

LESSON FOUR: The Main Sources of Fiqh

❖ **Part Two: Secondary Sources**

I. IJMA' (Consensus of Legal Opinion)

1. Definition

▪ *Literal meaning:*

Consensus, determination, resolution and agreement upon something.

▪ *Technical meaning:*

“The agreement of the jurists from among community of Muhammad *peace be upon him* after his death in a certain period of time upon a rule of Islamic law.”

2. Conditions for the Validity of Ijma'

- The agreement must take place among mujtahids. (Mujtahid is a person who is qualified to exercise ijtihad).
- The agreement must be among the mujtahids of one period, even though some mujtahids of subsequent periods may differ from them.
- The agreement must be unanimous.
- The jurists must belong to the Islamic community.
- The agreement of jurists must be held after the death of Allah's Messenger *peace be upon him*.
- The agreement should be held on a rule of Islamic law (in legal matter).

3. Types of Ijma'. There are two types of Ijma':

a) **Explicit Ijma' (إجماع صريح):**

- “One in which the legal opinions of all the mujtahids of one period converge in relation to legal issue, and each one of them states his opinion explicitly.”
- This is realized sometimes by their meeting in one place and examining an issue in question and finally they express an unanimous opinion.
- It may also take place when an issue occurred and every mujtahids give the same legal opinion.

b) Silent or tacit Ijma' (إجماع سكوتي):

- It takes place when some jurists, one or more, give a legal opinion with regard to specific rule about a particular legal issue, then the rest of them are informed of this opinion and they keep silent and they neither acknowledge it nor object to it.

4. Proof and Justification of Ijma' as a Source of Islamic Law.

It is established by the Qur'an and the Sunnah.

- **The Qur'an;**

“ O you who believe! Obey Allah and Obey the Messenger and those charged with authority among you.....” (al-Nisa'(4):58).

The word (أولي الأمر) means scholars (العلماء) of the community. Thus the agreement of the mujtahids is bound to follow.

- **The Sunnah;**

There are many Sunnahs indicated that the Muslim community is infallible in their agreement and Ijma' is obligatory on the Muslims. The prophet Muhammad *peace be upon him*, said:

“My community will not agree on mistake.”

“Allah's hand is over the community.”

II. QIYAS (Analogical Reasoning)

1. Definition

- Literal meaning:
 - a. measurement i.e. measuring something with another.
 - b. Comparison i.e. comparing something with another.
 - c. Equation.
- Technical meaning:
 - a. “Applying a case whose rule is not found by the text to a case whose rule is found in the text on account of equation of both cases in respect of effective cause of the rule.”
 - b. “Equating a case, whose rule is not mentioned explicitly in the text, with a case whose rule is mentioned, on the basis of the equality between effective causes found in the two cases.”

2. Essential Elements of Qiyas

- Original case (الأصل)
- Legal ruling of original case (حكم الأصل)
- New or parallel case (الفرع)
- Effective cause (العلة)

3. Examples of Qiyas

Example (1)

- New Cases, (**Toddy, Drug**).
- Effective Cause, (**Intoxication**).
- Original Case, (**Wine**).
- Legal Ruling of Original Case (**Prohibition**), (al-Ma'idah(5):90).

Example (2)

- New Case, (**Wife with postnatal blood**).
- Effective cause, (**Hurt/Causing harm**).
- Original Case, (**Wife with menstruation**).
- Legal Ruling of Original Case, (**Prohibition of Approaching**), (al-Baqarah(2):222).

Example (3)

- **Killer of the testator** (Parallel case).
- **Hastening a thing before its time** (Effective cause).
- **Killer of the legator** (Original case).
- **Disentitlement to inheritance** (Legal Ruling), The Sunnah.

4. Types of Qiyas

There are many types of Qiyas:

a. Qiyas of Higher Order (القياس الأعلى): The effective cause in the parallel case is of higher order than the effective cause in the original case. E.g.

- _ Saying 'uff' to parent, (Original case) _ Prohibition, (Legal Ruling), (al-Isra'(17):23).
- _ Torment, (Effective cause)
- _ Cursing/Beating parent, (Parallel case).

b. Qiyas of an Equivalent Order (القياس المساوي): The effective cause in parallel

case is of the same strength with the effective cause in the original case. E.g.

_ Consumption of orphan's property, (Original Case)

_ Destruction of orphan's property, (Effective cause)

_ Damaging of orphan's property (Parallel case)

_ Prohibition, (Legal Ruling), (al-Nisa'(4):10).

c. Qiyas of a Lower Order (القياس الأدنى): The effective cause in parallel case is of a lower order than the effective cause found in original case. E.g:

_ Wine, (Original case)

_ Prohibition (Legal Ruling) (al-Ma'idah(5):90.

_ Intoxication, (Effective cause)

_ Toddy, (Parallel case)

5. Justification of Qiyas as a Source of Islamic Law

- The majority of Muslim jurists are of the view that Qiyas is a source of Islamic law. It is relied upon in deriving legal rules.
- Muslims are obliged to follow the legal ruling which is validly derived from qiyas.

*The justification of Qiyas as a source of Islamic law is established by the **Qur'an** and **Sunnah**:*

a. The Qur'an;

*" O you who believe! Obey Allah and Obey the Messenger and those charged with authority among you. **If you differ in anything among yourselves, refer it to Allah and His Messenger...**"* (al-Nisa'(4):58)

- The argument is that Allah has commanded after that (i.e. after obeying Allah, His Messenger and those in authority) to refer the disputed matters to Him and His Messenger.
- Referring the disputes to Allah and His Messenger signify referring them to the Qur'an and Sunnah. That will be by means of drawing conclusion from them by **analogy**.
- This is because **analogy means referring the new case to the original case and applying to it its rule**. In other words, referring the disputed case i.e. a case for which no rule has been provided in the text to a case for which a rule has been provided in the text.

b. The Sunnah;

There are many cases in which the Messenger of Allah *peace be upon him* in response to queries of the Companions tried to give answers in a form that was supposed to train them in legal thinking and in many such cases the method is quite similar to analogy.

For example,

➤ *“A woman came to the Messenger of Allah *peace be upon him* requesting him to give her legal opinion (fatwa). She said: Messenger of Allah my father has died and performance of hajj was due to him. May I perform the hajj on his behalf? Allah’s Messenger said: Tell me if your father owed a debt and you paid it, would that benefit him? She replied: yes. The Messenger of Allah *peace be upon him*. said: Perform the hajj on his behalf, the debt due to Allah deserves most to be paid.”* (It is reported by al-Bukhari and al-Nasa’i)

➤ *“The Messenger of Allah *peace be upon him* said to Umar Ibn al-Khattab when he asked him about kissing the wife by one who was fasting: Tell me if you rinse your mouth with water then eject it, what will you do? Umar said: It doesn’t matter. The Messenger of Allah said: It is all right.”* (It is reported by Abu Dawood).