the caliphate of Abū Bakr (may Allāh be pleased with him).
2. That the grandmothers inherit one-sixth collectively.
3. That a son excludes a grandson from inheritance.

The *Ḥujjiyyah* (Authority) of *ʾijmāʿ*:

The scholars of *ʾuṣūl*, including the ʾAshʿarīs, the Muʿtazilites, and the major schools of Islamic thought, unanimously agreed on the authority of *ʾijmāʿ*. Their evidence includes:

1. Allāh Almighty's statement: “And whoever opposes the Messenger after guidance has become clear to him and follows a path other than that of the believers – We will give him what he has taken and drive him into Hell and evil it is as a destination.” [Al-Nisāʾ 4:115]. The “path of the believers” refers to their consensus. Since punishment is linked to opposing it, following it becomes obligatory.
2. The prophet's (peace and blessings be upon him) statement which is narrated by Muʿāwiyah: “A group from my *ʾummah* will remain steadfast upon the command of Allāh. Those who forsake them or oppose them will not harm them until Allāh’s decree comes and they are triumphant over the people.” [Recorded by Al-Bukhārī and Muslim].
3. The statement of Ibn Masʿūd (may Allāh be pleased with him), reported by ʾAḥmad and others: “Whatever the Muslims deem good is good in the sight of Allāh, and whatever they deem bad is bad in the sight of Allāh.”
4. The statement of Abū Masʿūd al-Badrī, reported by Al-Ḥākim and others: “Stick to *al-jamāʿah* (the community), for Allāh will not unite the *ʾummah* of Muḥammad on misguidance.”

First: Rational and Intellectual Possibility of *ʾIjmāʿ*:

There is no rational obstacle to the occurrence of *ʾijmāʿ*, regardless of its actual occurrence. Human intellect does not deem it impossible for people to agree upon a matter. Even today, people of differing beliefs agree on certain factual matters without dispute.

Indeed, Muslims have unanimously agreed on many essentially-known aspects of religion, such as: That ẓuhr prayer consists of four rakʿāhs., that fajr is two rakrāhs, and the prohibition of *zinā* and alcohol.

Second: Real and Customary Possibility of *ʾIjmāʿ*:

The *mutakallimūn* (theologians) did not unanimously agree on absolute occurrence of *ʾijmāʿ* due to customary realities. The majority of them held that it is customarily possible, and they cited as evidence the previously mentioned essentially-known aspects of religion.

Some from the school of al-Naẓẓām, and some of the Shīʿah and Khawārij, held that customary occurrence of *ʾijmāʿ* is impossible, arguing that the agreement of diverse scholars on a single ruling is far-fetched. They claimed that their agreement based on a *dālīl ẓannī* (an indefinite proof) is practically inconceivable. They rejected the previous pieces of evidence of the prohibition of *zinā* and alcohol as being based on a *dalīl qaḍʿī* (a definitive proof), not *ʾijmāʿ* itself.

Third: Possibility of Knowing and Observing *ʾIjmāʿ*:

Scholars differed on whether *ʾijmāʿ* can be known or observed. This depends on their view of its possibility.

- The majority, including scholars of ʾuṣūl, the Muʿtazilites, and the ʾAshʿarīs, held that it can be known—whenever it occurs—regardless of time period. They cited observable cases of known consensus, such as: The consensus of the Jews and Christians in rejecting the prophethood of Muḥammad (peace and blessings be upon him), the Muslim consensus on the abrogation of the earlier revelations before prophet Muḥammad, the Sunnī consensus affirming the ruʾyah (Beatific Vision) of Allāh, and the Muʿtazilite consensus denying it. These consensuses are not limited to one generation or period.
- Some ʾAshʿarīs, such as al-Rāzī and al-Bayḍāwī, argued that knowledge of *ʾijmāʿ* is limited to the era of the Companions, due to the relatively small number of scholars and the ability to ascertain their views. In later eras, with the proliferation and dispersion of scholars, they held it is practically impossible to ascertain the opinions of competent scholars to establish *ʾijmāʿ* reliably. The more the views are limited, the more their observance is possible. The undefined opinions cannot be comprehend in full. This was also the view of some Ḥanbalīs and the Ẓāhirī school.

Lecture Thirteen

Types of *ʾIjmāʿ* (Consensus)

ʾIjmāʿ (consensus) is divided into two types:

1. Explicit *ʾIjmāʿ*: This is the intended meaning when the term is used without qualification. It refers to the unanimous agreement of all *mujtahidūn* (competent scholars) in a given era on the ruling of a particular issue, whether through speech or action.
2. Tacit *ʾIjmāʿ*: This occurs when some of the *mujtahidūn* express an opinion which is known to the rest, and the others remain silent without rejecting it. This silence is considered as tacit approval.

As for the first type, the *fuqahāʾ* (jurists) unanimously agreed on its authority and that it yields *ʿilm qaṭʿī* (definitive knowledge), although they differed on the possibility of its occurrence after the era of the *Ṣaḥābah*.

- The Ẓāhirīs, some Ḥanbalīs, and some ʾAshʿarīs limited it to the era of the *Ṣaḥābah*.
- The ʾImāmiyyah required the presence of the designated *Imām*, even if hidden.
- The majority held that it is possible in every era.

As for the second type, the *ʾuṣūliyyūn* (fundamentalists) differed regarding its authority. The Ḥanafīs, Mālikīs, and Ḥanbalīs accepted its authority, whereas the Shāfiʿīs and Ẓāhirīs rejected it, arguing that "a statement cannot be attributed to one who remains silent." The views of the scholars on this type are summarized as follows:

Definition of Tacit *ʾIjmāʿ*:

The *ʾuṣūliyyūn* differed on its definition:

- Ibn Amīr Ḥājj: It is the statement of some and the silence of the rest.
- Al-Qarāfī: It is the ruling of part of the *ʾummah* and the silence of the rest.

- The Ḥanbalīs: It is when some of the *Ṣaḥābah* (may Allāh be pleased with them) say something, it becomes known to the rest, and they remain silent without opposing or denouncing it.

The difference between the *jumhūr* definition and the Ḥanbalī definition lies in that the Ḥanbalīs restrict it to the era of the *Ṣaḥābah*, as previously mentioned.

The *ʾuṣuliyyūn* also differed on its authority in more detailed opinions:

1. It is a reliable *ʾIjmāʿ* and a binding authority: This is the view of most Ḥanafīs, Mālikīs, Imām ʾAḥmad, and some Shāfiʿīs. They argued that it is not expected from scholars to remain silent over error, as Allāh has made them inheritors of the prophets in conveying the *Sharīʿah* and enjoined upon them the duty of clarification. They must deny anything opposite to the *Sharīʿah*. Hence, their silence indicates agreement.
2. It is not a binding authority: This is the view of Al-Shāfiʿī, ʿĪsā ibn ʾAbān, Al-Ghazālī, and Al-Rāzī. They argued that silence does not necessarily imply agreement, for it could be due to various reasons such as internal disagreement without vocalizing it, indecision, or fear of expressing an opinion that opposes the other opinion which is supported by the ruler or the public.
3. It is a binding authority, but not a reliable *ʾIjmāʿ*: This is the view of Al-Samʿānī, Al-Jubbāʾī, and Al-Ṣayrafī (a Shāfiʿī). They maintained that the publicization of a view and the silence of others renders the view authoritative over others due to the absence of any known opposition, though it does not amount to *ʾijmāʿ shar'ī* (legally valid consensus) due to the possibility of disagreement.

ʾIjmāʿ after the Generation of the *Ṣaḥābah*:

Scholars differed on the possibility of *ʾIjmāʿ* occurring after the generation of the *Ṣaḥābah*. The prevailing view is that it is extremely difficult due to the following:

- Certainty of *ʾijmāʿ* requires knowledge of the agreement of every single *mujtahid*, which is practically impossible. Who could possibly know the views of all *mujtahidūn* across the East and the West?

- Those who are assumed to be in agreement may have remained silent due to fear or *taqiyyah* (concealment). This has been evident in historical instances where scholars expressed their opinions only after the cause of silence had been removed.
- There is a difference between *'ijmā'* on the *kulliyyāt* (universal totalities) of religion and *'ijmā'* on issues subject to *ijtihād*. The universal totalities are based on definitive evidence and do not require consensus, whereas jurisprudential rulings are based on indefinite evidence.

'Ijmā' of a Particular School or Group of Scholars:

There are forms of specialized *'ijmā'* that do not qualify as the general *'ijmā'* we have defined earlier. For example: *'Ijmā'* among the Ḥanafīs on a certain issue, based on the agreement of the major Imāms of the school and those who came after, *'ijmā'* among grammarians on certain linguistic rules, or *'ijmā'* among scholars of rhetoric on the division of speech into literal and figurative. These forms are only authoritative for those who follow that particular school or field and do not serve as binding authorities on others.

Is *'Ijmā'* Established by the Agreement of All Scholars or their Majority?

Assuming access and knowledge of the views of all scholars — is consensus valid based on the view of the majority?

1. *'Ijmā'* is only valid through the agreement of all *mujtahidūn*: This is the view of the majority of Ḥanafīs, Mālikīs, Shāfiʿīs, and the correct opinion in the Ḥanbalī school. If even one *mujtahid* disagrees, then no consensus has occurred.
2. *'Ijmā'* is valid through the agreement of the majority and its authority is binding: This is the view of Ibn Jarīr, Al-Rāzī (from the Ḥanafīs), Al-Khayyāṭ (from the Muʿtazilites), Ibn Khuwāz Mandād (from the Mālikīs), and a narration from Imām ʾAḥmad.
3. It is a binding authority but not a reliable *'Ijmā'*: This was favored by Ibn al-Ḥājib (from the Mālikīs), Al-Jārburdī (from the Shāfiʿīs), and Al-Ṭūfī (from the Ḥanbalīs).

Is the Agreement of the Majority a Binding Authority?

1. The majority view is that it is not a binding authority in and of itself, based on the verse: "And if you disagree over anything, refer it to Allāh and the Messenger..." [Al-Nisā' 4:59]. Even a single disagreeing *mujtahid* constitutes a considerable disagreement.
2. Others held that it is a binding authority, citing the saying of the Prophet (peace and blessings be upon him): "Indeed, Allāh will not gather my *'ummah*—or he said: the *'ummah* of Muḥammad (peace and blessings be upon him)—upon misguidance." [Recorded by Al-Tirmidhī].

Lecture Fourteen

Sources of Legislation – *Qiyās* (Analogical Reasoning)

Fourth: Qiyās:

Linguistically, *qiyās* means estimation or measurement. For instance, *qistu al-thawb bi al-dhirāʿ* means "I measured the garment using the forearm." The verb can be both *qāsa yaqīsu* (with *yāʾ*) and *qāsa yaqūsu* (with *wāw*). It is a transitive verb that may be followed directly by the object or preceded by a preposition (*bāʾ* or *ʿalā*), such as *qāsa ʿalā kadha* or *qāsa bi kadha*. (It is said that Imruʿ al-Qays was named so because he would evaluate matters by his own judgment.)

Terminologically, it is defined as: "Equating a *farʿ* (subsidiary case) with an *ʾaṣl* (original case) based on a shared *ʿillah* (effective cause) in the latter's *ḥukm* (ruling)."

Thus:

- **Equating** means establishing equivalence or similarity.
- ***Farʿ***: the new case for which no explicit ruling exists.
- ***ʾAṣl***: the case upon which the analogy is based, and for which a ruling exists either via textual evidence or consensus; this excludes making analogies between two subsidiary cases.
- ***ʿIllah***: the common, relevant attribute shared between the original case and the subsidiary case.
- ***Ḥukm***: the legal ruling regarding the act of the legally accountable individual, whether through obligation, prohibition, or permissibility.

Elements of *Qiyās* (based on the above definition):

1. ***ʾAṣl* (Original Case):** Must be established by *Sharīʿah*, cannot be abrogated, and cannot itself be a subsidiary case of another original case.
2. ***Farʿ* (Subsidiary Case):** Its *ʿillah* must be clear and equivalent, and its ruling must be subsequent to the *ʾaṣl*.

3. ***Ḥukm* (Ruling of the *ʾAṣl*):** Must be established by textual evidence or consensus, cannot be established by another analogy, must be rational and comprehensible, so that the *ʿillah* can be understood, and cannot be specific to a unique incident (e.g., "It is yours and not lawful to anyone after you," or the acceptance of Khuzaymah ibn Thābit's solitary testimony).

4. ***ʿIllah* (Effective Cause):** Must be a consistent and well-defined prevalent attribute.

The Authority of *Qiyās*:

- The majority of scholars hold that *qiyās* is a binding authority and a legitimate source of legislation.
- Ibn Ḥazm, the Ẓāhirīs, and some Muʿtazilīs rejected *qiyās*, viewing it as legislation based on personal whims.

Evidence for the Majority:

1. Allāh Almighty's statement: "So take warning, O people of vision." [Al-Ḥashr 59:2] The term *iʿtibār* [which is the noun for the verb *iʿtabirū* (take warning)] implies reflection and drawing analogies. "People of vision" refers to those with insight, not merely physical sight. That is, an insane person whose vision is sound does not have a sense of reflection. Insight here refers to observing analogies and estimating the unmentioned matters based on the alike mentioned matters.

2. The well-known narration of Muʿādh when the Prophet (peace and blessings be upon him) sent him to Yemen and asked: "How will you judge if a case arises?" He said: "By the Book of Allāh."
   The Prophet said: "And if you do not find it therein?"
   He replied: "Then by the Sunnah of the Messenger of Allāh." The Prophet asked: "And if you do not find it in the Sunnah?" He said: "Then I will exert my *ijtihād* (reasoning) and not fall short." Qiyās falls under the realm of *ijtihād*. In one version, Muʿādh said: "I will draw analogies."

3. The Prophetic responses practically accounts for *qiyās*. For instance, when ʿUmar asked about kissing while fasting, the Prophet (peace and blessings be upon him) responded: "What do you think if you rinsed your mouth—

would that break the fast?"
He said: "No." The Prophet (peace and blessings be upon him) said: "So what about that?" which means, what is the difference?

The common *ʿillah* is that both actions involve swallowing saliva; and rinsing one's mouth precedes drinking as kissing precedes intercourse).

Another example is applying *qiyās* for fulfilling a vow of performing *ḥajj* for the deceased based on repaying their debt.

Another example is applying *qiyās* for a legally accountable person whose child's appearance is different based on the same case in camels.

4. Practice of the Companions:

Abū Bakr's analogy of the father in *kalālah* (a childless and parentless person) to the son due to a shared effective cause.

ʿUmar's advice to Abū Mūsā al-ʾAshʿarī: "Recognize analogies and parallels, and use your judgment to derive rulings."

5. Rational Evidence:

Since legal texts are finite and real-world cases are infinite, *qiyās* becomes necessary to ensure the *Sharīʿah* addresses new circumstances and people's needs.

Distinction Between: *ʿIllah* (Cause), *Sabab* (Reason), and *Ḥikmah* (Wisdom):

- Reason: An explicit cause that legally triggers a ruling due to an associated wisdom. Examples: The *niṣāb* (minimum threshold) is the reason for the obligation of *zakāh*. A contract is the reason for transferring ownership.

The *sabab* (reason) is a visible, consistent factor upon whose presence or absence the ruling hinges.

- Effective Cause: The underlying wisdoms and objectives for commands and prohibitions—or it is the motive for the ruling. Example: Hardship is the *ʿillah* (effective cause) for permitting shortening the prayer and breaking the fast during travel.

The *'illah* (effective cause) is not necessarily a visible, consistent factor, but it is usually a hidden factor whose essence requires *ijtihad*.

- Wisdom: The public objective or benefit served by the ruling, whether commands or prohibitions, such as preserving wealth which is the wisdom of the legal punishment of *qaṭ'* (amputation).

Difference Between Reason and Effective Cause:

The *sabab* (reason) does not require knowledge of the wisdom behind the ruling; it is a straightforward trigger for implementation of the ruling. For example, distinguishing the white threat (dawn) from the black thread (night) is the reason for starting the fast and the obligation to pray fajr.

The *'illah* (effective cause) requires identifying a link between the ruling and its benefit. For example, intoxication is the cause for the prohibition of wine. Hardship is the cause for the permissibility of shortening prayer during travel.

Difference Between Effective Cause and Wisdom:

We mentioned that *'illah* is the underlying factor of the ruling. However, the *ḥikmah* (wisdom) refers to the consequential outcome of the link between the ruling and its effective cause.

Examples: The *'illah* for the prohibition of wine is intoxication; the *ḥikmah* is the preservation of intellect.

The *'illah* for *qiṣāṣ* (legal retaliation) is intentional killing and shedding blood; the *ḥikmah* is the preservation of life.

The *'illah* for amputation is theft; the *ḥikmah* is the preservation of wealth.

The *'illah* for flogging is fornication; the *ḥikmah* is the preservation of lineage.

Unlike *'illah*, *ḥikmah* (wisdom) cannot serve as the basis for *qiyās* (analogical reasoning), though it remains important and considerable.

Lecture Fifteen

The Methods of Identifying the *ʿIllah* (Effective Cause) in *Qiyās*

1. Text Explicitly:

This is when a word or phrase directly indicates the *ʿillah*.

Examples:

Allāh Almighty's statement: "So that it will not be a perpetual distribution among the rich from among you." [Al-Ḥashr 59:7].

His statement: "Because of that, We decreed upon the Children of Israel." [Al-Mā'idah 5:32].

The statement of the Prophet (peace and blessings be upon him): "Seeking permission (before entering) was legislated because of (the possibility of) seeing (something inappropriate)."

Allāh Almighty's statement: "Then you would withhold out of fear of spending." [Al-'Isrā' 17:100].

His statement: "And if you are in a state of *janābah*, then purify yourselves." [Al-Mā'idah 5:6] — here, the condition (which is *janābah*) is made the *ʿillah* (cause).

The statement of the Prophet (peace and blessings be upon him) also said: "Whoever revives dead land, then it is his."

2. Relevant Impilicity:

This is when a certain *qarīnah* (clue) suggests an *ʿillah*.

Examples:

The Prophet (peace and blessings be upon him) said: "Do not perfume him, for he will be resurrected on the Day of Judgment in a state of *talbiyah*." — we understand that it is due to the state of *ʾiḥrām*.

Allāh Almighty says: "Say: It is *'adhā* (harmful), so stay away from women during menstruation." [Al-Baqarah 2:222] — which implies prohibition of anal intercourse due to it being constant harm.

3. Consensus:

This occurs when the *'ummah* agrees upon a specific *'illah* for both the original and the subsidiary case.

Example:

ʿAlī (may Allāh be pleased with him) said: "Whoever drinks, babbles nonsense; and whoever babbles, fabricates accusations." No one objected to his in this reasoning.

4. Influence:

This is when a ruling is found in correlation with a certain characteristic, making it likely the ruling is due to it.

Examples:

Bulūgh (puberty) influences the lifting of legal interdiction.

Giving precedence to a full brother over a half-brother in marriage guardianship, because he is given precedence in inheritance.

5. Resemblance[1]:

This refers to a characteristic that resembles the ruling by association.

Example:

Requiring a dowry after *khalwah* (seclusion) with a spouse. Originally, a dowry is due after *waṭ'* (consummation), but seclusion resembles or may lead to it. Allāh says: "while you have been intimate with each other." [Al-Nisā' 4:21].

6. *Ṭard* and *ʿAks* (Consistency and Continuity of an Effective Cause):

[1] Unlike the Ḥanafīs, it is established according to the Shāfiʿīs.

This is when the ruling appears with the presence of a characteristic and disappears in its absence.

Example:

Intoxication makes grape juice prohibited, and when it is no longer intoxicating, it is not prohibited.

7. *Sabr and Taqsīm* (Isolating and Dividing the Effective Cause):

Sabr (probing): Testing whether a given characteristic is valid as an *ʿillah*.

Taqsīm (division): Categorizing potential effective causes to find the valid one.

Example:

Allāh Almighty says: "Or were they created from nothing, or are they the creators?" [Al-Ṭūr 52:35] — proves that they have a creator who is Allāh.

In a jurists' debate, the Shāfiʿīs probed and divided the effective cause of the right of *wilāyat al-ʾijbār* (compulsion in marriage), whether it is due to virginity, youth, or not based on any *ʿillah*.

In the case of *kaffārah* (expiation) for intercourse in Ramaḍān: Is it due to intercourse alone? Or due to being a Bedouin? Or because he knowingly practiced intercourse during the day hours in Ramaḍān?

Key Terminologies Related to the *ʿIllah*:

***Al-Manāṭ* (the locus of the *ʿillah*):** It is a characteristic equal to *ʿillah*. It has three forms:

***Takhrīj al-Manāṭ* (extracting the effective cause):** A legal ruling exists in a text without a stated *ʿillah*, so the *mujtahid* extracts it.

Example: The cause for the prohibition of wine is not explicitly stated. Likewise, various effective causes have been proposed for the prohibition of *ribā*.

***Tanqīḥ al-Manāṭ* (rectifying the effective cause):** When there are several possible effective causes for a ruling, the *mujtahid* filters out the invalid ones to retain the strongest candidate. This was referred to previously in *al-Sabr wa al-Taqsīm*.

***Taḥqīq al-Manāṭ* (ascertaining the effective cause):**
Verifying whether the established effective cause exists in the subsidiary case depending its existence in the original cause.

Example: Cats are not impure because the Prophet (peace and blessings be upon him) said: "They are among those who circulate among you." But does this same ruling with its effective cause apply to mice?

Types of *Qiyās*:

There are various types of *qiyās* tackled by the fundamentalists. We mention some of them as follows:

***Qiyās al-'Awlā* (Analogy of the Superior):** Where the subsidiary case is even more deserving of the ruling than the original case. Example: Prohibiting striking the parents, based on the prohibition of saying "*'uff*" to them.

***Qiyās al-Musāwī* (Equal Analogy):** Where both the original and the subsidiary case are equal in suitability for the ruling. Example: Comparing the destruction of an orphan's wealth to consuming it.

***Qiyās al-Dalālah* (Inferred Analogy):** Where the ruling in the subsidiary case is known only through evidence of the *'illah*, not the *'illah* itself. Example: A woman with no husband becomes pregnant — analogized to a fornicator in punishment. The *'illah* is *zinā*, but the proof of *zinā* is established only by the effect, which is *ḥaml* (pregnancy). That is, pregnancy is an effect of *zinā.* Thus, the ruling is established through the evidence of the *'illah* not the *'illah* itself.

***Qiyās al-Shabah* (Analogy of Resemblance):** When resemblance is observed either in one original case or in two original cases. Then, we decide on which original case analogy applies. Example: An accidently-murdered owned slave: Is he analogized to a free man (due to humanity in both)? Or to owned property (due to being a slave)? Resulting in blood money due to humanity or monetary value based on which aspect is emphasized.

***Al-Qiyās al-Jalī* (Obvious Analogy):** Universally agreed upon and unambiguous. Example: Analogizing drugs to wine.

***Al-Qiyās al-Khafī* (Subtle Analogy):** Where the *'illah* is not clearly apparent, and scholarly disagreement may occur. Example: Analogizing *qāt* (khat) to narcotics, or cigarettes to other harmful substances.

Lecture Sixteen

Sources of Legislation - *Istiḥsān* (Juristic Preference)

Fifth: *Istiḥsān* (Juristic Preference):

Linguistically, *istiḥsān* is similar to *istifʿāl* and derived from *ḥasan* (something good), meaning to deem or believe something to be good.

Terminologically, it is the *mujtahid*'s deviation from the implication of an obvious *qiyās* (analogy) to the implication of a subtle *qiyās*, or from a general ruling to an exceptional ruling based on an evidence that supports his deviation in his mind.

It is evident from this definition that the deviation occurs in two areas:

1. *Qiyās*: by leaving the stronger in favor of the weaker.
2. Legal maxims: by making exceptions for the sake of *maṣlaḥah* (public interest).

Example: The default ruling is that the burden of proof lies upon the claimant, and the oath is upon the one who denies, based on the *ḥadīth* reported from ʾIbn ʿAbbās (may Allāh be pleased with him): "If people were given (everything) by their claims, some would claim the wealth and blood of others. But the burden of proof is upon the claimant, and the oath is upon the one who denies." [Recorded by Al-Bayhaqī].

This *ḥadīth* is considered a foundational evidence in judicial processes and the preferred principle in dispute resolution.

From this legal maxim, it is understood that there are two parties: the claimant, who must provide proof, and the denier, who must take an oath. Nevertheless, the Ḥanafī jurists held that: If the seller and buyer dispute over the price before receipt, with the seller claiming it was two thousand and the buyer claiming one thousand, then both must take an oath by way of *istiḥsān*.

The reason for *istiḥsān* here is that each party is simultaneously a claimant and a denier: The seller is claiming a specific price and denying the buyer's right to take the item for the price he states. The buyer denies the increase in price and claims

his right to the item. Thus, both are claimant and denier, and so they both take oaths.

Example: The liability of *al-ʾajīr al-mushtarak* (a shared employee) [he who works for multiple people simultaneously—such as a shoe or car repairer who serves the general public.

The legal maxim is that an *ʾamīn* (trustee) is not liable unless through negligence or transgression, and this applies to a hired worker in general. However, an exception is made for the shared employee, who is liable by *istiḥsān*, due to the need to protect people's property from loss or damage.

The *Ḥujjiyyah* (Authority) of *Istiḥsān*:

The scholars differed regarding the authority of *istiḥsān* as previously defined:

First View: The Ḥanafīs, Mālikīs, and Ḥanbalīs deemed *istiḥsān* authoritative. It is reported that Mālik said: "*Istiḥsān* is nine-tenths of knowledge." Muḥammad ibn al-Ḥasan said: "The companions of Abū Ḥanīfah used to debate with him using analogies, but when he said 'I perform *istiḥsān'*, none could rival him. He used analogy as long as it remained sound; when it became unsound, he opted for *istiḥsān*."

ʾAṣbagh ibn al-Faraj, a Mālikī scholar, said: "*Istiḥsān* dominates *fiqh* more than *qiyās*."

Qāḍī Yaʿqūb said: "The adoption of *istiḥsān* is the position of ʾAḥmad, which means abandoning a ruling in favor of another that is more preferred."

They cited several evidences, including:

1. The statement of Allāh Almighty: "Those who listen to the Word and follow the best of it." [Al-Zumar 39:18]. And: "Follow the best of what has been revealed to you from your Lord." [Al-Zumar 39:55]
   These verses praise following what is best, and praise indicates authority.
2. From the Sunnah: The saying of ʿAbdullāh ibn Masʿūd (may Allāh be pleased with him): "Whatever the Muslims consider good is good before Allāh, and whatever they consider bad is bad before Allāh."

3. It has been affirmed that the *Sharīʿah* sometimes deviates from strict analogy for the sake of *maṣlaḥah* (public interest), such as allowing *salam* and *istiṣnāʿ* contracts despite the Prophet's (peace and blessings be upon him) prohibition: "Do not sell what you do not possess."
4. It is also practiced in many legal matters for the sake of public interest, such as permitting the use of baths without setting a time limit, and drinking from a water container without specifying an exact quantity.

Second View: The Shāfiʿīs and Ẓāhirīs rejected the authority of *istiḥsān*, viewing it as legislation by mere personal whims. It is reported that Al-Shāfiʿī said: "Whoever practices *istiḥsān* has legislated." He also dedicated an entire chapter in *Al-'Umm* (The Exemplar) to refute *istiḥsān*.

Ibn Ḥazm said: "Truth is truth even if people find it repulsive, and falsehood is false even if people find it good. Thus, *istiḥsān* is merely a desire, a whim and a misguidance."

Their Evidences:

1. They argued that Allāh Almighty says: "If you differ in anything among yourselves, refer it to Allāh and the Messenger." [Al-Nisāʾ 4:59] —And *istiḥsān* is not included in that referral.
2. The statement of Allāh Almighty: "Judge between them by what Allāh has revealed and do not follow their whims." [Al-Māʾidah 5:49]
3. The statement of Allāh Almighty: "And do not follow that of which you have no knowledge." [Al-ʾIsrāʾ 17:36]. They argue that *istiḥsān* is following something without clear evidence.

Types of *Istiḥsān* (According to the Ḥanafīs):

The Ḥanafīs classified *istiḥsān* into several types:

1. **Text-based *istiḥsān*:** Such as the permissibility of *salam* sales.
2. **Consensus-based *istiḥsān*:** Such as the permissibility of *istiṣnāʿ* contracts. Although, in principle, they are invalid (since they involve selling a non-existent item), consensus affirms their permissibility.

3. **Subtle analogy-based *istiḥsān*:** Such as analogizing *Ḥuqūq al-irtifāq* (easement rights) to *waqf* (endowment) of agricultural lands—such as a spring or growing trees in the center of a field. These do not enter into a sale contract unless explicitly mentioned.

Thus, in *waqf*, analogy works in the same way, but they used analogy with *ijārah* (leasing), not with *bay'* (sale), based on subtle analogy: the purpose of *waqf* is benefit, not ownership, and benefit cannot be achieved without easement rights.

4. ***Istiḥsān* based on *'urf* (custom):** Such as stipulations in sales contracts. By analogy they would be invalid, but due to prevailing custom they are permitted by *istiḥsān*.
5. ***Istiḥsān* based on *maṣlaḥah* (public interest):** As in the example of the liability of a shared employee mentioned earlier.
6. ***Istiḥsān* based on necessity (*ḍarūrah*):** Such as purifying wells in which impurity has fallen by extracting a specified amount of water, done out of necessity and thus allowed by *istiḥsān*.

Lecture Seventeen

Sources of Legislation – *Istiṣḥāb* (Presumption of Continuity)

Sixth: *Istiṣḥāb* (Presumption of Continuity):

Linguistically, it means: "to accompany," or "to maintain what has been established," as if the state remains unseparated.

Terminologically, it means: the persistence of a previously established ruling into the future until there is evidence indicating a change.

Examples:

- *Wudū'* (ablution): presumed valid until its invalidation is proven.
- Virginity: presumed intact until proven otherwise.
- Missing person: presumed alive until death is confirmed; thus, they retain the legal rights of the living, such as marriage, inheritance, and so on.
- Ownership: presumed to remain with the original owner until transfer is established.
- Free of liability: presumed until otherwise is established.

The previous examples are related to affirmation. Examples for negation:

- Presuming non-obligation of fasting outside the month of Ramaḍān.
- Non-obligation of prayer before its appointed time.
- Invalidity of a sixth daily prayer.

The *Ḥujjiyyah* (Authority) of *Istiṣḥāb*:

Scholars have differed on the authority of *istiṣḥāb* as previously defined:

1. **First Opinion:** *Istiṣḥāb* is authoritative. This is the view of the Mālikīs, Shāfiʿīs, Ḥanbalīs, and Ẓāhirīs, in both affirmation and negation.
2. **Second Opinion:** It is not authoritative, the position of the majority of Ḥanafīs and many theologians like Abū al-Ḥusayn al-Baṣrī.

3. **Third Opinion:** *Istiṣḥāb* is valid only as a defensive argument, not for establishing new rights. It maintains the status quo due to lack of evidence, but cannot serve to affirm something that did not previously exist.
    - Example: By *istiṣḥāb*, it is valid to deny claims of inheritance from a missing person by presuming they are alive in order to protect his rights, but it is not valid to grant the missing person new rights that did not previously exist. For example, if his father dies, he will not inherit him because he is missing.

This is the view of many Ḥanafīs, including al-Taftāzānī.

4. **Fourth Opinion:** *Istiṣḥāb* is only a supporting evidence used in weighing between two options. This is attributed to al-Shāfiʿī.
    - Example: The default ruling regarding private parts is prohibition. No woman's private parts become lawful except through marriage or *milk yamīn* (ownership via slavery), so the default *istiṣḥāb* (presumption) remains prohibition of private parts.

Evidences of the Proponents of *Istiṣḥāb*:

1. The statement of Allāh Almighty: "Indeed, conjecture avails nothing against the truth." [Yūnus 10:36]. It indicates that the default state is certainty which is not displaced by doubt, because it is transient.
2. The statement of Allāh Almighty: "I have lived among you a lifetime before this – do you not reason?" [Yūnus 10:16]. The Prophet (peace and blessings be upon him) uses his truthfulness and trustworthiness for forty years as a default continuing presumption.
3. Al-Bukhārī reports from ʿUbbād ibn Tamīm, from his uncle, that he complained to the Messenger of Allāh (peace and blessings be upon him) about a man who imagined something during prayer. The Prophet said: "He should not leave (his prayer) unless he hears a sound or finds a smell." The meaning is not limited to these two cases; rather, one should not presume invalidation of *wuḍū'* unless there is a confirmed invalidating factor.

4. Reported by Abū Dāwūd from Abū Saʿīd al-Khudrī that the Prophet (peace and blessings be upon him) said: "If one of you is uncertain about his prayer, let him dismiss the doubt and build upon what is certain."

Examples of *Istiṣḥāb*:

1. If a wife claims she did not receive the allotted maintenance, and the husband claims he delivered it, her claim is accepted by taking an oath, because the default state is presuming the continuity of maintenance after liability has been proved, until proven otherwise. The husband is not obliged to take an oath.
2. If a borrower claims to have repaid a loan, or a buyer claims to have paid the seller, or a tenant claims to have paid rent, and the lender, seller, or landlord deny this, then their counterclaim of non-payment is upheld because the default state is presuming the continuity of the debt, the price and the rent after liability has been established, unless proof is given by the claimant.
3. If a woman claims her *'iddah* (waiting period) continues and her menstrual purity has not ended, her claim is accepted by taking an oath. She receives maintenance during the *'iddah* because the default state is presumption of its continuation during the affirmed *'iddah*.
4. If someone eats late at night without being certain that fajr has entered, their fast is valid because the default state is presuming the continuity of night. But if they eat at before subset, thinking night has begun, and it turns out it had not, the fast is invalid, because the default state is presuming the continuity of daytime.
5. A modern example: Brain death – The debate revolves around whether the default state is presumption of life until both brain and heart functions cease, or if brain death alone suffices as a sign of death.

Types of *Istiṣḥāb*:

1. *Istiṣḥāb al-'Ibāḥah* (Presumption of Permissibility): When there is no evidence for forbiddance and prohibition.

2. *Istiṣḥāb al-ʿAdam* (Presumption of Non-Existence) or *al-Barāʾah* (Presumption of No Liability): Until proven otherwise, the person is not held accountable.

3. *Istiṣḥāb* of an Established State: Such as ownership, permissibility of conjugal relations, purity, etc., until evidence for change appears.

General Legal Maxims Derived from *Istiṣḥāb*:

1. The default state is the presumed continuity of things as they were until proven otherwise.
2. Certainty is not removed by doubt.
3. The default state in things is permissibility.
4. The default state is non-liability.
5. The default state regarding private parts is prohibition.
6. The default state in speech is presumed to carry its literal meaning unless proven otherwise.
7. The default state for accidental attributes is presumed absence. Example: One buys a car and uses it, then claims it was defective. The seller's denial is accepted by taking an oath.
8. The default state is attributing recent events to their nearest possible time. Example: A non-Muslim man dies, and his wife later becomes Muslim and claims a share in inheritance. According to Imām Abū Ḥanīfah and his two companions, the heirs' claim is accepted, because the wife's conversion is a recent event, and new events are linked to the closest likely time. According to Zafar, her claim is accepted.

Lecture Eighteen

ʿUrf (Custom)

Linguistically, *ʿurf* refers to something elevated. It is also used to denote what is known and recognized, as in the verse: "Command what is customarily acceptable [ʿurf]." [Al-ʾAʿrāf 7:199].

Terminologically, it refers to: that which sound minds have consistently accepted, as witnessed by trustworthy individuals, and which upright human natures find agreeable.

The word "that which" (*mā*) is general and includes both speech and actions.

The phrase "consistently accepted" excludes what occurs rarely or sporadically.

The phrase "by sound minds" excludes customs driven purely by whims and desires—such as the consumption of intoxicants or the practice of hiring dancers for weddings.

The phrase "accepted by upright natures" excludes what sound human nature finds repugnant—such as incestuous marriage or same-sex unions.

***ʿĀdah* (Habit):**

It is a recurring matter not based on a rational connection.

The word "recurring" excludes what happens infrequently or only once. Repetition implies an occurrence that happens repeatedly.

The phrase "not based on a rational connection" excludes effects that occur due to a cause, as in causal relationships.

The scope of *ʿādah* is broader than that of *ʿurf*, as it may be individual or collective.

It may be:

- Natural, like climate being hot or cold;
- Rational, like *ʿurf*;

- Driven by desire, like unlawful financial consumption—as in the case of the people of Shuʿayb;
- Or invented, like swearing by faith, trust, or the spirit of one's parents.

Types of *ʿUrf*:

1. Practical Custom: What people are accustomed to in practice, such as: *bayʿ al-taʿāṭī* (silent transactions), dividing the dowry into immediate and deferred portions.
2. Verbal Custom: The use of a specific term to refer to a specific meaning, such as: restricting the word *meat* to refer only to livestock and excluding fish and birds.
3. General Custom: Customs adopted by the general population in a country, such as: agreeing upon traffic light signals by color.
4. Specific Custom: Customs followed by a specific group, such as: traders' customary practices in certain types of transactions, or a region's norm concerning the bride's trousseau from the father's side.

The Authority of *ʿUrf* in *Fiqh*:

First opinion: *ʿUrf* is a binding authority and independent *Sharʿī* evidence. This is the opinion of the Ḥanafīs, Mālikīs, and some Ḥanbalīs, and it was favored by Ibn al-Qayyim. They cited the following as evidence:

- The statement of Allāh Almighty: "Accept what is easy, enjoin what is customarily good [*ʿurf*], and turn away from the ignorant." [Al-ʾAʿrāf 7:199].
- The *mawqūf* narration of Ibn Masʿūd: "What Muslims deem good is good in the sight of Allāh."

Second opinion: *ʿUrf* is not independently authoritative or evidence except when the *Sharīʿah* indicates it should be considered. This is the view of the Shāfiʿīs.

Conditions for Acting upon *ʿUrf*:

1. It must be widespread and prevalent among the people—not just the habit of a single individual or small group.
2. It must not contradict a *shar'ī* text or consensus. Otherwise, it is a corrupt custom, such as: usurious transactions accepted by common practice, or civil marriage contracts that conflict with Islamic *Sharī'ah*.

Among the Ḥanafīs, *'urf* is a strong form of evidence that even takes precedence over *qiyās* (analogical reasoning). This is known as *istiḥsān al-'urf* (juristic preference based on custom) such as permitting a sale that has a condition although *qiyās* prohibits this transaction. It is also used to specify a general text of probable meaning. For example, the restriction of the word *meat* to livestock animals, even though the Qur'ān refers to fish as meat in the verse: "Fresh meat." [Al-Naḥl 16:14]. Likewise, restricting the term *dābbah* (*beast*) so that it does not include humans, based on common usage.

Impact of *'Urf* on *Fatwā* in Minority Muslim Communities:

Recognizing *'urf* in non-Muslim lands is both important and delicate. Not every custom is valid simply because it exists in a non-Muslim context, nor should all customs be dismissed merely because they are found in non-Muslim communities.

Examples of valid practical customs in such contexts include forming a board of directors to manage Islamic centers, appointing a regular Imām, providing housing for the Imām, collecting zakāh during Ramaḍān, and organizing annual fundraising campaigns. These customs and others have evolved over time, do not contradict *Sharī'ah*, and are thus considered in *fatwās* and actual practice.

However, corrupt customs do exist in such communities, such as certain types of clothing, celebratory practices that contradict the core principles and practices of Islamic *Sharī'ah*. In such cases, the *'urf* cannot be considered a valid basis for permissibility.

Lecture Nineteen
Sadd al-Dharā'i' (Blocking the Means)

First: Definition of *Sadd al-Dharī'ah*:

Linguistically, *dharī'ah* means "a means" or "a way to something," and *sadd* means "blocking" or "preventing."

Terminologically, it is: A matter which is not prohibited in and of itself, but committing it is feared to lead to that which is forbidden.

Certain things have been forbidden in the *Sharī'ah* not as an end in themselves, but as a means to a forbidden end.

Examples include the prohibition of selling weapons to one intending to commit unjust killing, the prohibition of statues due to the fear of them being worshipped, the prohibition of *'īnah*-sales (sales with immediate repurchase) due to the fear of them leading to *ribā* (usury), and other such examples.

Second: The Views of the *'Uṣūliyyūn* on This Maxim:

The esteemed scholars have differed concerning the application of this concept in *fiqh*. Their positions may be detailed as follows:

1. The Proponents:

This includes the Mālikīs and Ḥanbalīs. They maintained that this maxim is among the general legal evidences in Islamic *fiqh*, and that it may be invoked to prohibit or abhor certain acts.
They supported this stance with several pieces of evidence, including:

- The statement of Allāh Almighty: "And do not insult those whom they invoke besides Allāh, lest they insult Allāh in enmity without knowledge..." [Al-'An'ām 6:108]. Prohibiting the insult of their deities so that they do not retaliate in kind and insult Allāh.
- The statement of Allāh Almighty: "And do not approach this tree." [Al-Baqarah 2:35]. They were forbidden from even approaching the tree lest it leads to the forbidden act of eating from it.

- The statement of Allāh Almighty: "Do not say '*rāʿinā*' but say '*unẓurnā*.'" [Al-Baqarah 2:104]. To prevent the Jews from exploiting the word (*rāʿinā*) as a means to insult the Prophet (peace and blessings be upon him), given its usage in their language.
- The statement of the Prophet (peace and blessings be upon him): "Leave that which causes you doubt for that which does not cause you doubt."
- The well-known *ḥadīth*: "The lawful is clear, and the unlawful is clear..." We find in it: "So whoever avoids the doubtful matters has safeguarded his religion and his honor."

Ibn al-Qayyim discussed this issue extensively in *'I'lām al-Muwaqqiʿīn*, citing ninety-nine evidences for it.

The Mālikīs and Ḥanbalīs employed this maxim to prohibit and forbid various acts — albeit with some differences between them. Among these applications:

The prohibition of a woman traveling for *ḥajj* without a *maḥram*, the prohibition of *khalwah* (seclusion) with an unrelated woman, the prohibition of looking at women (according to the Ḥanbalīs), the prohibition of fermenting drinks in certain containers, the prohibition of drinking juice after three days, and other matters that were deemed forbidden due to the possibility of them leading to the forbidden.

2. The Opponents:

This includes the majority of scholars from the Ḥanafīs, Shāfiʿīs, and Ẓāhirīs.

Ibn Ḥazm stated in *al-'Iḥkām*: "Abū Muḥammad said: Whoever passes judgment based on suspicion, or caution regarding a matter whose reality is not certain, or based on fear that it might be a means to something that has not yet occurred — has judged by conjecture. And whoever judges by conjecture has judged by falsehood and lies. This is not permitted, for it is judgment based on whims and an evasion of truth. We seek refuge in Allāh from any school that leads to this. Moreover, this school of thought is, in and of itself, weak, corrupt, and self-contradictory. For if one thing is forbidden out of fear that it may lead to *ḥarām*, then by that logic, men should be castrated — lest they commit fornication, and people should be killed — lest they commit disbelief, and grapevines should be destroyed — lest wine be produced from them. In summary, this is the most

corrupt school on earth, for it leads to the invalidation of all truths. After all, Allāh is our source of success."

Those who rejected this maxim presented the following arguments:

1. *Sharī'ah* is built upon judging by what is apparent, not what is hidden. We are not held accountable to investigate hearts and intentions. Whoever manifests Islam is accepted as a Muslim unless he does something that contradicts Islam. To judge by blocking the means is to judge by speculative unseen outcomes.

2. Judging by *sadd al-Dharā'i'* is a form of conjecture, and Allāh has said: "Indeed, conjecture does not avail anything against the truth." [Al-Najm 53:28]. Had the matter been certain, it would have been forbidden with certainty. Allāh Almighty also said: "Avoid much conjecture." [Al-Ḥujurāt 49: 12]. While *dharā'i'* are founded upon conjectures.

For example: One might say that looking (at women) should be forbidden because it might lead to *ḥarām*.
We respond: This is not definitive, as in most cases, looking does not lead to *ḥarām* — thus no ruling can be established on such a basis.

3. The *dharā'i'* (means) are not uniform, but varied and unstable in nature. They may fall under categories of obligation, forbiddance, abhorrence, permissibility or recommendation. Not only that — they also differ based on their associated objectives in terms of the strength of public interests or harms, and in how apparent or obscure the means are.

Thus: This is an inconsistent descriptor, and forbiddance cannot validly be based upon it. Allāh Almighty said: "Do not say about what your tongues assert falsely: 'This is *ḥalāl* and this is *ḥarām*,' so as to fabricate lies against Allāh." [Al-Naḥl 16:116].

4. The matter of *dharā'i'* is subjective and differs with the states of individuals. Legal rulings, however, must be consistent and universal. Adopting *sadd al-dharā'i'* can result in contradictory rulings — where the same issue is both forbidden and permitted.

5. The majority of scholars rejected rulings based on *dalālah* (indirect indication) — which is stronger than *sadd al-Dharā'i'*. For example: The *ḥadd* (legal punishment) is not applied to a woman who has undergone *li'ān* (mutual cursing) even if evidence is proven in case of being pregnant, due to the presumption of innocence and the legal maxim "the child belongs to the bed." If the stronger (i.e., indications) is rejected, the weaker (i.e., *dharā'i'*) in total should be rejected.
6. Most of the evidences cited by the proponents of this maxim may be justified as prohibitions in themselves based on further interpretation — not merely based on blocking the means to something forbidden.

For example, the statement of Allāh Almighty: "Do not insult those whom they call upon besides Allāh..." [Al-ʾAnʿām 6: 108]. This may fall under the general prohibition of insult, as in: "Allāh does not like the public utterance of evil speech — except by one who has been wronged." [Al-Nisāʾ 4:148]. As well as the *ḥadīth* about the bankrupt person, which includes: "...and he insulted such and such..."

The intended meaning could be the avoidance of imitating or keeping step with the disbelievers, not a general rule against criticizing their deities. After all, Muslims did satirize the disbelievers and their gods in both poetry and prose.

As for the second verse: "Do not approach this tree." [Al-Baqarah 2:35]. This is not merely a prohibition of absolute approaching, but a prohibition of eating, as evidenced by: "And eat thereof freely wherever you wish." [Al-Baqarah 2:35]. It also follows that the tree would remain forbidden even if its fruit was brought to them — thus, the ruling applies directly to the act itself.

These are the most significant objections raised by the opponents. However, a review of various jurisprudential rulings indicates that the application of *sadd al-dharā'i'* has, in fact, been practiced by many scholars—even those from whom rejection of the maxim has been narrated. Hence, Imām al-Zarkashī stated in *al-Baḥr al-Muḥīṭ*: "Abū Ḥanīfah and al-Shāfiʿī said: It is not permissible to prohibit something on the basis of *sadd al-dharā'i'* (blocking the means). We would reply: Consider the verse, "O you who believe! Do not say '*rāʿinā*'" [Al-Baqarah 2:104], and the verse, "Ask them about the town that was by the sea." [Al-ʾAʿrāf 7:163]. Also, the saying of the Prophet (peace and blessings be upon him): 'May Allāh

curse the Jews; fat was forbidden for them, so they melted it, sold it, and consumed its price.' And his saying (peace and blessings be upon him): 'Leave that which causes you doubt for that which does not.' And his saying (peace and blessings be upon him): 'The *ḥalāl* is clear and the *ḥarām* is clear, and between them are matters that are doubtful...'" — end quote.

Similarly, Al-Qurṭubī remarked: "Blocking the means is the view of Mālik and his followers. Most others disagreed with it in principle, yet they still applied it in many detailed rulings." He then clarified the precise point of disagreement, stating: "Know that whatever leads to falling into the forbidden is either something that necessarily results in the forbidden or not. If it necessarily leads to it, then it is not part of this discussion, but rather belongs to the category of avoiding the forbidden matters from which one cannot be safe —thus, doing it is also *ḥarām*, by analogy to the maxim that 'what is necessary to fulfill an obligation becomes obligatory.' If it does not necessarily lead to it [i.e., the forbidden], then it is either something that frequently leads to the forbidden, or rarely does, or is equal in both probabilities. These are what we refer to as '*dharā'i'*'' The first of these (frequent lead) must be taken into account. As for the second and third, the [Mālikī] scholars have disagreed on them."

A similar conclusion is found in Al-Qarāfī's *al-Qawā'id*, where he notes: "Mālik was not alone in this view; rather, every scholar applies it. What distinguishes the Mālikīs is their broader application. He states: "There are certain *dharā'i'* that are accepted by consensus."

We also find in our own [Ḥanafī] school jurisprudential subsidiary rulings that fall under the category of *sadd al-dharā'i'*, such as the ruling that a woman must cover her face if her beauty may cause temptation—even though the relied view of the school is that the face and hands are not *'awrah* (private parts).

Third: A Call for Balanced Application:

Justice and fairness demand that we exercise restraint in issuing prohibitions based solely on *sadd al-dharā'i'*, for excessive reliance on it can lead to hardship and unnecessary restriction. Such an approach would contradict the overarching objectives of the *Sharī'ah*, one of which is *raf' al-ḥaraj* (removal of hardship).

Allāh, the Exalted, said: "He has not placed upon you in religion any hardship." [Al-Ḥajj 22:78].

Thus, should we:

- Prevent men from getting married out of fear of poverty or financial difficulty?
- Discourage people from having children due to the corruption of some generations or lack of guidance?
- Ban the cultivation of a crop because it is sometimes used in unlawful ways?
- Avoid visiting churches to introduce Islam, merely because they contain images and icons that contradict Islamic teachings?
- Refrain from attending university lectures because of the presence of improperly dressed women, thereby falling behind in the pursuit of knowledge and education?
- Cease reading Orientalist literature and the works of critics of Islam for fear of falling in confusion or misguidance?
- Sever ties with neighbors under the pretext of avoiding being influenced by their customs?
- Prohibit the use of the internet due to the presence of harmful improper content in order to avoid temptation?
- Stop working during Ramaḍān just because long days might make fasting more difficult?
- Require male teachers to avoid eye contact with female students and speak to them while lowering their gaze—merely as a preventive measure from temptation?
- Demand that physicians apply the same restriction in interacting with the female relatives of patients?
- Forbid male Qur'ān reciters from teaching women the Qur'ān out of fear of visual or auditory temptation?

- Prohibit women from performing *ṭawāf* in order to prevent the likelihood—or mere possibility—of physical contact in the crowded Ḥaram?
- Disallow visiting the Prophet's (peace and blessings be upon him) grave for fear of impermissible acts of *tabarruk* (seeking blessings from Allāh through a righteous person)?
- Remove the Prophet's (peace and blessings be upon him) grave from the Prophetic Mosque in order to prevent the possibility of people praying in a mosque containing a grave?
- And if we choose not to relocate his grave due to his lofty status and his supplication "O Allāh, do not make my grave an idol that is worshipped!"—then should we move the graves of his two Companions instead, merely to block the means of *tabarruk*?
- Ban the ceremonial covering of the Kaʿbah for fear of it becoming an object of *tabarruk*?

These are but a few of the many hypothetical scenarios that, if we took *sadd al-dharā'i'* to extremes, would lead to tangible harm for individuals or for Islam itself.

Accordingly, it is imperative to be cautious in applying the maxim of *sadd al-dharā'i'*. A sound and balanced standard must be established—one that takes into account circumstances, time, place, and prevailing customs.

What is forbidden based on *sadd al-dharā'i'* in one place may be permissible in another; what is forbidden at a certain time may be permissible at another; what is forbidden for one individual or circumstance may be permissible in another.

This is precisely what the Ḥanafī scholars meant when they said: This principle as unstable and inconsistent.

So, What Are the Criteria for Prohibition Based on *Sadd al-Dharā'i'*?

Below are some of the key standards for applying the maxim of *sadd al-dharā'i'* (blocking the means):

1. The strength of the suspicion that a permissible act will be used as a means for something forbidden: The *dharīʿah* (means) must customarily and regularly lead to definite harm or corruption. For instance, digging a well behind the door of a house or in a dark area where someone may inevitably fall into it.

Accordingly, if the feared harm is rare or uncertain, then the act should not be forbidden on the basis of blocking the means. An example of this is when women work with men in settings that are open to public scrutiny, such as offices or administrative buildings. This should not be forbidden on the basis of preventing *khalwah* (seclusion) or *fitnah* (temptation), as the presence of others serves as a barrier.

2. The application of *sadd al-dharāʾiʿ* must not contradict *maṣlaḥah muʿtabarah* (considered interests): A *maṣlaḥah muʿtabarah* is one acknowledged by the *Sharīʿah* through an explicit text from the Qurʾān, Sunnah, or scholarly consensus. Since *sadd al-dharāʾiʿ* is a matter of *ijtihād*, it cannot override a revealed text. For example, we do not equalize male and female inheritance shares just to block the means of accusations that Islam favors men over women.
3. The application of *sadd al-dharāʾiʿ* must not contradict a pressing need. For instance, it would be incorrect to prohibit loans due to some cases of non-repayment, or to discourage entrusting others with items due to some cases of betrayal. Lending should only be avoided if betrayal and breach of trust have become widespread and common.
4. The application of *sadd al-dharāʾiʿ* must not oppose a greater or equal interest.

This is a critical point, for *jalb al-maṣāliḥ* (the pursuit of benefit) is among the highest objectives of the *Sharīʿah*. If a Muslim is faced with a situation in which an action will clearly yield a benefit but may involve a possible harm, then the pursuit of benefit should take precedence.

An example: looking at one's fiancée, or accompanying her during travel when there is a fear for her safety—such as a woman traveling from *dār al-ḥarb* (a non-Muslim land), like the case of ʾUmm Kulthūm. Or the incident when ʿĀʾishah was

left behind and later accompanied by Ṣafwān ibn al-Muʿaṭṭal—this was not prohibited except where it leads to actual corruption. But if the action leads to a stronger interest, then it is not deemed corruptive.

5. There must be no concrete clue of suspicion for the action. In such cases, the means should not be blocked.
6. Application must not be marked by narrow-mindedness, extremism or exaggeration. Religious narrow-mindedness is explicitly condemned in the foundational texts of the Sharīʿah, forbidding overexaggerating in religious matters. The religion calls for moderation, balance, and mildness. Excessive prohibition and overzealous restriction contradict the *fiṭrah* (natural disposition) and the essence of the religion.

Fourth: Balancing *Sadd al-Dharāʾiʿ* with Other Legal Maxims:

When discussing the maxim of *sadd al-dharāʾiʿ*, we must also mention other *qawāʿid fiqhiyyah* (legal maxims) that help create balance and context. These include:

1. "What is prohibited as a *dharīʿah* (means) may be permitted for the sake of a preponderant benefit."
2. "Greater leniency is afforded in the means than in the ends."

For example, entering upon non-*maḥram* (marriageable) women may be permitted when necessary and without prior permission for entering—such as in cases of fire or emergency. It would be inconceivable to say that this should be forbidden on the basis of blocking the means to potential forbidden gaze at women with the possibility of seeing them in sheer clothes. The same applies to chasing criminals, outlaws, and bandits—despite the investigative procedures that may involve surveillance, tracking or spying.

Fifth: The Concept of *Fatḥ al-Dharāʾiʿ* (Opening the Means) by the Mālikīs:

Just as Mālikī scholars extensively discussed and developed the concept of *sadd al-dharāʾiʿ*, they also paid attention to its opposite: *fatḥ al-dharāʾiʿ* (opening the means)—where the means to a benefit are facilitated, rather than blocked.

Al-Qarāfī (may Allāh have mercy on him) said: "Know that just as a means must sometimes be blocked, it is also sometimes obligatory to be opened, and at other times it may be abhorred, recommended, or permissible."

Likewise, Shaykh al-Islām al-Ṭāhir ibn ʿĀshūr, in his outstanding work *Maqāṣid al-Sharīʿah*, stated: "Indeed, the *Sharīʿah* deliberately opened up *dharāʾiʿ al-maṣāliḥ* (the means to achieving benefits)."

This is why we find legal maxims such as:

- "What is necessary to fulfill an obligation becomes obligatory."
- "What is necessary to achieve a permissible act becomes permissible."

For example, reciting the Qur'ān correctly and properly is obligatory. This necessitates learning the rules of *tajwīd*. Since these rules pertain to the manner of due performance, learning them from someone proficient becomes obligatory. This applies to both men and women. So, if a woman finds no qualified teacher except a man, it becomes obligatory for her to learn from him—because *what is necessary to fulfill a religious obligation becomes obligatory*. In this case, the *dharīʿah* (means) is opened rather than blocked, contrary to what may be initially assumed.

A woman should not refrain from seeking knowledge from a man unless she is certain that it will lead to corruption. Likewise, male scholars should not withhold teaching women merely on the basis of *sadd al-dharāʾiʿ*; they may only abstain if actual harm or evil is verified.

Lecture Twenty

Al-Maṣāliḥ al-Mursalah (*Unrestricted Interests*)

Maṣlaḥah means benefit or interest. *Mursal* means that which is left unrestricted or indefinite.

Al-Maṣlaḥah al-Mursalah refers to an interest for which there is no specific ruling mentioned by *al-shāri'* (the Legislator), nor is there any *Shar'ī* evidence indicating its *i'tibār* (consideration) or its *'ilghā'* (cancellation).

Example: Establishing prisons to isolate criminals. There is no explicit textual command or prohibition concerning this. The most that appears in the Qurʾān is a narrative reference in the story of Yūsuf (peace be upon him). However, the *maṣlaḥah* (interest) of isolating criminals necessitated it, so ʿUmar ibn al-Khaṭṭāb (may Allāh be pleased with him) instituted it.

Example: Forming a regular army with assigned service duties and fixed stipends. There is no textual evidence commanding or forbidding this. Nonetheless, the interest of protecting the state required the enlistment of soldiers.

Example: Codifying *Sharīʿah* rulings into specific legal articles and statutes. There is no textual evidence that explicitly commands or prohibits this; the *Shar'ī* command is general *to judge between disputing people*. However, the interest requires the formation of legal codes.

The *Ḥujjiyyah* (Authority) of the Maxim of *Maṣāliḥ Mursalah* in Legislation and Jurisprudence:

First opinion: *Maṣāliḥ* are not an independent source of evidence. This is the view of the Ḥanafīs and the Shāfiʿīs.

Their reasoning is that *maṣādir al-tashrī'* (the sources of legislation) already include sufficient textual and analogical evidence to cover all rulings falling under unrestricted interested—through the Qurʾān, Sunnah, *'ijmā'* (consensus), and (*qiyās*) analogy.

Moreover, a *maṣlaḥah* not supported by any *Shar'ī* proof is not deemed a legitimate interest, and hence the authority lies with the evidence—not the presumed benefit.

Second opinion: *Maṣāliḥ* are an independent and recognized source of evidence and a binding authority upon which rulings may be established. This is the view of the Mālikīs and the Ḥanbalīs.

Their rational justification is that human interests are infinite, while revealed textual evidences are finite. Hence, *'aṣl al-'ibāḥah* (the default state of permissibility) must be employed for undefined actions.

They also cite the practices of the Companions and the Followers in numerous matters, including:

- The first and second compilations of the Qur'ān.
- The addition of diacritical marks and vowel points during the 'Umayyad era.
- The addition of stop and start markers during the 'Abbāsid period.
- The establishment of prisons, government ministries, and the organization of *kharāj* (land tax).
- The system of *istikhlāf bi al-'ahd* (appointing a successive ruler via personal nomination), as practiced by Abū Bakr and 'Umar (may Allāh be pleased with them).

Conditions for Acting upon a *Maṣlaḥah Mursalah*:

1. It must be real in essence and not merely apparent. Such as adopting a direct electoral system for selecting a ruler, or establishing a *Council of Senior Scholars*, or appointing a Grand Imām for Al-Azhar.
2. It must be public and not limited to a specific individual or group.
3. It must not contradict any established *Shar'ī* ruling, whether based on explicit text or *'ijmā'* (consensus).

Examples of *Maṣāliḥ Mursalah*:

- Implementing a membership system for electoral rights in Islamic centers.

- Prohibiting entry into the mosque with shoes.
- Using loudspeakers to project the voice of the *mu'adhdhin* and the Imām.
- Floor markings to assist with aligning rows during prayer.
- Regulating the number of *ḥujjāj* (pilgrims) each year.

***Maṣlaḥah Mursalah* and *Bidʿah*:**

We have clarified the conditions for applying *maṣlaḥah mursalah*: it must be real, public, and not in contradiction with a text or consensus.

As for *bidʿah* (innovation): it is that which contradicts an established verbal or practical text, or introduces a belief of reward or punishment in the Hereafter without evidence.