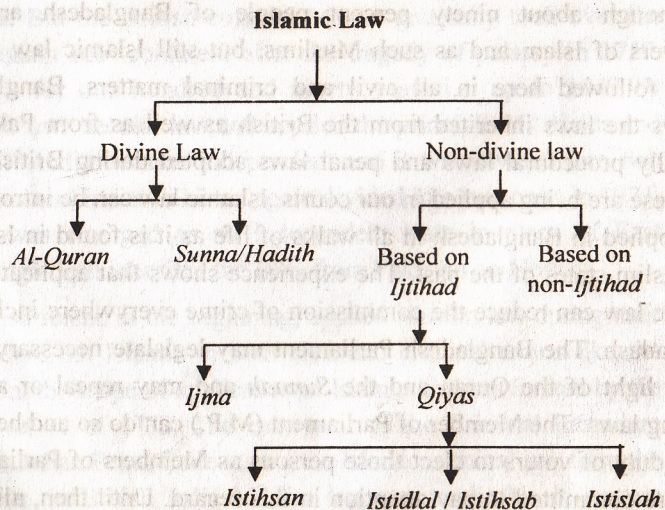


Chapter Two Sources of Islamic Laws

Islamic law consists of moral, ethical and social code. It guides a man towards good and away from evil. So it is guidance both spiritual and temporal.²³ State pays attention to the enactment and enforcement of temporal laws only. Islamic law, as enforced in Bangladesh, is the combination of divine as well as state legislation. Islamic law deals with the rights and obligations of human beings, which are primarily derived from the Quran and Sunna.

The sources of Islamic law are (i) divine and (ii) non-divine. The divine sources are the Quran and *Sunna* and the non-divine sources are *Ijma*, *Qiyas* and *Ijtihad*. Besides these, some jurists also recognize *Istihsan*, *Istidlal* or *Istishab* and *Istislah* as sources of Islamic law.

The sources of Islamic law is shown in the following diagram:



Let us discuss the sources one after another in details

²³ Shawkat Mahmood, Muslim Law, P.1

1. The Quran, the first source of Islamic law

(i) Arrangement of the Quran.

Al-Quran is the first and main source of Islamic law. Literally, Quran means 'reading' or 'recitation'. It is a communication from Allah to the prophet Muhammad (peace be on him) in Arabic, conveyed by the Angel Zibrail. It was revealed piecemeal over a period of 23 years-13 years at *Mecca*, and 10 years at Medina, in relation to particular events or necessity. There are 114 suras (chapter) and 6666 verses (sentences) divided into 30 equal parts (para), each chapter having separate little. The revelation of the Quran began with sura Al-Alaq (96:1) starting with the words—"Read in the name of your lord" and ending with the verse in sura Al-mayidah (5:3) "Today I have perfected your religion for you and completed my favour toward you, and chosen Islam as your religion." The present order of the verse within each sura and the sequence of the suras were re-arranged and finally settled by the prophet in the year of his demise¹

(ii) Gradual revelation and preservation

The Quran was revealed gradually; the verses of the Quran support this view. These verses are stated as follows:

'The unbelievers say, "Why has not the Quran revealed to him (Muhammad) all at once? Thus (it is revealed) that your heart may be strengthened, and we have rehearsed it to you gradually, well-arranged," (25:32). The Quran further states, "It is Quran which I have divided into parts in order that you may recite it to people at intervals. I revealed it by stages." (17:106). Another verse also supports the view like, "By degrees I shall teach you to declare the message so that you do not forget." (87:6).

There has not been any change in the Quran even of a single vowel since its revelation. In this respect the Quran declares as follows: "Verily, I myself have sent down this exhortation and most surely I shall be its guardian"(15:9).

¹ Mohammad Hashim Kamali, Principles of Jurisprudence, P.14

(iii) Compilation of the Quran

During the life of the prophet, the text of the Quran was preserved in memories as well as in inscriptions on flat stones, wood, bones. Aboo Bakr (R), the first caliph, employed Zaid-bin Thabit, the scribe of the prophet, to collect and compile the Quran, who did this within two years of the demise of holy prophet and after the battle of Yamamah in which at least seventy memorisers of the Quran (*Hafiz*) died. But several versions and readings of this edition soon crept into use. Hence the third caliph, Hazrat Uthman, verified the accuracy of the text and compiled it in a single volume with the help of Zaid bin Thabit. All the remaining variations were damaged and the present authentic text has remained in use to this day.²

(iv) Subject matter of the Quran

The Quran gives us a few laws and some general principles of law and left the bulk of social, political, constitutional and international laws open for the Muslims themselves for legislation in different countries and different ages depending on the conditions and circumstances. Out of 6666 verses, only about 500 verses relate to matters of laws, both secular and ecclesiastical.³ The rules of laws are mostly contained in *sura al-Baqara*, *Sura an Nisha*, *Sura al Imran*, *Sura al Maiyidah*, *Sura an Noor*, *Sura at-Talaque* and *Sura Bani Israil*. The ordinances contained in the Quran were revealed to settle the issues, which were raised for determination by the prophet, and to prohibit the harmful customs like gambling, usury, unlimited polygamy and infanticide.⁴ Social reforms like enhancing the status of women, the rules of succession and inheritance, guardianship for the minors and cripples and providing punishment (*Hudud*) and *Qisas* were also included in the Quran.⁵

Besides, Quran points out what is good and what is bad for human being for whom it was revealed. Quran enjoins a man to follow the right path and refrain from wrong path. Quran discusses the creation of the earth and sky, mystery of the creation of human beings, teaching

² Mahammad Hashim Kamali. Principles of Islamic Jurisprudence, P.17

³ Mir Waliullah, Muslim Jurisprudence and the Quranic Law of Crimes. P. 6

⁴ Abdur Rahim, Muhammadan Jurisprudence, P. 70

⁵ Shaukat Mahmood, Muslim Law, P. 1-2.

to take lesson from the past nation. The central idea of such discussions is to teach human beings what he is to do and what he is not to do for his welfare in this world and also in the world to come and in that context injunctions and prohibitions are the main theme of the Quran.

(v) Classification of the verses of the Quran

The verses of the Quran are of two types-

(a) *Muhkamat* or decisive

(b) *Mutashabihat* or allegorical

Muhkamat verses are of three types-

(i) *Amr* or commands

(ii) *Nahi* or prohibitions

(iii) *Amshal* or exemplary

As regards the period of revelation, the suras or verses are of two types-

(a) **Makki** and (b) **Madani**

(a) **Makki sura**: All the suras which revealed from the starting upto *Hijrat* are called *Makki* sura. The subject-matter of these suras is oneness of Allah, prophethood and the next world. The central idea contains in the makki suras is to call all human beings to the path of Allah and to avoid the path of devil (*satan*) so that they may be rewarded and be free from punishment. The length of the suras is small but its subject matter and thought are so deep that it needs interpretation for proper understanding. The number of *Makki* sura is ninety two.

(b) **Madani sura**: All the suras were revealed after *Hijrat* and upto the last verse are called *Madani* sura. The subject-matter of these suras are:- individual as well as collective *ibadat*, social and economic affairs, inheritance, war, treaty, trade and commerce, legislation and mode of implementation etc. They also narrate historical events in order that man can take lesson out of it. The prophet administered the Islamic state established by him with the Quranic Laws. The number of *madani* sura is twenty two.

The verses are again divided into repealing (*Nasek*) and repealed (*Mansuk*). A big majority of the lawyers and jurists are of opinion that

some verses of the Quran stand repealed by some verses of the Quran. There is divergent views regarding the number of Quranic verses that stand repealed. Allamah Jalalud-Din Suyuti, an eminent *mufassir*, records the number of repealed verses at twenty. But Shah Waliullah Muhaddis, the most renowned Muslim scholar, puts this number to five only. But others held that there was no case of repeal and they rejected theory of the repeal of the Quranic verses.⁶ Al Quran is the absolute word of Allah and in case of a clear injunction in it regarding any issue, the rule of decision is final and conclusive.

2. Sunnah or Hadith

Sunnah or *Hadith* is the second source of Islamic law. Though the words '*Sunnah*' and '*Hadith*' are generally used as synonymous but still there are some differences in meaning and use. So these two terms are discussed under separate head.

Sunnah means the words, the acts and the acquiescence of the prophet Muhammad (Peace be on him) and the words and acts of his companions. Literally speaking, *Sunnah* 'means a path or way, a manner of life'. But according to jurists, it signifies the practice of the prophet. It also includes, according to some, the practice of the four caliphs and some other famous companions of the prophet. In the Quran, the words "*Sunnah*" and *sunan* (plural) have been used in a number of times (16 times). *Sunnah* has been used to imply an established practice or course of conduct. According to Islamic jurists, *Sunnah* or *Hadith* means all that is narrated from the prophet, his doings, his sayings and his tacitly approved activities. *Hadith* (traditions) means the words of the prophet only. Literally, it means 'news' or 'tale' or verbal communication of any kind. In the language of the law, it means tradition relating to the sayings and practice of the prophet. *Ahadith* is the plural of *Hadith*.

Distinctions between Sunnah and Hadith

Sometimes confusion arises regarding *Sunnah* and *Hadith* and the latter is considered as the second source of Islamic law. Actually, *Hadith* differs from *Sunnah* in the sense that *Hadith* is a narration of the conduct of the prophet, whereas *Sunnah* is the example or the law that is deduced from it. *Sunnah* is the practice and precepts of the prophet,

⁶ Waliullah, Muslim Jurisprudence and the Quranic Law of Crimes, P.10.

while *Hadith* tells what was the *Sunnah*. *Hadith* is the vehicle or the carrier of *Sunnah*. *Sunnah* is not only referred to the *Hadith* of the prophet but also to the established practice of the community.⁷ Thus *Hadith* enshrines *Sunnah*. *Sunnah* was there when there was no book on *Hadith*. *Hadith* was collected about one hundred and fifty years after *Hijrat*. In spite of some differences between the two, the jurists use them synonymously.

Arguments in favour of Hadith or Sunnah

The following verses of the suras support the authority of *Hadith* as source of Islamic law:

- (i) "He (prophet) does not speak of his own desire, it is none other revelation." (53:3)
- (ii) "And whatever the Messenger gives you, take it, and whatever he forbids you, abstain from it." (59:7).
- (iii) "Obey Allah and obey the Apostle and those in authority from among you." (4:59).
- (iv) "Whoever obeys the Apostle, he indeed obeys Allah." (4:80)
- (v) "Whenever Allah and his Messenger have decided a matter, it is not for a faithful man and a woman to follow a course of his or her own choice." (38:36).
- (vi) "By your Lord, they will not believe until they make you a judge regarding disagreements between them and find in themselves no resistance against accepting your verdict in full submission" (4:65).
- (vii) "I follow not but what is revealed to me." (10:15).
- (viii) "And most surely you conform (yourself) to sublime morality." (68:4).
- (ix) "Say, surely (as for) me, my Lord has guided me to the right path." (6:161)
- (x) "Say, surely my prayer and my sacrifice and my life and death are (all) for Allah, the Lord of the universe." (6:162)

⁷ Muhammad Hashin Kamali, Principles of Islamic Jurisprudence P.47.

- (xi) "Certainly you have in the Apostle of Allah an excellent example for him who hopes in Allah and the last day and remembers Allah much." 33:21

The interpretation of the above verses gives a clear picture regarding the freedom of the prophet to express his opinion for the solution of the issue regarding which Quran is silent. The prophet (peace be on him) also said that what he has made unlawful is like that what Allah has made unlawful. He further said that this is one of my laws and he who loves my laws, verily loves me, and he who loves me will be with me in be paradise. He also said, "I have left two things among you. You will never go astray so long as you hold fast these two. These are- the Book of Allah and my *Sunnah*."⁸ Quran and *Hadith*, therefore, are the basic sources of Islamic law.

Classification of *Hadith*

Hadith or *Sunnah* may be classified into different categories from different standpoints, which are as follows:

- (1) Classification with reference to subject matter
 - (a) *Hadith-e-Qauli* or what has been said by the prophet.
 - (b) *Hadith-e-Feli* or what has been done by the prophet.
 - (c) *Hadith-e-Taqriri* or that which was done or said in the presence of the prophet but he did not raise any objection against those. Thus sayings, doings and consent of the prophet also constitute *Hadith* or *Sunnah* of the prophet.
 - (d) *Hadith al Qudsi*- It embodies a revelation from Allah in the language of the prophet. It is of two types namely—
 - (i) *Hadith-al lafzi* – It reports the exact words of the prophet.
 - (ii) *Hadith bil Maani*– It is in the language of reporter but the sense or spirit is the prophet's.

A *Hadith al Qudsi* is reported as follows:

Abu Hurairah (R) said: The prophet of Allah related these words of Allah, "The sons of Adam vex me, and abuse the age, whereas I am the age itself, in my hands are the events, I have made the day and night".

⁸ Cited in Hashim's book, Principles of Islamic Jurisprudence, P. 45

Classification according to Jurists

- (a) The *Mutawatir* (continuous)
- (b) The *Mashhur* (well-known)
- (c) The *Ahad* (Isolated)

(a) The *Mutawatir*-

Literally, *Mutawatir* means 'continuously recurrent'. In the context of law, it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate lie. Such a possibility is inconceivable due to their large number, diversity of residence and reliability.⁹ *Mutawatir Hadith* was narrated by a large number of the companions and later by a large number of the *Tabi'in* and then in their time by a large number of *Tabi-Tabi'in* and so on to the time when it reached the compilers. This type of *Hadith* was narrated by large number of narrators in all stages beginning to the prophet upto compilers. Such *Hadith* is genuine and most reliable. The number of such *Hadith* is very small. Some jurists are of opinion that the number of such *Hadith* is five only, though others differ with this view.

(b) *Mashhur*

This type of *Hadith* is originally reported by one, two or more companions from prophet or from another companions but later became well known and was transmitted by an indefinite number of people. Examples of the *Mashhur Hadith* are those which are reported from the prophet by a prominent companion and then transmitter by a large number of narrators whose agreement upon a lie is inconceivable.¹⁰ "The murderers shall not inherit the murdered" and "No woman shall be married simultaneously with her paternal or maternal aunt" are the two examples of *mashhur* Hadith which received the general support from the Quran-*sua Nisha* verses 11 and 24.

(c) The *Ahad*

Ahad Hadith is that *Hadith* which is isolated and it is reported by one narrator from another or by one from many narrators or by many

⁹ M. Hashim. Kamali, Principles of Islamic Jurisprudence, P. 68.

¹⁰ M. Hashim Kamali, Principles of Islamic Jurisprudence, P. 72.

from one narrator. This *Hadith* fails to fulfill the requirements of either the *Mutawattir* or *Mashur Hadith*. The majority of the jurists are of opinions that *Hadith Ahad* may establish a rule of law provided that it is related by a reliable narrator and the contents of the report are not against reasoning. *Ahad Hadith* may, therefore, form the basis of obligation of law subject to condition the fulfillment of the following requirements:

- (a) That the transmitter is a competent person, that is, he shall not be a minor and lunatic. Women, blind persons and slaves are considered competent for reporting *Hadith*.
- (b) The transmitter must be Muslim.
- (c) The transmitter must be an upright person (*'adl*) at the time of reporting the *Hadith*, that is, he has not committed a major and known sin. Ofcourse, there are differences among the schools of Islamic jurisprudence regarding the uprightness (*'adalat*) of a reporter. According to Hanafi view, the reporter must not have committed major sin; according to shafi view, he is to be free from the commission of both major and minor sin, but the Maliki and Hanbali views is that he must be pious, observer of religious duties and good conduct. It is to be noted that all the companions (*Shahabies*) possessed the qualifications of uprightness (*'adalat*) irrespective of their divergence of juristic or political view.
- (d) The narrator of *Ahad Hadith* must possess retentive memory so that his report may be trusted.
- (e) The narrator is not implicated in any form of distortion either in the text (*matan*) of a *Hadith* or in its chain of transmitters (*isnad*).
- (f) The transmitter of *Ahad Hadith* must have met his immediate source and heard from him the *Hadith* directly.

The prophet (peace be on him) acted on three capacities as follows:

- (i) as Messenger of Allah (ii) as Imam or Head of the state and (iii) as a judge of the state. So whatever has been said, done and commended or delivered by him under any capacity come under the purview of *Hadith*, which are binding force for all Muslims. But it is a reality that the followers of one school or sect would, in most cases,

refuse to accept a *Hadith* narrated by the followers of the other school or sect without undertaking any trouble of verification as to whether it is true or false.

B. Authentic Books on *Hadith*

According to Sunni schools, there are six authentic Books on *Hadith*. These are as follows:-

- (1) Sahi-al-Bukhari compiled by Muhammad bin Ismail al Bukhari (194-256 A.H)
- (2) Sahi al Muslim compiled by Muhammad Ibn al Hijaj (204-291 A.H)
- (3) Jamiya Tirmiji compiled by Abu Isa Muhammad al Tirmij (209-279 A-H)
- (4) Sunan Abu Daud compiled by Abu Daud al Sijistaini (204-275 A-H.)
- (5) Sunan Nasae by Abdu Rahman al Nasae (215-306 A.H)
- (6) Sunan Ibn Maja by Abu Abdulla Muhammad Ibn Maja (209-273 A.H).

The first two books are called '*Sahihain*' or two authentics and are of highest authority. Bukhari is more dependable than Muslim. Besides the six above, there are three books on *Hadith*, which are also looked with great respect. These are as follows:

- (1) Muatta by Imam Malik ibn Anas
- (2) Musnad by Imam Ahamad bin Hambal
- (3) Kita al Umam by Imam Shafei

The Shias Consider the following four books on *Hadith* as the most authentic-

- (1) Tahdeeb al Ahkam by Muhammad Ibn Ali.
- (2) Jamia al Kafi by Muhammad Ibn-e-Yaqub
- (3) Istibsar by Muhammad Altus.
- (4) Manla-yastah dirush al Faqih by sheik ali.

It has been stated earlier that *Hadith* is the second source of Islamic law and it has been accepted as a binding force by schools of Islamic jurisprudence. It is helpful to frame new laws to meet the requirements of the time.

3. *Ijm'a* or Consensus of opinion

Ijm'a is considered as the third source of Islamic law. It can be applied only in case of law where it has not been covered by the first two sources. *Ijma* is the verbal noun of the Arabic word *ajm'a* which has two meanings – (1) to determine and to agree upon something; (2) whenever there is a unanimous agreement on something, there is also a decision on that matter.¹¹

The term *Ijm'a* has been defined by different scholars differently. *Sir Abdur Rahim* defines *Ijm'a* as the agreement of the jurists among the followers of the prophet Muhammad (Peace be on him) in a particular age on a question of law.¹² Some define *Ijm'a* as the unanimous agreement of the mujtahid of the Muslim community of any period following the demise of the prophet on any matter. *Ijma* is, therefore, can occur only after the demise of the prophet. The prophet alone would solve any problem during his lifetime. *Ijm'a* has further been defined as the consensus of opinion of the Muslim scholars of all ages, or consensus of opinion of the companions (*shahaba*) of the prophet, or opinion of the jurists of *Medina*, or opinion of the members of the family of the prophet or concurrent decision of the first four Caliphs. In fact, *Ijm'a* is the consensus of opinion of Muslim jurists of any age on any issue, which warrants solution.

Authority in favour of *Ijm'a*

The authority of *Ijm'a* as source of law is based on both Quranic and traditional texts. The following verses of the holy Quran are cited in favour of *Ijm'a*:

- (i) "You are the best community that has been raised for mankind. You injoin right and forbid evil". (3:110).
- (ii) "Thus we have made you the followers of the middle course, that you may be witness over others" (2:143).

¹¹ Mohammad Hashin Kamali, Principles of Islamic Jurisprudence. P. 72.

¹² Abdur Rahim, Muhammadan Jurisprudence P. 115.

- (iii) "Do not be like those who separated and divided after they had received clear proofs". (3:105).
- (iv) "Today I have completed your religion" (5:3).
- (v) "Obey Allah and obey the prophet and those amongs you who are in authority" (4:59).
- (vi) "If you yourselves do not know, then ask those who know" (21:7).
- (vii) "Cling firmly together to the rope of Allah and do not be separated" (1:103).
- (viii) "He who breaks away from the prophet after he has been shown the right path and follows the ways of men other than Muslims, We shall give what he has chosen and relegated to Hell" (4:115).

We now quote the following *Hadith* in favour of *Ijm'a*.¹³

- (i) My followers will never agree upon what is wrong.
- (ii) Whoever separates himself from the main body will go to hell.
- (iii) Whatever the Muslims hold to be good is good in the eye of Allah.
- (iv) It is incumbent upon you to follow the most numerous body.
- (v) He who opposes people to the extent of a span will die the death of men who died in the days of ignorance.
- (vi) Allah does not allow the people to go astray after He has shown them the right path.
- (vii) The (protecting) hand of Allah is over the entire body and no account will be taken of those who separate themselves.

States are to encounter new problems due to political, social, cultural and geographical change and growth of population, development of science and technology, which need to be solved by application of *Ijm'a*. *Ijm'a* can help to solve new problems in the light of Quran and *Hadith* and this process shall continue up to the day of resurrection. The

¹³ See Abdur Rahim, Muhammadan Jurisprudence, P. 115.

appointment of Hazrat Abu Bakar (R) as Caliph (Head of the state) is the result of the application of *Ijm'a*.

Conditions of a valid *Ijm'a*

In order to be a valid *Ijm'a*, the following conditions are to be considered:

- (i) *Ijm'a* must not be contrary to the text of holy Quran and *Hadith* or against the fundamental principles of Islam.
- (ii) Once the companions of the prophet agreed upon a particular issue, it cannot be opened to the jurists of later ages nor it can be repealed by them.
- (iii) *Ijm'a* of one age may be reversed by subsequent *Ijm'a*. It means new decision may be taken on the same issue by the jurists of later ages provided it is more suitable with the changed circumstances.
- (iv) When the jurists of an age have expressed two views on a particular question, a third view is not admissible.¹⁴

The last point needs illustrations, which are explained with examples.

- (a) A deceased person leaves behind him his grandfather and a brother. According to the opinion of some jurists, the grandfather will take the entire property excluding the brother but according to second opinion of another group of jurists is that the estate is to be divided between the grandfather and the brother. The third opinion is that the grandfather is to be excluded and the brother alone will inherit the property. The third view is inadmissible, because it is contrary to the above two views.
- (b) Some jurists held the view that *iddat* of pregnant widow is four months and ten days or till delivery whichever is the longer. The another view is that *iddat* expires on delivery. The third view is that it is only four months and ten days though delivery does not take place. The third view is not acceptable, because it is opposed to the above two views.

¹⁴ Abdur Rahim, Muhammadan Jurisprudence, P. 129.

Types of *Ijm'a*

Ijm'a may be classified from different standpoints. According to the status of the jurists, it is of three types-

- (i) *Ijma* of the companions (*shahabis*) of the prophet.
- (ii) *Ijma* of the *Mujtahidun* or jurists of any age.
- (iii) *Ijma* of the *Mujtahidun* but not necessarily of the *mujtahid* only.

The first two types are recognized and it is called *Azimāt* or regular *Ijma*. The third type is not always recognised and it is less important than the first and the second. This third type is called *Rukhsat* or irregular.

From the point of view of occurrence, *Ijm'a* is of two types:¹⁵

- (i) Explicit *Ijm'a* in which every *Mujtahid* expresses his opinion either verbally or by an action.
- (ii) Tacit *Ijm'a* whereby some of the *Mujtahids* of a particular age give an expressed opinion concerning incident while the rest remain silent.

Explicit *Ijm'a* is definite and binding but Tacit *Ijm'a* is presumptive which only creates probability. According to shafi school, tacit *Ijm'a* is not a proof since it is the opinion of some individual *Mujtahid*. But Hanafi school considers it as a proof provided some *Mujtahidun* agree while others remain silent to that issue.

Gradations of *Ijm'a*

Ijm'a can be graded into four types so far its importance is concerned.¹⁶

(b) First Grade

The first grade of *Ijm'a* is that *Ijm'a* when the companions of the prophet gave their consent to a particular proposition expressly by declaration or acting on it. It is the regular *Ijm'a* of the companions and hence its authority is the highest. Anybody who denies the authority of

¹⁵ Muhammad Hashin Kamali, Principles of Islamic Jurisprudence, P. 185.

¹⁶ Aziz Ahmad, Islamic Law in theory and Practice, PP. 47-48.

that *Ijm'a* is considered as infidel like a person who does not believe in the Quran.

Second Grade

It is the *Ijm'a* of the Companions when a few of them expressed their opinion while the others kept silence and did not repudiate it. It is irregular *Ijm'a* of the companions and its authority is equal to *Hadith* al Mutawater. He who denies it, is a sinner.

Third Grade

It is the *Ijm'a* of the Mujtahids of the later ages on a question which was neither raised nor decided during the time of the companions. This type of *Ijm'a* is equal to the value of *Hadith Mashhur*.

Fourth grade:

It is the *Ijm'a* of the jurists of later ages on a question about which there was difference of opinion among the companions. This is equal to *Hadith* al Gharib (unfamiliar) in respect of its value.

Repeal of *Ijm'a*

Ijm'a of one age may be repealed by subsequent *Ijm'a* of the same age. In the like manner, *Ijm'a* of one age may be repealed by *Ijm'a* of a subsequent age. But *Ijm'a* of companions cannot be repealed subsequently.¹⁷ The reason is that the companions are the best persons who lived in the best age. It is not possible that they would agree on a wrong decision. The prophet certified them, "My companions are as stars. Whomsoever of them you follow, you follow the right course." The jurists of later ages are not entitled to find out a different solution on any issue which was settled by the companions.

4. Qiyas or Analogy

Qias is the fourth source of Islamic Law. *Qiyas* is an Arabic term which, literally, means 'measuring' or 'ascertaining the length, weight or quality of something'. It also means 'comparison' or equality or accord. But in the language of the law, it means a process of deduction by which

¹⁷ A. Rahim, op.cit, P. 128.

the law of a text, is applied to cases which are governed by the reason of the text.¹⁸

Analogy is only warranted when solution of a new case cannot be found in the Quran, the *Sunnah* or a definite *Ijm'a*. It is, therefore, unnecessary to resort to *Qiyas* if the new case could be solved under the ruling of the existing law.

Arguments in favour of *Qiyas*

There is a dispute regarding *Qiyas* as to whether it is a source of Islamic law or not. So we can give some arguments in its favour to remove controversy. These are stated as follows:

(i) Though some schools of Islamic jurisprudence do not acknowledge the authority of *Qiyas* or analogy as a valid source of law, but it is a reality that in the ever-changing world new problems warrant solution if these cannot be solved by any direct text of the Holy Quran or *Hadith* and not determined by *Ijm'a*. Under the circumstances, mujtahidan provide proper solution by applying analogy or Qyas in the light of Quran and *Hadith*.

(ii) The Holy Quran has cited number of historical events and the Muslims are asked to think and consider and derive lessons from those events. So inference can be made that similar deeds will follow with similar results. This can be done through analogical deduction. The punishment for drinking wine, for example, is scourging of eighty stripes determined by a *Hadith*. But what would be the punishment for addiction to heroine. By applying analogy the Mujtahid can prescribe the same punishment or more for such addiction as it has been fixed for addiction to drinking wine.

(iii) By analogy law is only expounded and not established. So a jurist discovers law by analogy only, he does not legislate any new law.

(iv) A well-known *Hadith* narrated by Ibu Abbas is a strong ground in favour of *Qiyas*. The holy prophet appointed Muadh-bin Jabal, one of his companions, as Governor of Yemen and also as judge. No trained lawyers existed at that time and the prophet asked him, 'According to what shall you judge? He replied: 'According to the holy

¹⁸ Abdur Rahim, Muhammadan Jurisprudence, P.198.

Quran. 'And if you find not therein?' 'According to the *Sunnah*'. 'And if you find not therein?' 'Then I shall strive to interpret with my reason'. At this the prophet was pleased and said: Praise be to Allah who has favoured His messenger with what His Messenger is willing to approve.¹⁹ So this *Hadith* is a strong document in favour of *Qiyas*.

Conditions of a Valid *Qiyas*

There are some essential conditions for the validity of a *Qiyas*, which are as follows:

Firstly, analogical deduction or analogy must not be opposed to a text nor covered by the words of a text. In other words, it must not have precedence over a text of the holy Quran, or *Hadith*. The reason is this that a *Qiyas* is always a subordinate source and as such it is invalid if opposed to the text and it would be superfluous if covered by a text. Thus a *Qiyas* is in the nature of corollary from words of the text.²⁰

Secondly, an analogy must not be such as to involve change in the law embodied in the text. For example, a woman is prevented from performing prayer (*Salat*) during menstruation. From this one can draw analogy that during menstruation a woman is not permitted to move around *Kaba* since it is a worship (*Ibadat*) like prayer. This is not acceptable because it is an addition to the text, which permits a menstruating woman to go around *Kaba* during Hajj which is one of the five pillars of Islam.

Thirdly, the analogy must not be applied to the vocabulary of the text, but to be applied to the effective cause on which it is based. When analogy is drawn on any particular issue, the *illat* or effective cause is to be considered and not the language of text. For example, *Khamar* or wine, the root meaning of it is the fermented intoxicating juice from grapes and dates, is prohibited by the text of the Quran simply because it intoxicates the senses of the drinking persons. Hence *Khamar* refers to intoxicating substances irrespective of their element. This analogy is drawn on the basis of effective cause or *illat*.

¹⁹ Aasaf A.A. Fyzee. Cited in the outlines of Muhammadan Law, PP. 18-19.

²⁰ Abdur Rahim. Muhammadan Jurisprudence, P. 143.

Fourthly, the law of the text must not be such that its *raison d'être* cannot be understood by human intelligence. The following examples will help us to make this point clear.

(i) The law, according to a *Hadith*, is that a fasting is not broken if a man eats something by forgetting during fasting. But if a man drinks even a single drop of water intentionally during fasting, his fasting is broken. This law is not based on any logic and hence no analogy can be derived from it.

(ii) 2.5% Zakat is to be paid on surplus income, One-fourth for husband and one-eighth for wife is allotted in the law of inheritance. Why it has been done? There is no reply to this 'why'. Why it has been done is known to Allah, the all-Knowing. No law, therefore, can be deduced from such text.

Fifthly, a *Qiyas* must be founded on law established either by the text of the holy Quran or *Hadith* or *Ijma*. No *Qiyas* is allowed from another *Qiyas*. This is the view of both Hanafi and Maliki schools. Their argument is that if the latter analogy or *Qiyas* is right then the first one becomes superfluous. But according to shafi and Hambali school, an analogical deduction from another deduction is allowed.

Sixthly, the law enunciated in the text to which analogy is sought to be applied must not have been intended to confine itself to a particular set of fact. It means, analogy cannot be drawn on a particular issue from the text which is of exceptional nature. For instance, the prophet said, "If Khuzaima (a companion) testifies for anyone that is sufficient for him." Analogy cannot be drawn from this *Hadith* that the testimony of one person is sufficient to establish a claim whatever pious that witness maybe. In this case, reference was made to Khuzaima personally relating to a particular event. Actually, two witnesses are required in ordinary cases but four witnesses are required to establish fornication. So analogy on the basis of this exceptional case is invalid.

Lastly, *Qiyas* should not be confined to a particular age only. The scope of *Qiyas* should always be kept open with a view to solve any new problem in the light of Quran, *Hadith* and *Ijm'a*.²¹

²¹ Aziz Ahmad. Islamic Law in Theory and Practice, P. 58.

Arguments against Qiyas

Though *Qiyas* is considered by majority jurists as the fourth source of Islamic law, but still Zahiri school and some persons belonging to Mutazila school specially *Ibrahim-al Nazzam* and *Ibn Hazm* deny the authority of *Qiyas* as valid source of Islamic law. They have placed the following arguments against *Qiyas*.²²

(i) They contended that commands and prohibitions are determined by the clear authority of the Quran, the *Hadith* or *Ijm'a* and in their absence nothing else can determine an obligatory or a prohibitory injunction, and the matter would automatically fall under the category of *mubah* (permissible). The Quran states, "Say, God has not by His revelations made anything unlawful to man except a dead body or the flowing blood of an animal."²³ Further, they mentioned the Quranic verse, "Say, whatever is not found to be forbidden in the Book of God is lawful to men." Thus they argue that there is no room for analogy or *Qiyas* to determine any *Ahkam* or ruling.

(ii) *Ibn Hazm* Placed another argument against *Qiyas* quoting from the Quran which is, "We have neglected nothing in the Book (Al-Anam, 6:89). "We revealed the Book as an explanation for everything" (Al-Nahl 16:89). Again, "This day, I have perfected your religion for you, and completed My favour upon you (5:3). *Ibn Hazm*, therefore, contended that since the Law-giver (Allah) provides solutions to all problems, so to consider *Qiyas* is tantamount to an acknowledgement that the Quran and the *Hadith* fail to provide complete guidance.

(iii) Another argument is that Allah Himself enjoins us not to pursue that of which we have no knowledge (17:36). So to find out new law by applying analogy is not necessary.²⁴

(iv) Lastly, *Ibn Hazm* holds the view that *Qiyas* is clearly forbidden in the Quran saying, "O you who believe, do not press for word before Allah and His messenger and fear Allah" (49:2), which implies that law-giver has chosen to remain silent. The prophet said,

²² Hohammad Hashim Kamali, Principles of Islamic Jurisprudence, P. 219.

²³ Abdur Rahim, Muhammadan Jurisprudence, P. 140.

²⁴ Abdur Rahim, Muhammadan Jurisprudence, P. 140.

'when I recommend you to do something, do it to the extent that you can and avoid what I have forbidden.'²⁵

But in spite of that, majority jurists are of opinion that *Qiyas* is not an addition or superimposition on the texts but it is their logical extension. So the necessity of *Qiyas* is a must to solve new problems which will arise due to changing circumstances.

5. Other Subsidiary Sources

Besides Quran, *Hadith*, *Ijm'a* and *Qiyas*, the jurists of earlier ages invented some new doctrines as sources of law. These are similar to *Qiyas*.

(i) *Istihsan* (ii) *Istislah* (iii) *Istidlal*. These are discussed below:

(i) *Istihsan* or Juristic Equity

The term '*Istihsan*' was used by the Hanafi lawyers alone. Literally *Istihsan* means 'preferring' or considering a thing to be good. It is parallel to the doctrine of equity of the English law propounded by Court of Chancery. By the application of this doctrine, a jurist is enabled to get over a deduction of an analogy, either because it is opposed to a text or consensus opinion, or is such that his better judgment does not approve of it.²⁶ According to Hanafi school, rule deduced by *Istihsan* is based on the Holy Quran and sunnah and like a rule of *Qiyas*. *Istihsan* is based on the consideration that a law is enacted for the benefit and good of man.²⁷ A rule which is inequitable and does not serve the basic purpose is not acceptable as correct.

The following illustrations will give clear understanding about it.

(a) If a wife falls sick in the house of her husband, she is entitled to maintenance as per the principle of *Istihsan*. But analogy suggests that she is not entitled to maintenance *if she is incapable* to have sexual cohabitation with her husband due to her illness, for, it is deemed that she is not in the custody for the purpose of enjoyment. The law is that she is entitled to maintenance only when she is in the custody of her husband.

²⁵ M. Hashim Kamali, Principles of Islamic Jurisprudence, P. 220.

²⁶ Abdur Rahim, Muhammadan Jurisprudence, P. 164.

²⁷ Aziz Ahmad, Islamic law in theory & Practice, P. 61

(b) The object of *waqf* must be perpetual. Analogy suggests that *waqf* of movable property generally is unlawful, but although opposed to analogy, the *waqf* of horses, arms, axes, saws and so forth is valid according to the principle of *Ihtisan* on the basis of certainty.²⁸

(ii) Istislah or public good

Imam Malik, the founder of Maliki school, introduced 'istislah' which is somewhat similar to juristic equity or preference. According to this doctrine, deduction of law can be based on the ground that it is in the interest of the community or 'public good'. Under this formula, a departure from analogy is only allowed when it becomes necessary in the interest of the general public or the community as a whole. The following illustrations will help to understand the principle.

(a) Islam does not allow the dissection of any organ or limbs or any part of the body when it is in good condition. But the donation of blood, kidney, eye etc, for example, may be allowed when it is done for public good.

(b) A fortress is besieged by a Muslim army. The besieged use Muslim prisoners as a shield. It is not allowed to shoot at the Muslim prisoners because occupation of the fortress is not absolutely essential to save Islam or the Muslim community.

(c) In the midstream a boat is found to be overloaded and it is felt that the boat will sink due to that. It is not allowed to throw a passenger of the boat to save the other passengers. The argument is that it is not done in the interest of the community as a whole. The death of all the passengers is not to be considered as death of the whole community. Hence throwing of a passenger from a overloaded boat to rescue the rest of the passenger is not a public good.

(d) The removal of a grave or demolition of a building from a road side with the intention to broaden of a road or to make it straight, which is very necessary, is to be considered lawful, because it is done for public good. People at large will be benefitted by doing so.

(iii) Istidlal- 'Istidlal', according to Hanafi school, means inferring of a thing from another thing. But according to Maliki and shafi school, it is

²⁸ Hedayat, P. 235.

a distinct method of juristic deduction on the basis of legal reasoning, but not covered by *Qiyas*, *Istidlal* is of three kinds:-²⁹

- (a) The expression of the connection existing between one proposition and another without any specific effective cause;
- (b) presumption that a state of things, which is not proved to have ceased, still continues; and
- (c) The authority as to the revealed laws previous to Islam.

The first type distinguishes *Istidlal* from *Qiyas* because an effective cause is the basis of *Qiyas* but not so is *Istidlal*.

Examples of the first type-

- * A person who can contract himself into marriage can agree to pay dower as well.
- * If a minor can commit *Zihar*, he can also give talaq. But as a minor admittedly cannot give talaq, he is also not capable to commit *Zihar*.
- * The flesh of horse is *halal* or permissible and so it cannot be forbidden.
- * Sexual intercourse between two unmarried persons is not valid, so it is forbidden.

Example of the second category is that if a man has disappeared and whose whereabouts are not known, he is presumed to be alive and as such his property will not be distributed among the heirs and so he can also inherit from others. This is the view of Hanafi school. According to Hanafi school, the presumption that a particular state of things continues until the contrary is proved is valid only to the extent it serves to protect existing rights, and not for establishing or creating a new right. *Shafis* agree with the view but do not recognise that the property of the disappeared man is to be distributed among the heirs. According to one opinion that the Hanafi doctrine of *Istihsan* or juristic equity and maliki doctrine of *Istislah* or public good are covered by *Istidlal*.³⁰

²⁹ Shawkat Mahmood, Muslim Law, PP. 3-4.

³⁰ Abdur Rahim, Mhammadan Jurisprudence, P.P 168-169.