AN EXAMINATION OF THE CAUSES OF JURISTIC DIFFERENCES IN INTERPRETATION IN ISLAMIC LAW

BY

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Dedication

The work is dedicated to Allah, The All-Knowing.

Declaration

I hereby declare that this thesis entitled **"An Examination of the Causes of Juristic Differences in Interpretation in Islamic Law"** has been written by me in the Department of Islamic Law. It is a record of my research work. It has not been presented in any previous application for a higher degree. All quotations are indicated and the sources are fully acknowledged.

Waheed Rafiu ADEROHUNMU …… ……...
Signature Date

Certification

The thesis entitled **"An Examination of the Causes of Juristic Differences in Interpretation in Islamic Law"** by Waheed Rafiu ADEROHUNMU meets the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

Differing is inevitable among people, because of individual natural differences regarding thinking, understanding, power of assimilation, intellect, etc. Thus, differences and contradictions are a natural outcome. Incidentally people have grossly misconceived differences of opinion among the jurists either due to their ignorance or lack of understanding of the nature of texts of the Qur'an and the Sunnah, and where the text is silent.Modern advocacy for adherence to hadith that has emerged in recent time, has painted a sordid picture of the classical jurists, depicting their works as mere academic exercise. This notion needs to be corrected. Otherwise, the Shari'ah will, in turn, not be suitable and applicable to new situations for which there is no decisive ruling in both the Holy Qur'an and the Sunnah.The aim is to show that the nature of the Qur'anic provisions makes the phenomenon of Ikhatilaaf (difference of opinion) among the jurists inevitable, that the nature of the provisions found in the Sunnah gives room for difference of opinion in interpretation among the jurists and that apparent Silence of the Shari'ah regarding some matters has contributed on a large scale, to difference of opinion among the jurists. The juristic differences that arose among the jurists have been contrasted under the following main causes namely; the nature of the Qur'an provisions, the nature of the texts of the Sunnah and silence of the texts term both the Qur'an and the Sunnah.The research methodology of the thesis was doctrinal. In the course of the research, some findings were made. The research found that the nature of evidences found in the Qur'an and the Sunnah give room for interpretation and as a result of that, differences prevail among the jurists of Islamic law. The research recommends that causes of juristic differences in interpretation in Islamic Law should be taken as a course for Islamic Law students in our Universities.

Glossary

‘*Adl*: Act of justice.

Ahkam: The plural word for hukm meaning rulings

Darurah:Necessity (something that must be done in preventing any of the purposes of the law)

Diyah: Blood-money paid in the case of an unintentional killing

Fiqh:The science of extraction of religious regulations from their detailed sources

Furood: The plural word for fard meaning the allocated shares in inheritance

Fuqahaa:The plural word for faqih. It refers to jurists who extract religious regulations from their detailed sources

Hadd: The singular word for hudood meaning punishment

Hadith:Is a saying or action or silent approval linked to the Prophet (peace be upon him) it may be genuine or otherwise

Hikmah: The wisdom behind a regulation

*Hukm:*Ruling

Hudood:The plural word for hadd meaning punishments

Hyad:Menstrual blood

Ibadah:The act of worship in Islam

Ibahah: The permissibility act of Islam

*Illah:*An effective cause which a ruling is funded

*Ihram:*The entering into a state of consecration

Ijtihad:An exercise of one’s reasoning to arrive at a logical conclusion on a legal issue done by jurist to reduce a conclusion as to the effectiveness of a legal precept in Islam

Ijmaa': It is the consensus of opinion of the companions of the Prophet and the unanimous agreement reached on the decision taken the jurists of any period following the demise of the Prophet Muhammad on various Islamic matters.

Istihsan:(Equity in Islamic law) it means equitable preference to find a just solution

*Istisha*b:(Legal presumption) it is the presumption in the laws of evidence that a state of affair know to exist in the past continues to exist until the contrary is proved.

Istislaah/maslahah: (Consideration of public interest) it is realization of benefit or interest.

Junub:(Pollution) means the major impurity which exists at the occurrence of the ejaculation of semen with or without passion, or sexual intercourse after which semen is noticed or not.

Kalaam:Speech

Khabar-al-wahid: solitary report (Hadith reported by one person only)

Mashoor Hadith:(Famous) Hadith reported by more than two reporters

Mursal Hadith: (Hurried) A hadith which the link between the successor and the Prophet (peace be upon him) is missing. e.g. when a successor says" The Prophet said……"

Musarrat:The aminal whose milk is retrained in its udders so as to impress the buyer

Mujtahid:Is one who is knowledgeable about the religion of Islam, the Sunnah, Fiqh and Usul-al-Fiqh (Theories of Jurisprudence).

Matn: Is a content or text of the report or Hadith

Mubah(Ibahah): The permissibility act of Islam

*Mafqud:*A missing person

Maslahah(Istislaah):(Consideration of public interest) it is realization of benefit or interest.

Mustanbitah:The effective cause derived through text and consensus

*Mu'ath thir (Mustanbitah):*The effective cause derived through the or consensus

Munasib: A suitable or appropriate cause

Mafsadah:Act of preventing harm on the public

Mu'amalah:Social relations

Maqasid:Objectives or purposes of the law

Mutawatir:Is a report which is decisive in its certainty through the number of its reporters and their reliability

Mushaf: A copy of the Holy Qur'an

*Nass/Nusus:*Text/Texts of the Qur'an or the Sunnah

Qati':A decisive evidence from either the Qur'an, the Sunnah or consensus

Qisas:Equitable retaliation for the murder already committed

Qiyas: Is the legal principle introduced in order to extend a ruling from an original case, to a new case, because the latter has the same effective cause as the former

Qur'an: Is the Arabic speech of Allah that revealed to the Prophet Muhammad (S.A.W) in wording and meaning in the period of 23 years through the Angel Jibril (A.S) that has been preserved in the Mushaf and its recitation considered as act of worship and has reached us by Mutawatir transmissions, and remain as a challenge to whole mankind and jinns to produce something similar to one of its shortest chapters which started from sooratul-Fatihah and ended with sooratul-Nas

Quraysh:A tribe among the tribes in Makkah which the Prophet is said to have come from

Riba (Usury):One such evil means of acquiring wealth which is described in the Holy Qur'an in no uncertain term is Al-Riba

Riwayah:Report

Salah(Prayer):Is a form of physical worship assigned to the Muslims five times a day at specified times
Subh:Morning / Dawn

Shari'ah:Is an Arabic word meaning the path to be followed. Literally, it means 'they way to a watering place' it is the path not only leading to Allah, the most High, but the

path shown by Allah, the creator Himself through His Messenger, Prophet Muhammad peace be upon him.

Sunnah:Is what has been passed down from the prophet (peace and blessing of Allah be upon him) of his statements, actions, tacit approvals, manners, physical characteristics or biography, regardless of whether it was before he was sent as a prophet or afterwards

Sa':An object use for measurement of anything edible that can be used for food, it is equivalent to a handful of the two hands together.

Sahaabah:(companions) they are those who lived with the Holy Prophet(peace be upon him) and believed in his message and died on it.

Ta'will:Allegorical interpretation, it is a process of reading into words and sentences, hidden meaning which is often based on speculative reasoning and *ijtihad.*

Ta'lil:(Ratiocination) meaning search for the causes, and refers to the logical relationship between the cause and effect.

Tuhr:A period of purity between two menstrual periods.

Ta'zir:Disgracing the criminal for his shameful criminal act. It is punishment which has not been fixed by law, and the judge is allowed discretion both as to the form in which such punishment is to be inflicted and its measure.

*Talaq:*A legal method whereby a marriage is brought to an end.

*Ulama:*The plural word for 'alim' it means scholars.

*Wuduh:*Clearity

Zakah:(Religious tax). It is a fiscal worship by which islam requires the well-to-do care for the needs of the poor and to pay a subsidy to maintain public benefits, like hospital, educational institutions and defence force.

Zakatul-fitr: Al-fitr means the breaking of the fast at the end of Ramadan. Zakatul-fitr is also referred to as the zakah of the body.
Zina:It means sexual intercourse between a man and a woman not married to each other.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

It will be wrong for anyone to consider the divergent views of Muslim jurists (both early and present) on issues or matters as mere academic exercise. Differing is inevitable among mankind because of individual natural differences regarding thinking, understanding, power of assimilation, intellect, etc. Thus, differences and contradictions are a natural outcome. Allah The Most High says: "And if your Lord had willed, He could have made mankind one community; but they will not cease to differ"[1]

Texts under Islamic Law are general in their nature, and give room for interpretations. Some of the provisions from the Qur'an are not opento interpretations. On the other hand, some of its provisions are open to different interpretations. Similarly, there are parts of the texts of Sunnah which are subjected to interpretations and there are some which are not. Some matters are neither expressly mentioned in the Qur'an nor the Sunnah, and this is regarded as silence of the texts regarding them. This has made the jurists to develop some certain principles. The detailed texts

[1] Ali, A.Y. (1938) : *The Holy Qur'an,* The Islamic Foundation, United Kingdom, 3rd edition, Chap.11 :118. This translation is used throughout the work.

found in the Qur'an and the Sunnah according to the Islamic Jurists, are divided into four types as follows:

1) Texts which are definitive (qat'iyyah) both in respect of authority and meaning.
2) Texts which are authentic in their authority but speculative (zanniy) in meaning.
3) Texts which are of doubtful authority, but definitive in meaning.
4) Texts which are speculative in respect to both authority and meaning[2].

Interpretation which gives room for decision or owing to opinion, does not apply to the first of the above categories, such as the clear provision (Nusus) concerning the prescribed penalties (Hudud) on the allocated shares (Furood) of inheritance both in the Qur'an and SunnahAl-mutawatir (continuous Sunnah) that conveys definitive meaning. But interpretation can validly operate in regard to any of the remaining three types of texts[3].

Knowing the causes of juristic differences in interpretation under Islamic Law, helps in a long way, to overcome and at the same time to discard the blind following of one of the four major orthodox schools of Islamic Jurisprudence. The correctness of the orthodox interpretations was proportional to their innate capabilities and to the types and quantity of

[2] Kamali, M.H. (1991): *Principles of Islamic jurisprudence,* Islamic Text Society, Malaysia, 2nd Edition, p.316,see also, Nyazee, I.A.K. (2000): *Islamic jurisprudence,* Islamic Research Institute, Islamabad,1st edition, p.148

[3] Ibid, p. 316-317, see also, Khalaaf A. (2010): *Ilmu Usul Fiqu,* Daral-Ghad Al-Gadeed, Egypt, p. 238

legal authorities (adillah) available to them at the time of making rulings. It is based on these facts, that the early jurists prohibited their followers from blind following in all aspects and disliked disagreement, as it has shown in their actual statements:

Abu - Yoosuf, Ya'qoob, disciple of Imaam Abu Haneefah, reported that the Imaam once told him, "Woe be on you, Yaqoob. Do not write down all you hear from me, for surely I may hold an opinion today and leave it tomorrow, hold another tomorrow and leave it the day after"[4].

Ibn 'Abdil-Barr reported that Imaam Maalik once said:

"Verily I am only a man, I err and am at times correct; so thoroughly investigate my opinions, then take whatever agrees with the Book and the Sunnah, and reject whatever contradicts them"[5].

Imam Ash-Shaafi'ee stressed a very important point concerning personal opinion versus the Sunnah where he said:

"The Muslims (of my time) were of a unanimous opinion that one who comes across an authentic Sunnah ofThe Holy Prophet (peace be upon him) is not allowed to disregard it in favor of someone else's opinion"[6].

[4] Philips, B. A. (1990): *The Evolution of Fiqh*, International Islamic publishing House, 3rd Edition, p.119, Al-albaanee,M.N. (nd): *Sifatus Salaatin Nabiy*, Maktabatul Mu'arif,Riyad, P.47

[5] Philips, B. A., op. cit., p.121, Al-albaanee, M.N. op. cit., p.48

[6]. An-Nawawee, M.Y. (nd): *al-Majm'u,*Vol.1, P.63,htt:www.mktaba.org, Philips, B.A., op. cit., P. 122, al-Albaanee, M.N., op. cit., p.50

Imam Ahmad Ibn Hambal, in his warnings against blind following was reported to have said; "Do not blindly follow my rulings, those of Maalik,ash-Shafi'ee, al-Awzaa'ee, or ath-Thawree. Take (your rulings) from where they took theirs"[7].

The four Sunni Schools of Islamic Law are not sects. Each has been organized around a legal theory that it upheld and practised for legal deduction[8].

However, despite various handicaps, the early Muslim jurists discharged their duties to Islam and to their fellow mankind by using Allah's given power of intellect to interpret His purpose to mankind.

Hopefully, this work should encourage greater harmony between divergent opinions among presentday Muslim jurists and judges.

[7] . Philips, B.A., op. cit., 123, Al-baanee, M.N., op. cit., p.53, As-Shaibee lee, Y.A.(nd): *Mafhoomu likhtilaaf wa Atharuhu fi Qadaa 'alal hirhaab,* Shamela Library, 2nd version, http://www.Shamela.ws

[8] Nyazee, I.A.K. (2007): *Theories of Islamic law,* Adam Publishers, India, P.11

1.2 Statement of the Problem

Modern advocacy for adherence to hadith that has emerged in recent time, has painted a sordid picture of the classical jurists, depicting their works as mere academic exercise. This notion needs to be corrected. Otherwise, the Shari'ah will, in turn, not be suitable and applicable to new situations for which there is no decisive ruling in both the Holy Qur'an and the Sunnah. All the schools of Islamic law (al-Madhahib), have contributed in different degrees to the development of Islamic law in its totality. In other words, they remain the only tools ever used in expansion of the Islamic law.

It should also be known that these jurists, whatever the result of their exercise in the course of interpretation, positive or negative, it is rewarded. The Holy Prophet (peace be upon him) says:

"When anybody exercises ijtihad (juristic reasoning) and he is correct in his opinion, he will have two rewards, but if he errs in his effort, he will still have earned one reward"[9].

[9] al-Ash'as S.A. (nd): *Sunan Abi Dawood*, Daaru Al Fikri, Vol.2, P.323, Hadith No. 3574, see also, An-Naisaaburee M.H. (nd): *Sahih Muslim*, Daaru Ihyaai Turaasil Arabee, (Beirut), Vol.3, P.1342, Hadith No. 1716, Muhammad, I.A. (1987-1407) *al-Jami'u as-Sahih al-Mukhtasar*, Daaru Ibn Katheer, (Beirut), Vol.6, P.2676, Hadith No. 6919 .

1.3Aim and Objectives of the Study

The aim of this work is to provide a ground for correcting the misgivings that many reserve against our past and present jurists and judges on cases where they differ.

The study is conducted with the following objectives:

1) To show that the nature of the Qur'anic provisions makes the phenomenon of Ikhatilaaf (difference of opinion) among the jurists inevitable.
2) To show that the nature of the provisions found in the Sunnah gives room for difference of opinion in interpretation among the jurists.
3) To show that apparent Silence of the Shari'ah regarding some matters has contributed on a large scale, to difference of opinion among the jurists.

1.4 Justification

Knowing the causes of juristic differences in interpretation under Islamic law is relevant and important to the law makers, judges and researchers. Law makers across the globe will find this study relevant because it will help in formulating relevant policies on issues under Islamic law. Judges will also benefit from the work because it will guide them in taking proper decision on cases that may be brought before them under Islamic law. Certainly the work would provide a ground for correcting the misgivings that many reserve against our past and present jurists and judges on cases where they differ as it presents the nature of the texts of both the Qur'anand

the Sunnah and silence of the texts as the causes of juristic differences in interpretation.

Above all, the work will be of great value to policy and decision makers, teachers and leaders in Islamic law. It is hoped also that the work would fill a literature gap by contributing to knowledge and useful as reference material for juristic reasoning (Ijtihad), as it is strongly believed by the writer that the door has not been closed.

1.5 Scope of the Study

The research deals substantially with the textual aspects regarding the causes of juristic differences in interpretation under Islamic law which has major impact on legal interpretation and juristic opinion.

However, the research covers territorially, all Sunni Muslim existing areas where legal decisions under Islamic law are in operation throughout the whole world.

1.6 Methodology

With regard to the aspect in which this research is said to cover, as stated in its scope, the doctrinal method being the most considerable method with regard to legal research will be relied upon.

The writer in his findings will incorporate the primary sources of Islamic law, namely the Qur'an and Sunnah of the Prophet (peace be upon him) and

secondary sources also be based on the classical works of the jurists on Islamic legal theories such as Ilmu Usil al-Fiqh by Khallaf, al-Wajeez fi usil-al-fiqh by Zaydanee, Usul Fiqh, by Khudaree, al-Muwa faqaat fi 'usil al-Ahkam by al-Shatibee, al-Ihkaam fi usulil-ahkaam by al-Aamidee, ar-Risaalah by ash-Shafi'ee, Al-Mustasfaa by Imam Ghazalee, Usul al-Fiqh, by Abu Zahrah, Theories of Islamic law by Nyazee, and Principles of Islamic jurisprudence by Kamali among others in discussing the characteristics features of the Quranic legislation and the Sunnah, and their methods of qiyas where the text is silent while their works on jurisprudence or fiqh such as Ar-rad 'Ala Seeril Auzaa'ee by Abu Yusuf, Bidaayatul-mujtahid Wa Nihayatul-Maqtasid by Ibnu Rushd, al-Qawaanin al-fiqhiyah by Ibnu Juzay, Al-Istidhkaa Li Madhahibi A'immatil Amsaar by Ibnu 'Abdil Barr, Tuhfatul Fuqahaa by as-Samarqandee, Al-Furu' by al-Muqdisee, al-Mugnee, by Ibnu Qudaamah, Al-Fiqul-Ismalee wa Adillatuhu by az-Zuhailee and Al-kaafee fi Fiqh Ahlil Medinah by al-Qurtubee, among others in discussing differences among the jurists and giving instances on issues that they differ over and this will also be supported by other works on differences or causes of differences among them such as Raf'ul Malaam 'anil-Aimmatil A'alaam by Ibnu Taimiyah, Ikhtilaaful – Aimmatil Ulama,by as-Shaibaanee, Eetharul – Insaaf Fi Athaaril Khilaaf, by Ibnu Zawzee, Al-Jaami'ul Mufeed Fi Asbaabi Ikhtilafil Fuqahaa, by Hamidee,

Al-khilaaf bainal 'Ulama, by Usaimin, and Al-Insaaf Fit-Tanbeeh 'Ala Asbaabil Ikhtilaaf, by al-Batlaimusee, among others.

1.7 **Literature Review**

The writer has come across certain works on this topic, although the approach and the scope differ from that of the writer.

Works of both early scholars and contemporary scholars which discussed juristic differences that must not left out in mentioning among the others are:

Raf'ul Malaam 'anil-Aimmatil – A'laam, Imam Ibnu Taimiyah, Ahmad bin Abdul Halim.[10]

The writer of this work discussed the differences as well as their causes among the companions of the holy Prophet (peace be upon him). In this approach, all the causes that were mentioned related only to the Sunnah. Causes of difference due to the Qur'anic provisions and silence of both the Qur'an and the Sunnah were not mentioned, that is the gap which this work would bridge, as it presented them in a more simplified method.

[10] Daarul Kutubil 'ilmiyyah, Beirut, Lebanon, 2nd edition, 1408 A.H. 1988

Ar-rad 'ala Seeril Auzaa'ee, Abu Yusuf, Ya'qub bin Ibrahim[11]

The writer of this work, Abu Yusuf, here adopted the methods of the jurists (fuqahaa) by mentioning areas of Fiqh in which Imam al-Auzaa'ee had actually differed from Imam Abu Hanifah. The writer, after mentioning Abu Hanifah's stand regarding a matter, would follow it up with the contrary view from Imam Auzaa'ee. This approach only discussed the differences between those two great legal thinkers but the views of the other jurists were not entertained. This work has captured the views of other jurists and causes of differences among them.

Bidaayatul-Mujtahid wa Nihayatul-Muqtasid, Abulwaleed, Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rushdi.[12]

The author of this work did not present his work as causes of differences among the jurists, rather, the work was made to be seen as comparative fiqh, because in his approach, he discussed matters of fiqh and mentioned alongside the views of the jurists regarding any issue they might have differed upon. He also combined in this approach, differences and the causes from both the Qur'an and the Sunnah and even the silent of the law. In this work, emphasis was laid on the differences and the causes even

[11] Daaru Kutubil'ilmiyyah, Beirut, Lebanon, Shamela Library, 2nd version 2.11.
[12] Mustaphal -Baabee al-Halabee and Sons Publication, Egypt, 4th Edition, (1395A.H./1970).

though the work is seen as rather complicated in its legalistic and philosophical sense.

Al-Qawaanin al-fiqhiyah, Muhammad bin Ahmad bin Juzay Al-Kalbee al-Gurnatee, Shamela Library, 2nd version 2.11.

The writer of this work discussed differences among the jurists by mentioning first the general view of the four leading sunni jurists and subsequently, any view that differed from that. The work was actually meant to be a summary of ibn Rushd's Bidayah.

This approach also was not presented for the purpose of discussing differences and the causes, but it rather depicts comparative studies of fiqh. It is scientifically designed to precisely codify the views of the four schools, and eliminating the details in the Bidayah. Therefore, causes of differences left unmentioned in this area would be presented in this work.

Al-Ikhtilaaf fi 'Amalul-Islaamee Asbaabuhu wa Athaaruhu, Shiekh Nasir Sulaiman al-Amur, Shamela Library, 2nd version 2.11.

The author of this work discussed some textual causes but did not mention alongside them, matters or areas of fiqh that the jurists differed upon. He had also combined in this approach, causes that are peculiar to individual jurists. The personal causes mentioned by the writer include; natural differences regarding human power of assimilation, forgetfulness, difference in intellect, hatred, self reliance, lack of recognition for other

peoples' views, love for argument and tribalism. This work would mention alongside the textual causes, matters or areas that the jurists differed upon.

Al-Ikhtilaaf, As-baabuhu Wa Adabuhu, Aa'id al-Qarnee, Shamela Library, 2nd version 2.11.

The writer of this work did not discuss textual causes nor did he mention matters of fiqh that the jurists differed upon, but rather, his approach was centered on causes that are peculiar to individual jurists. These personal causes include; mistake, i.e. (in the course of juristic reasoning), hatred and enmity, envy, pride, strict adherence to some individuals' views and methods, lack of exposure, egotism, pessimism, prevalence of whims, etc.

Fiqhu Khilaaf wa Athaaruhu Fil-Qadaa 'Alal Irhab, Yusuf Abdullah Shaibeelee, Shamela Library, 2nd version 2.11.

The writer of this work did not discuss the causes of differences among the jurists nor did he mention matters of fiqh over which they differed upon. He also did not mention in his work, any personal cause that is peculiar to an individual interpreter. His approach was rather, to show the kind of difference which is blameworthy and that which deserves praise. In other words, he discussed areas where difference is tolerated in the religion and areas that difference is prohibited.

Eetharul – Insaaf Fi Athaaril Khilaaf, Bastu bin Jauzee, Al-Hanafee.[13] The writer of this work adopted the approach of the jurists by mentioning the branches of fiqh in which the Hanafee school differed from the other schools of jurisprudence, such as the Malikees, Shafi'ees or Hambalees.

The writer, with reference to any matter of difference, would put forward the view of the Hanafee school and the evidence that they rely on, before putting forward the views and authorities of the other schools. This work only captured the differences among the jurists and not the causes.

Ikhtilaaful – Aimmati 'Ulama, Al-wazeer Abu Al-Mazfar, Yahaya bin Muhammad bin Hubairah As-shaibaanee, Daarul Kutubil 'ilmiyyah, Beirut, Lebanon, (1st edition 1423 A.A./2002 A.C).

The writer of this book discusses only the juristic differences among the jurists. In this work, the writer adopted the methods of the fuqahaa (jurists) by mentioning areas of fiqh which the jurists differed upon. The views of the jurists are mentioned with reference to any matter that they differed upon. This approach also captured only one aspect, that is, what has to do with the causes of the differences, the other aspect of the topic, that is, the differences, is not mentioned.

[13] Daarus-Salaam, al-Qahirah, 1st edition, (1408 A.H.)

Al-Istidhkaa Li Madhahibi Aimmatil Amsaar, Abu Umar, Yusuf bin Abdillah bin AbdilBarr, an-Namree, al-Malikee, Daarul Kutubil 'ilmiyyah, Bairut, 1st edition, 1421/2000.

The author of this work took a unique approach by arranging the chapters in his work based on the arrangement of chapters in the Muwatta of Imam Malik. Differences among the jurists were discussed in this work after mentioning all the hadith or Sunnah regarding all matters said that the jurists have differed upon first, then followed by the views of the jurists.

In this approach also, causes of the differences were not mentioned.

Al-Insaaf Fima bainal 'ulamaa minal Ikhtillaf, Abu Umar-Yusuf bin Abdillahi bin Abdil Barr-an-Namree, al-Malikee. Shamela Library, 2nd version 2.11.

This work only captured the differences among the jurists regarding the recitation of Basmalah at the beginning of prayer (Salah). The writer of this work mentioned the group of jurists that did not accept the recitation of basmalah first with the authorities they rely on, and then the views of the second group who accept its recitation and the authorities they rely on. This work also, did not capture other areas of differences among the jurists nor did it discuss causes of their differences.

Al-Insaaf Fit-Tanbeeh ‘ala Asbaabil Ikhtilaaf, Abu Muhammad, Abdullah bin Muhammad bin asSayid, al-Batlaimusee[14] The writer of this work only discussed some causes of juristic differences among the jurists. The writer succeded in mentioning just eight (8) causes among the texual causes. With this approach, matters which the jurists differed upon based on the mentioned causes were not mentioned. In other words, instances were not given to back up each of the stated causes.

Takhreejul Furu ‘alal Usul, Mahmud bin Ahmad, al-Zanjanee-as-Shaafee. Mu’assasah-al-Risaalah, Beirut, 2nd edition, (1398 A.H.).

The author of this work, Imam al-Zanjaanee, adopted the approach of the jurists. He mentioned a few branches of fiqh in which Imam As-shaaf’ee actually differed from Imam Abu Hanifah.To him in any matter of fiqh, that both Imam Shaaf’ee and Abu Hanifah differed upon, the view of as-Shaaf’ee and his authorities are presented first, then the view and evidence from Abu-Haneefah. This approach also, captured only the differences without mentioning the causes and the views of the other jurists were not entertained.

[14] Daarul Fikr, Beirut. 2nd Edition (1403 A.H.)

Al-Insaaf Fi Bayan Asbaabil Khilaaf, Ahmad bin Abdur-Raheem, Waliyullah Ad-Dahlawee, Daaru An-Nafaais, Beirut, 2nd edition (1404 A.H).

The writer of this work discussed causes of juristic differences among the companions of the Prophet (peace be upon him), those that followed them or the Taabi'un and the schools of Islamic jurisprudence. This approach also, captured only the causes of differences that are peculiar to the Sunnah. Causes of differences due to the Qur'anic provisions and silence of the law were not entertained.

Al-khilaaf Bainal 'Ulama, Muhammad, bin Salih bin Muhammad Al-'Usaimin[15]

The author of this work discussed the causes of differences among the companions of the Prophet of Allah (peace be upon him), and gave instances of matters that they differed upon with regards to any cause he mentioned. Looking at these causes, the writer was able to capture the causes with respect to the Sunnah only. Some other causes with respect to the Qur'anic provisions and silence of the law were not mentioned.

[15] Daarul-Watan, publication,(1423), Shamela Library, 2nd version 2.11.

Al-Jaami'ul Mufeed Fi Asbaabi Ikhtillafil Fuqahaa, Dr. Abdulkareem Hamidee, Daaru ibn 'Azmi, Beirut, 1st edition, 1430 A.H./2009.

This book is a unique work in this area. The writer of the work adopted the theoretical approach in order to explain Ibnu Rushdin's objective in his work; Bidayatul Mujtahid wa Nihayatul Muqtasid which is purposely to explain causes of juristic differences. With this approach, the writer was able to discover twelve textual causes of juristic differences among the classical jurists in the Bidayatul Mujtahid. Each of the causes mentioned in this work was not discussed under the sources of law observed that each of them can be ascribed to.

This work has shown that previous writers on the topic had approached the topic in three different ways:

(i) by discussing only the juristic differences;

(ii) by discussing the causes of juristic differences alone;

(iii) by combining both juristic differences and the causes.

However, this work should be regarded as a development in this area rather than looking to the lapses on the part of the previous writers. The writer of this work has decided to present the mentioned causes of juristic differences under Islamic law by previous writers, under the sources of law it is observed that each of them can be ascribed to, and supplemented by textual causes left unmentioned in this area which include admissibility or

inadmissibility of certain principles and methods of qiyas (analogical reasoning), and present them in a more simplified method.

This writer, in considering the nature of evidence under Islamic Law, has attempted to centre his study on textual causes in order to widen its scope beyond limitations found with the previous writers due to their various approaches based upon time and clime; and certainly not out of incompetence.

It may be said that the additional causes discussed alongside the textual onesby some of the previous writers, such as mistake, i.e. (in the course of juristic reasoning), hatred and enmity, envy, pride, strict adherence to some individuals' views and methods, lack of exposure, egotism, pessimism, prevalence of whims, etc. did not give them room to expand the textual causes as the writer of this work did.

1.8 Organizational Layout

The structure of the work is anchored on a five-chapter format;

Chapter One deals with the general introduction which presents the subject matter of the research, highlighting its problems, objectives, scope, methodology, literature review, justification and the structure of the thesis.

Chapter Two explains the nature of the Qur'an provisions which contain the grade of meaning in texts, the clear words and unclear words, textual implications, definitive and speculative provisions, instances on definitive provisions in the Qur'an, instances on speculative provisions in the Qur'an, the general and the specific provisions, tpypes of general, ruling on general and specific, conflict between general and specific, instances of differences due to general and specific provisions of the Qur'an, the absolute and the qualified as provisions of the Qur'an, ruling on the absolute and the qualified and prevalence of the qualified over the absolute.

Chapter Three discusses the nature of the Sunnah as a source of law under Islamic law, definitive and speculative provisions of the Sunah, instances on definitive provision of the Sunnah, instances on differences due to speculative provision of the Sunnah, instances on differences due to the general and the specific provision of the Sunnah, narration of the Sunnah, unawareness of the Sunnah , instances on differences due to unawareness of the Sunnah, conditions for the acceptance of solitary Sunnah, instances on differences due to solitary, apparent textual conflict, conditions for apparent conflicts,

ways to harmonize apparent conflict and instances on differences due to textual apparent conflict.

Chapter Four deals with differences due to silence of the texts, (the Qur'an and the Sunnah); laws in cases where both the Qur'an and Sunnah are silent, acceptance or otherwise of the acceptance of certain principles, methods of Qiyas, identification of the objectives of the law, instances on differences due to silence of the law.

Chapter Five concludes the work with a Summary, Findings and Rcommendations.

CHAPTER TWO

THE NATURE OFTHE QURANIC PROVISIONS

2.1 Introduction

This chapter will examine the Qur'an as a source of law. Thus, the writer's approach will not revolve around discussion on the sciences of the Qur'an or Ulum al-Qur'an.

The Qur'an is the first source of Shari'ah and the jurists are unanimous on this[1]. Quranic verses expressly indicate that it is the basis and main source of law in Islam.

The Quran provides: "If any fail to judge by what Allah had revealed, they are unbelievers"[2]. "And if any fail to judge by what Allah had revealed, they are wrong doers"[3]. "If any do fail to judge by what Allah had revealed, they are those who rebel"[4].

The Quran, as a whole is not a legal or a constitutional document nor a code of law because legal material occupies only a small portion of the bulk of it text. Out of over 6,200 verses, less than one-tenth (350) verses, relate to law and jurisprudence while the remainder are largely concerned with

[1] Kamali, M.H., op. cit., p. 22, Zaydanee, A. (2009): *Al-wajeez fi usul-at-fiqh*, Resalah publishers, Beirut, 1st Edition, p. 119
[2] Q.5 :47.
[3] Q5:48
[4] Q5: 49

matters of belief and morality, the five pillars of the faith and a variety of other themes.[5]

The Qur'an is the Arabic speech (Kalaam) of Allah that was revealed to the Prophet Muhammad (S.A.W) in wording and meaning in the period of 23 years through the Angel Jibril (A.S) that has been preserved in the Mushaf and its recitation considered as act of worship and has reached us by Mutawatir transmissions, and remain as a challenge to whole mankind and jinns to produce something similar to one of its shortest chapters which started from suratul-Fatihah and ended with suratul-Nas

The Qur'an began with the suraal-Alaq starting with the words "Read in the name of your Lord"[6] and ending with the verse in Sura al-Ma'idah, "Today I have perfected your religion for you and completed my favour toward you, and chosen Islam as your religion".[7]

The revelation of the Qur'an spanned the period of 23 years- ten years in Makkah and 13 years in Medinnah.

Many of the directives in the Qur'an are general. A text in the Qur'an may atimes in its meaning, convey a manifest import but which is not in

[5] Al-Kamali, op. cit. P.26, See also, Ahmad H. (2001): *The Early development of Islamic Jurisprudence*, Islamic Research Institute, Islamabat-Pakistan, P.47

[6] Q96:1

[7] Q5 :3, Kamali, M.H., Op. Cit., P.22. Some disagree on this verse, saying that the last verse of the Qur'an was surah al-baqarah(2 :281), where Allah says : 'Fear the day when you will be brought back to Allah ; then every soul will be paid in full according to whatever it has earned and he will not be treated unjustly'. See Qadhi, A.Y. (1999) : *An Introduction to the sciences of the Qur'an*, Al-Hidaayah publishing and distribution, Birmingham, United Kingdom, 1st ed, P.93-94.

harmony with the text in which it occurs. A text may appear in the general form but may not be specified therein, or might have been specified in another text. Another text may appear in the absolute term but need not be qualified or might have been qualified in another text elsewhere. Similarly, a text may convey a command or prohibition form, but the injunction in such command does not amount to a binding one, just as the injunction in such prohibition may not amount to a forbidding one[8].

However, expressions in a variety of forms like the foregoing ones are often open to interpretation.

Therefore, this chapter discusses the characteristic features of Quranic legislation upon which interpretation takes a significant role.

[8] See Al-Kamali, op.cit. P.28, Zaydanee, A., op.cit., p.278, Qadhi, A.Y., Op. cit. p.228, Kalaaf, A., p.36

2.2 The Grades of Meaning in Texts

From the view point of clarity (wuduh) in respect to meaning, words are divided into two main categories of clear and unclear words.[9]

2.2.1 The clear words;

A clear word conveys a concept which is intelligible without recourse to interpretation or ta'wil.

A ruling which is communicated in clear words constitutes the basis of obligation, without any recourse to interpretation or ta'wil. In other words, a clear text is self-contained, and needs no recourse to extraneous evidence.

From the viewpoint of the degree of clarity and conceptual strength, clear words are divided into four (4) types in a ranking which starts with the least clear, and ends with the highest:[10]

1- The Zahir (Manifest) is a word which has a clear meaning and yet is open to interpretation or ta'wil, primarily because the meaning that it conveys is not in harmony with the context in which it occurs.[11]

It is a word which has a literal original meaning of its own but which leaves open the possibility of an alternative interpretation.

2- The Nass (Explicit) is a word which has a clear meaning just as the Zahir does,but it has a clearer meaning because of the fact that it is in harmony

[9]. Zaydanee, A., op. cit. P.268

[10]. Al-kamali, M.H., Op. Cit., P. 89, Zaydaanee, A., Op. Cit., P. 268, Khalaaf, A., Op. cit., P.180, Abu Zahrah, M. (1958): *Usul-al-fiqh*, P. 119.

[11] . Al-kamali, M.H., Op. Cit., P. 88, Zaydaanee, A., Op. Cit., P. 268, See also, Khalaaf A., Op. Cit., 180, Abu-Zahrah, M., op. cit. P.120

with the context in which it appears, but yet is still open to interpretation or ta'wil.[12]

The distinction between the Zahir and Nass mainly depends on their relationship with the contexts in which they occur.

Zahir and Nass both denote clear words, but the two differ in that the former does not constitute the dominant theme of the context whereas the Nass does.[13]

To illustrate this point, reference can be made to this Qur'anic text on polygamy:

"And if you fear that you cannot treat the orphans justly, then marry the women who seem good to you, two, three or four…"[14]

Two points constitute the principal theme of this text, one of which is that polygamy is permissible, and the other that it must be limited to the maximum of four. These are the explicit rulings (Nass) of this text. But this text also establishes the legality of marriage between men and women, especially in the part where it reads 'marry of the women who seem good to you.' However, legalizing marriage is not the principal theme of this text,

[12] . Al-kamali, M.H., Op. Cit., P. 88, Zaydaanee, A., Op. Cit., P. 268, see also, Khalaaf A., Op. Cit., 180, Abu-Zahrah, M., op. cit., P.120
[13] . Al-kamali, M.H., Op. Cit., P. 89
[14] Q4:3

but only a subsidiary point. The main theme is the Nass and the incidental point is the Zahir.[15]

Ruling on Nass and Zahir (Explicit and Manifest)

Nass is stronger than Zahir, and therefore, should there be a conflict between them, the former prevails over the latter. This may be illustrated in the following two Quranic passages, one of which is a Nass in regard to the prohibition of wine, and the other a Zahir in regard to the permissibility of eating and drinking in general. The two passages are as follows:

"O believers! Intoxicants, games of chance and sacrificing to stones and arrows are the unclean works of Satan so avoid them, that you may prosper"[16].

"On those who believe and do deeds of righteousness there is no blame for what they consume, when they guard themselves from evil, and believe and do deeds of righteousness …"[17].

The **Nass** in the first text is the prohibition of wine, which is the main purpose and theme of the text. The **Zahir** in the second text is the permissibility of eating and drinking without restriction. The main purpose of the second text is, however, to accentuate the virtue of piety (taqwa) in that taqwa is not a question of austerity with regard to food, it is rather a

[15] . Zaydaanee, A., Op. Cit., P. 268, Al-kamali, M.H., Op. Cit. P. 89, Khalaaf A., Op. Cit., 180, Abu- Zahrah, M., Op. Cit., P.120

[16] Q5:90

[17] Q5:93

matter of being conscious of Allah and doing good deeds. There is an apparent conflict between the two texts, but since the prohibition of wine is established in the Nass, and the permissibility regarding food and drink is in the form of Zahir, the Nass prevails over the Zahir.[18]

In another text, Allah says: "But Allah has permitted trade and forbidden usury (Riba)"[19]. The Zahir or manifest in this text is permission to trade and prohibition of Riba as the two words "Ahalla" and "Harrama" or permitted and forbidden imply. This is not the principal theme of this text, but only a subsidiary point. But the Nass or the explicit ruling of the text is the negation of comparison between trade and Riba(usury) which is the theme of the text, as it is the response from Allah to those who say: " Verily trade is like usury"[20].

3- Mufassar (Unequivocal)

Mufassar is a word the meaning of which is completely clear and is, in the meantime, in harmony with the context in which it appears. Because of this and the high level of clarity in the meaning of the Mufassar, there is no need for recourse to interpretation or ta'wil. But the mufassar may still be

[18] Al-kamali, M.H., Op. Cit., P. 91-92, Zaydaanee, A., Op. Cit., P. 268, Khalaaf A., Op. Cit., 180, Abu- Zahrah, M., Op. Cit., P.120

[19] Q2:275

[20] Q2:275, Zaydaanee, A., Op. Cit., P. 268, Khalaaf A., Op. Cit., 180, Abu-Zahrah, M., Op. Cit., P.120, Khudaree, M.B.(1998): *Usul Fiqh, Beirut,* P. 120

open to abrogation which might, in reference to the Qur'an and the Sunnah, have taken place during the lifetime of the Prophet (peace be upon him).[21]

The Mufassar, as the word itself implies, is that the text explains itself. The lawgiver has, in other words, explained His own intentions with complete clarity, and the occasion for ta'wil does not arise. The Mufassar occurs in two varieties, one being the text which is self-explained, or Mufassar bidhatih, and the other is when the ambiguity in one text is clarified and explained by another. This is known as Mufassar bighayrih, in which case the two texts become an integral part of one another and the two combine to constitute a Mufassar.[22]

To give examples of the Mufassar in the Qur'an are these texts:

"And fight the pagans all together as they fight you all together …."[23] The word 'all together (Kaffah)' which occurs twice in this text precludes the possibility of applying specification or takhsis to the words preceding it, namely the pagans or Mushrikun.[24]

[21] Al-kamali, Op. Cit., P.92, Zaydaanee, A., Op. Cit., P. 273, Abu- Zahrah, M., Op. Cit., P.122.

[22] Al-kamali, M.H., Op. Cit. P.92, Abu Zahrah, M. op. cit. P. 122.

[23] Q9:36

[24] . Al-kamali, M.H., Op. Cit., P. 91-92, Zaydaanee, A., Op. Cit., P. 268, Khalaf, A., op. cit. p. 184.

"We sent it (the Qur'an) down on the Night of Qadr. What will make you realize what the Night of Qadr is like? … It is the night in which angels and the Spirit descend …"[25].

The text thus explains the 'Laylah al-qadr' and as a result of the explanation so provided, the text becomes self-explained, or Mufassar.[26]

"And those who accuse chaste women of adultery and fail to bring four witnesses, flog them **eighty** stripes…"[27] The quantitative aspects of this ruling, i.e. **eighty,** is self-explained because it is a specific number that does not take increase nor decrease, so therefore, it is a form of Musfassar.[28]

4- Muhkam (Prespicuous)

Muhkam is a word whose meaning is clear beyond doubt and is not open to ta'wil or iterpretation and abrogation.[29]

The Muhkam is not open to ta'wil because its clarity has reached the level that precludes it from any form of ta'wil. And it is not open to abrogation because of its fundamental nature that is not open to replacement or changeor even open to these but accompanied with a word that prevents it

[25] Q97:1-4
[26] Al-kamali, M.H., Op. Cit., P. 93.
[27] Q24:4
[28] Zaydaanee, A., Op. Cit., P. 272.
[29] . Zaydaanee, A., Op. Cit., P. 274, Al-kamali, M.H., Op. Cit., P.95, see Qadhi, A.Y., Op.cit. P. 207.

from abrogation.[30] Examples of this are the following Qur'anic texts: "We created every living from Water"[31]. "Every soul shall taste death" (Q3:185) And the frequently occurring Quranic statement like 'Allah knows all things'. Statements like these cannot be abrogated, whether in the lifetime of the Prophet (peace be upon him), or after his demise.[32]

"And reject their evidence everafter …."[33] "It is not right for you to annoy the messenger of Allah; nor should you ever marry his widows after him"[34]. The prohibitions in these texts are emphasized by the word 'Abadan' or (never, ever) which renders them Muhkama, thereby precluding the possibility of abrogation.[35]

2.2.2 The unclear words:

A word is unclear when the meaning which it conveys is ambiguous or incomplete, and requires clarification or detail.

An ambiguous text which is in need of clarification cannot constitute the basis of action. The clarification so required can only be supplied through extraneous evidence, for the text itself is deficient and fails to convey a

[30] . Khalaaf A., Op. Cit., 185, Zaydaanee, A., Op. Cit., P. 275, Abu- Zahrah, M., Op. cit., p. 185
[31] Q21:30
[32] Al-kamali, M.H. Op. Cit. P. 95.
[33] Q24:4
[34] Q33:53
[35] Khalaaf A., Op. Cit., 185, Zaydaanee, A., Op. Cit., P. 275, Kamali, M.H., Op. Cit., P.95 Abu- Zahrah, M., op. cit., p. 185.

complete meaning without recourse to evidence outside its contents.[36] From the viewpoint of the degree of ambiguity in meaning, words are classified, once again, into four types which start with the least ambiguous and end by the most ambiguous in the range.

1- Al-Khafi (The Obscure)

Al-khafi denotes a word which has a basic meaning but is partially ambiguous in respect of some of the individual cases to which it is applied.[37] The word is consequently obscure with regard to those cases only.

The ambiguity in al-Khafi needs to be clarified by extraneous evidence which is often a matter of research and ijtihad.

An example of al-khafi is the word 'thief'' or Saariq in the Qur'anic text: "As to the thief male or female, cut off his or her hands…"[38] The word 'Saariq' is used to qualify a person who steals a guarded property. The manifest from the word 'Saariq is that it includes all members of its set, such as a pick pocket or al-tarraar and a person who steals the shroud of the dead or an-nabbash, therefore in respect to both the tarraar and nabbash, the word Saariq is ambiguous. When the word "Saariq" is applied to such

[36]. Al-kamali, M.H., Op. Cit., P.89, Zaydaanee, A., Op. Cit., P. 275.
[37] Zaydaanee, Op. Cit., P. 276, Kamali, M.H., Op. Cit., P.97, Khalaaf A., Op. Cit. 188, Abu- Zahrah, M., op. cit. p. 124.
[38] Q5:38

cases, does not make it immediately clear whether 'thief' or saariq includes a pickpocket or not and whether the punishment of theft can be applied to the latter. The basic ingredients of theft are present in this activity, but the fact that the pickpocket uses a kind of skill in taking the assets off a person in wakefulness makes it somewhat different from theft. Similarly, it is not certain whether 'thief includes a person who steals the shroud of the dead or an-nabbash, since a shroud is not a guarded property or al-mal al-muhraz.[39] This is why Imam Abu Hanifah and Muhammad would apply the discretionary punishment of ta'zir regarding the case. And Abu Yusuf including the three other leading classical jurists; Malik, Shafi'ee and Ahmad would apply the prescribed penalty for theft to both the pickpocket or at-tarraar and the one who steals shrouds of the dead or an-nabbash.[40]

2- Al-Mushkil (The Difficult)

Al-mushkil denotes a word which is inherently ambiguous, and whose ambiguity can only be removed by means of extraneous evidence outside its contents.[41] The Mushkil differs from the Khafi in that the latter has a basic meaning which is generally clear, whereas the former is inherently ambiguous. In other words, the Mushkil or difficult is homonym, that is it

[39] Kamali, M.H., Op. Cit., P.97, Zaydaanee, Op. Cit., P. 276.
[40] . Abu- Zahrah, M., op. cit. p. 125.
[41]. Kamali, M.H., Op. Cit., P.98, Zaydaanee, A., Op. Cit., P. 278, Abu- Zahrah, M., op. cit. p. 128

has more than one meaning, and when it occurs in a text, the text is unclear with regard to one or the other of those meanings.[42]

An example of the Mushkil in the Qur'an is the text; "Your wives are a place of cultivation for you, so come to your place of cultivation however you wish …"[43] The word 'Annaa' or however, is used literally to mean 'how', just as it is used as well to mean 'from where', but the indication and content of the text explain the intended meaning.[44] Another text of this kind is the text that reads thus: "Divorced women shall wait concerning themselves for three monthly periods"[45]. The word 'periods' or quru has two distinct meanings: menstruation or hayd and the clean period between two menstruations or tuhr. Whichever of these is taken, the ruling of the text will differ accordingly.[46]

3- Al-Mujmal (The Ambivalent)

Mujmal denotes a word which is inherently unclear and gives no indication as to its precise meaning.[47] The cause of ambiguity in Mujmal is inherent in the locution itself. A word may be a homonym with more than one meaning, and there is no indication as to which might be the correct one, or

[42] Kamali, M.H., Op. Cit., P.98, Zaydaanee, Op. Cit., P. 278, Abu- Zahrah, M., Op. cit. p. 128
[43] Q2:223
[44] Zaydaanee, A., Op. Cit., P. 278.
[45] Q2:228
[46] Kamali, M.H., Op. Cit., P.98, Zaydaanee, A., Op. Cit., P. 278, Abu- Zahrah, M., Op. cit. p. 128
[47] Khalaaf, A., Op. Cit., 191, Kamali, M.H., Op. Cit., P.99

alternatively the lawgiver has given it a meaning other than its literal one, or the word may be totally unfamiliar.[48] In any of these eventualities, there is no way of removing the ambiguity without recourse to the explanation that the lawgiver has furnished Himself, for He introduced the ambiguous word in the first place.

An example on Mujmal text in the Qur'an: "The stunning blow (al-qari'ah)! What is the stunning blow? What will make you realize what the stunning low is? It is theDay in which the people will act like scattered moths; and the mountains will be like carded wool"[49]. "Truly man was created restless (halu'an); so he panics whenever any evil touches him; and withholds whensome fortune befalls him"[50].

The ambivalent or mujmal words (al-qari'ah or the stunning blow and halu'an or restless) in these passages have thus been explained and the texts have as a result become self-explained or Mufassar.[51]

[48] Zaydaanee, A., Op. Cit., P. 279, Kamali, M.H., Op. Cit., P.99, Khalaaf, A., Op. Cit., 191,
[49] Q101:1-5
[50] Q70:20-23
[51] . Kamali, M.H., Op. Cit., P.99 , see Zaydaanee, A., Op. Cit., P. 279, Khalaaf, A., Op. Cit., 192

4- Al-Mutashabih (The Intricate)

Al-mutashabih denotes a word in the texts whose meaning is a total mystery.[52] There are words in the texts of the Qur'an whose meanings are not known at all. Neither the words themselves nor the context in which they occur provide any indication as to their meaning. The Mutashabih as such does not occur in the legal texts or nususshar'iyah, but it does occur in other contexts.[53]

Examples of the Mutahsabih in the texts of the Qur'an are expressions such as Alif-Lam-Meem, Ya-sin,Ha-meem, etc. Such expressions are referred to as al-huruf al-muqatta'at (abbreviated or disjointed letters), that is, letters whose meanings are total mystery. Among the scholars maintained that the verses pertaining to the attributs of Allah are also in the nature of the Mutashabih. These are the passages of the Qur'an which draw resemblance between Allah and man, such as; "The hand of Allah is over their hands"[54] "The Ever Merciful 'rose over' (Istawaa) The Throne"[55] "Build a ship under Our eyes and inspiration"[56] "And the face of your Lord will abide

[52] Kamali, M.H., Op. Cit., P.100 , Abu- Zahrah, M., 134 , Khalaaf, A., Op. Cit., 193, Zaydaanee, Op. Cit., P. 280.
[53] . Kamali, M.H., Op. Cit., P.100 , Abu- Zahrah, M., op. cit. p. 135, Khalaaf, A., Op. Cit.,193, Zaydaanee, A., Op. Cit., P.280.
[54] Q48:10
[55] Q20:5
[56] Q11:37

forever"[57] are instances of the Mutashabih as their precise meanings cannot be known[58].

2.2.3 Textual Implications

With reference to the textual ruling of the Qur'an and Sunnah, the jurists have distinguished another four (4) levels of meanings that a nass or text may be capable of imparting. The four (4) levels of meaning have been distinguished in an order which begins with the explicit or immediate meaning which is followed by the 'inferred' meaning, and lastly by the 'required' meaning.

1. Ibarah al nass (The explicit meaning)

Ibarah al- nass is the immediate meaning of the text which is derived from its obvious words and sentences.[59] The explicit meaning represents the principal theme and purpose of the text, especially in cases where the texts might impart more than one meaning and comprises in its scope a subsidiary theme or themes in addition to the one which is obvious. In its capacity as the obvious and dominant meaning, the Ibarah al- nass is

[57] Q55:27

[58] . Zaydaanee, A., Op. Cit., P.280, Khalaaf, A., Op. Cit., 194, Kamali, M.H., Op. Cit., P.100, Qadhi, A.Y., Op. Cit., P.208.

[59] . Kamali, M.H., Op. Cit., P.118, Khalaaf, A., Op. Cit., 161, Zaydaanee, A., Op. Cit., P.281, Abu- Zahrah, M., op. cit. P. 139, Khudaree, M.B., op. Cit., P.119.

always given priority over the secondary and subsidiary themes or meanings of the text.[60]

An example of a text of the Quran regarding Ibarah al- nass is: "And if you fear that you may be unable to treat the orphans fairly, then marry of the women who seem good to you, two, three or four. But if you fear that you cannot treat (your wives) equitably, then marry only one……..''[61]

This text conveys more than one meaning, at least three or four meanings are distinguishable in the text. First, the legality of marriage. Second, limiting polygamy to the maximum of four. Third, remaining monogamous if polygamy may be feared to lead to injustice; and fourth, the requirement that orphaned girls must be accorded fair treatment.[62]

All these meanings are conveyed in the actual words and sentences of the text. But the first and the last are subsidiary and incidental whereas the second and the third represent the explicit themes and meanings of the text, that is, the Ibarah al-nass. Limiting polygamy to the maximum of four is the explicit meaning which takes absolute priority over all the implied and incidental meanings that this text might convey.[63]

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[60]Kamali, M.H., Op. Cit., P.119, Khalaaf, A., op. cit., p.162.

[61] Q4:3

[62] . See Zaydaanee, A., Op. Cit., P.282. Kamali, M.H., Op. Cit., P.119, Khudaree, M.B., Op. Cit., P.119, Khalaaf, A., Op. Cit., 161

[63]. See Zaydaanee, A., Op. Cit., P.282. Kamali, M.H., Op. Cit., P.119, Khudaree, M.B., Op. Cit., P.119, Khalaaf, A., Op. Cit., p.162

2. Isharah al-nass (The alluded meaning)

Isharah al-nass is the meaning derived from the text which may not be obvious, but it imparts, nevertheless a rationally concomitant meaning which is obtained through further investigation of the signs that might be detectable therein.[64]

Isharah al-nass does not represent the principal theme, but yet, it embodies a necessary inference. Isharah al-nass may be easily detectable in the text, or may be reached through deeper investigation and jjtihad.

Example on isharah al-nass in the text of the Quran: ''But the one to whom the child is born (father) shall bear the cost of their food and clothing on equitable terms…….''[65]

The explicit meaning of this text obviously determines that it is the father's duty to support his child. It is also understood from the wording of the text that only the father and no - one else bears this obligation. This much is easily detectable and constitutes the explicit meaning of this text. But to say that the child's descent is solely attributed to the father and his identity is determined with reference to that of the father is a rational and concomitant

[64] . Kamali, M.H., Op. Cit., P.119, Zaydaanee, A., Op. Cit., P.283, Khalaaf, A., Op. Cit., 162, Abu- Zahrah, M., Op. Cit., P. 140, Khudaree, M.B., Op. Cit., P.119,

[65] Q2:233

meaning which is derived through further investigation of the signs that are detectable in text.[66]

The effect of both Ibarah al- nass or explicit meaning and Isharah al–nass or alluded meaning is that they convey a definitive ruling or hukm qati' on their own and are in no need of corroborative evidence, they are both similar in that both constitute the basis of obligation, unless there is evidence to suggest otherwise.[67]

3. Dalalahal-nass (the inferred)

Dalalh al- nass is the meaning which is derived from the spirit and rationale of a legal text even if it is not indicated in its expression.[68] Unlike the explicit meaning and the alluded meaning which are both indicated in the words and signs of the text, the inferred is not so indicated. Instead, it is derived through analogy and the identification of an effective cause (illah) which is in common between the explicit meaning and the meaning that is derived through the inference.[69]

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[66] . Khudaree,M.B., Op. Cit., P.120, Kamali, M.H., Op. Cit., P.120, Abu- Zahrah, M., Op. Cit., 141, Zaydaanee, A., Op. Cit., P.283

[67] . Kamali, M.H., Op. Cit., P.120.

[68] Khalaaf, A., Op. Cit., 165, Abu- Zahrah, M., Op. Cit., 141, Zaydaanee, A., Op. Cit., 286, Khudaree,M.B., Op. Cit., P.121

[69] Kamali, M.H., Op. Cit., P.121.

An example of Dalalah al-nass is the Quranic text that reads ‘’……say not to them a word of contempt (uff), nor repel them but address them, in terms of honor’’[70]

The word ‘uff’ in this text obviously forbids the utterance of the slightest word of contempt to the parents. The effective cause of this prohibition is respecting the parents and avoiding offence to them. There are, of course, other forms of offensive behavior besides a mere contemptuous word such as uff, to which the effective cause of this prohibition would apply.[71]

The inferred meaning of this text is thus held to be that all forms of abusive words and acts which offend the parents are forbidden even if they are not specifically mentioned in the text under consideration.[72]

4. Iqtida al-nass (Deemed Meaning)

Iqtida al – nass is a meaning on which the text itself is silent and which must be read into it if it is to fulfill its proper objective.[73]

An example of iqtida al – nass in the text of the Quran is the text that reads; “Unlawful to you are your mothers and your daughters….’’[74]

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[70] Q17:23

[71] . Khalaaf, Op. Cit., 165, Abu- Zahrah, M., Op. Cit., 142, Zaydaanee, Op. Cit., P. 287, Khudaree, M.B., Op. Cit., P.121

[72] . Khalaaf, A., Op. Cit., 165, Abu- Zahrah, M., Op. Cit., 142, Zaydaanee, A., Op. Cit., 287, Khudaree, M.B., Op. Cit., P.121

[73] . Kamali, M.H., Op. Cit., P.122, Abu- Zahrah, M., Op. Cit., 143, Khalaaf, A., Op. Cit., 167, Zaydaanee, A., Op. Cit., 288, Khudari, M.B., Op. Cit., P.121.

[74] Q4:22

This text proclaims the prohibited degrees of relations in marriage. The text does not mention the word 'marriage' but even so it must be read into the text to complete its meaning.[75]

Another text in the Qur'an reads: "Forbidden to you are dead meat, blood, the flesh of swine…"[76] this text did not mention that these are unlawful for consumption'. But the text requires the missing element to be supplied in order that it may convey a complete meaning.[77]

2.3 Definitive (Qat'i) and Speculative (Zanni) Provisions:

The sources of Islamic law are also classified by the majority of the jurists, as definitive and speculative. When we use the word definitive, we mean something about which we cannot have two opinions, while speculative means something that does not reach this level of strength. From another perspective, the attribute of a source being definitive or probable refers to the strength of transmission of the source, that is, the way it has been transmitted by the first three generations.[78]

A definitive text is one which is clear and specific; it has only one meaning and admits of no other interpretations. A ruling of the Qur'an may be

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[75] . Zaydaanee, A., Op. Cit., 288, Khalaaf, A., Op. Cit., 167, Kamali, M.H., Op. Cit., P.122 .

[76] Q5:3

[77] . Abu- Zahrah, M., Op. Cit., p. 144, Kamali, M.H., Op. Cit., P.122, Zaydaanee, A., Op. Cit., 288.

[78] Nyazee .I.A.K,(*Islamic jurisprudence*), Op. cit. P. 146

conveyed in a text which is either unequivocal and clear, on language that is open to different interpretations.

The speculative verses of the Quran are on the other hand, open to interpretation and ijtihad[79].

2.3.1 **Instances on Definitive Provision in the Qur'an:**

An example of this is the text on the entitlement of the husband in the estate of his deceased wife. Allah the Almighty says: 'In what your wives leave, your share is a **half**, if they leave no child'[80].

"The adulterer, whether a woman or a man, flog them each **a hundred** stripes"[81].

"And those who accuse chaste women of adultery and fail to bring four witnesses, (to prevent), flog them **eight**y stripes".[82]

The quantitative aspects of these rulings, namely one half, one hundred, and eighty are self-evidence and therefore not open to interpretation.

The validity of rulings like these in the Qur'an may not be disputed by any Muslim, rather, everyone is bound to follow them.[83]

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[79] Kamali, M.H., Op. cit. P. 28,see also, Al-Shatibee, I.M. (1997): *Al-muwa faqaat fi 'ulum-sharaiah*, Daru Ibn 'Afaan, 1st Edition, Vol.3, P. 184, Muhammad, A. (nd) : *Shrihul-'umdatu fi Usul-Al-Fiqh*, Al-Shamila library, 2nd version 2.11, P.125,
Khalaaf, A., Op. cit. P. 37, Abu-Zahrah, M., *usul-al-fiqh*, P. 92

[80] Q4:12

[81] Q24:2

[82] Q24:4, Kamali, M.H., Op. cit. P.28, see also; Zaydanee, A., Op. cit. P.125, Al-Khalaaf, A., op. cit. P.37

2.3.2 **Instances on Speculative Provisions in the Qur'an:**

The Ulama have differed on the definition of futile, as opposed to deliberate oaths, which occur in the Qur'an: 'Allah will not call you to account for what is futile (al-laghwu) in your oaths, but He will call you to account for your deliberate oaths …"[84].

According to the Hanafis, a futile oath is one which is taken on the truth of something that is suspected to be true but the opposite emerges to be the case. The majority have on the other hand, held it to mean taking an oath which is not intended, that is when taken in jest without any intention[85].

Similar differences have arisen concerning the precise definition of what may be considered as a deliberate oath.

The text then continues to spell out the expiation for deliberate oaths, 'for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or clothe them; or give a slave his freedom. If that is beyond your means, fast for three days...."[86]

There is also disagreement as to whether the three days of fasting should be consecutive or could be three separate days. Hence the text of this verse, although definitive on the basic requirement of expiation for futile oaths, is

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[83] Nyazee, I.A.K., (*Islamic Jurisprudence*), Op. cit. P.148,Khalaaf, A., Op. cit., p.37, Zaydaanee, A., Op. cit. p.125.
[84] Q5:89
[85] Kamali M.H., Op. cit. P.29, Abu Zahrah, M., Op. cit., P.92
[86] Q5:89

speculative and probable as to the precise terms of the expiation and the manner of its implementation.[87]

The Qur'an in the text which reads, "Prohibited to you are your mothers and your daughters"[88]. The text is definitive in regard to the prohibition of marriage with one's mother and daughter and there is no disagreement on this point. However, the word your daughters' could be taken for its literal meaning, which would be a female child born to a person either through marriage or through adultery (Zina) or for its juridical meaning.

The jurists are in disagreement as to which of these meanings should be read into the text. The Hanafis have upheld the first of the two meanings and have ruled on the prohibition of marriage to one's illegitimate daughter, whereas the Shafi's have upheld the second[89].

According to this interpretation, marriage with one's illegitimate daughter is not forbidden as the text only refers to a daughter through marriage.[90]

Another similar example is the Quranic text that reads thus: "Divorced women shall wait concerning themselves for three monthly periods…"[91]

The word 'periods' has two meanings, either menstrual periods, or periods of purity between two menstruations. The Hanafis, the Hanbalis and the

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[87] Kamali M.H., Op. cit. P.29, Abu Zahrah, M., Op. cit., P.92
[88] Q4:24
[89] Kamali, M.H., Op. cit., P.28-29 ,Ibn Katheer, A.H. (2004): *Tafseer ul-Qur'an il- 'Azeem*, Dar Al-Kutub Al-ilmiyah, Beirut, 2nd Edition, Vol.2, P.248
[90] Kamali, M.H., op. cit., P.28-29 Ibn Katheer, A.H., op. cit., V.2, P.248
[91] Q2:228

Zaydis have upheld the first, while the Shafi'ees, Malikis and Ja'faris have upheld the second meaning of periods.[92]

2.4 TheGeneral (Aam) and The Specific (Khas)

The 'Aam (lit. general) is a word that applies to all the members of a specific set, no matter how small or large that set is.

For example, Allah says; "**Every** soul shall taste death…"[93]

This text is applicable to every soul, be it a human, animal or jinn.

Khaas (lit. 'specific'), on the other hand, is a word that is used to denote a limited number of things, including everything to which it can be applied. The primary difference between Aam and Khaas is that Khaas applies to a simple subject or a specified number of objects; in other words, the scope of its application is limited, unlike the Aam.

There are three categories of aam:

1) Aam that is totally unspecified, this is rare in the Qur'aan. An example of this is the text, "Allah is aware of all things"[94] Since there are no exceptions to the text.

2) Aam in wording, but Khaas in meaning. This is also uncommon in the Qur'aan. An example of this is the text,

[92] Haamidee, A.K., Op. cit. V.1, P.233, Zaydanee, A., Op. cit., P.125, Abu-Zahrah, M., Op. cit., P.38, Kamali, M.H., P.116
[93] Q3:185
[94] Q4:176

'Then depart from the place where the people depart …[95]

The 'people'(Nas) referred to in this text are the other tribes beside the Quraysh. Even though the wording seems to be 'aam (i.e. all people), the meaning is in fact Khaas.

3) Aam that has been specified. This is the most common type of 'aam in the Qur'an. An example of this is the text:

"forbidden to you (in marriage) are … your step-daughters … who have been born of your wives with whom you have had intercourse with…."[96]

This text has specified an 'aam in that only a specific types of step-daughter is forbidden in marriage.[97]

2.4.1 **Types of The General (Al'aam)**

It thus appears that there are three types of 'Aam, which are as follows:

Firstly, the 'Aam which is absolutely general which may be indicated by a prefix in the form of a pronoun. For example the Quranic text, "There is no living creature on earth that Allah does not provide for"[98]; and "We created

[95] Q2:199
[96] Q4:23
[97] Kamali, M.H., Op. cit., P.102, Qadhi, A.Y., Op. Cit., P.228, Haamidee, A.M., Op. cit., Vol.1, P.30, Al-Aamidee, 'A.M.(1404 A.H.): *Al-Ihkaam fi usulil-ahkaam*, Darul-Kitabil-'Arabee, Beirut, 1st Edition, Vol.2, P.217, Khalaaf, A., Op. cit., P.201-205, The Islamic University, Medinah, (nd): *Mudhakiratul Usil Fiqh* , p.22-26, Ashamila Library, 2nd version 2.11.
[98] Q11:16

every living thing from water"[99]. In the first text, the word ('no one' or living creature'), and in the second text, the word ('all' or 'every') are expressions which identify the 'Aam. Both of these texts consist of general prepositions which preclude specification of any kind. Hence they remain absolutely general and include all to which they apply without any exception[100].

Secondly, there is the 'Aam which is meant to imply a Khaas (specific). This usage of 'Aam is also indicated by evidence which suggests that the 'Aam comprises some but not absolutely all the individuals to whom it could possibly apply. An example of this is the Quranic text that reads "And to Allah from the people is a pilgrimage to the house for whoever is able to find there to a way". (Q3:97). Hence the indications provided by the text imply that children and lunatics or anyone who cannot afford to perform the required duty are not included in the scope of this text[101].

Thirdly, there is the 'Aam which is not accompanied by either of the foregoing two varieties of indication as to it scope. An example of this is the Quranic text which provides that "Divorced women must observe three

[99] Q21:30

[100] Kamali, M.H., op. cit., P.103-104, Qadhi, A.Y., Op. cit., 229, Haamidee, A.K., Op. cit. V.1, P.30-31, Khalaaf, A., op.cit., P.205, Zaydanee, A., Op. cit., P.254

[101] Kamali, M.H., Op. cit., P.103-104, Qadhi, A.Y., Op. cit., 229, Haamidee, A.K., Op. cit. V.1, P.30-31, Khalaaf, A., Op.cit., P.205, Zaydanee, A., Op. cit., P.254

courses upon themselves"[102]. This type of 'Aam is Zahir (manifest) in respect of its generality, which means that it remains general unless there is evidence to justify specification (takhsis). In this instance, however, there is another Quranic text or ruling which qualifies the general requirement of the waiting period that the divorced women must observe. This ruling occurs in the Quranic text that reads: "O believers! When you enter the contract of marriage with believing women and then divorce them before consummating the marriage, they do not have to observe any waiting period"[103]. In this way, women who are divorced prior to consummating the marriage are excluded from the general requirement of the first text. The second text, in other words specifies the first.[104]

2.4.2 **Ruling on General and Specific**

The effect of 'Aam is that it remaining in force, and action upon it is required, unless there is specifying clause which would limit its application. In the event where a general provision is partially specified, it still retains its legal authority in respect of the part which remains unspecified.[105]

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[102] Q2:228
[103] Q33:49
[104] Kamali, M.H., Op. cit., P.103-104, Qadhi, A.Y., Op. cit., 229, Haamidee, A.K.,
Op. cit. V.1, P.30-31, Khalaaf, A., op.cit., P.205, Zaydanee, A., Op. cit., P.254
[105] Kamali, M.H., Op. cit., P.108, Abu-Zahrah, M., Op. cit., P.165, Al-Bazdawee, (nd): *Usul Fiqh,* Jaweed Barees publication, Karachi, p.63, As- Shawkanee,

2.4.3 **Conflict between Amm and Khass (General and Specific)**

Should there be two rulings on one and the same subject in the Qur'an one being 'Amm and the other Khass, there will be a case of conflict between them according to the Hanafis, but not according to the majority. The reason is that to the Hanafis, 'Amm and Khass are both definitive and as such a conflict between them is possible, whereas to the majority, only the Khass is definitive and it would always prevail over 'Amm which is speculative[106].

The Hanafis maintain that in the event of a conflict between the general and the specific in the Qur'an, one must ascertain the chronological order between them first; whether, for example, they are both Makki or Madani text or whether one is Makki and the other Madani. If the two happen to be parallel in time, the Khass specifies the 'Amm. If a different chronological sequence can be established between them, then if the 'Amm is of a later origin, it abrogates the khass, but if the Khass is later, it only partially abrogates the 'Amm. This is because the Hanafis maintain that the Khass specifies the 'Amm only when they are chronologically parallel, both are definitive and both are independent locutions[107].

M.A., Op. cit., Vol.1, P.338-340, Ar-Razee, M.U. (1400): *Al-mahsul*, Imam Muhammad Su'ud Islamic University, Riyadh, Vol. 1, p.501.

[106] Kamali, M.H., Op. cit., P.109, Abu-Zahrah, M., Op. cit., P.167, Ar-Razee, M.U., Op. cit., Vol.1 P.501, Khudaree, M.B., Op. cit., p. 155-156.

[107] Kamali, M.H., Op. cit., P.109, Abu-Zahrah, M., Op. cit., P.167

The majority of scholars, as already noted, do not envisage the possibility of a conflict between the ‘Amm and the Khass: when there are two rulings on the same point, one being ‘Amm and the other Khass, the latter becomes explanatory to the former and both are retained.[108]

2.4.4 Instance on the differences due to the general and the specific provisions of the Qur’an:

Ruling on one-fifth of the war booty:

Muslim jurists are in agreement that, the booty acquired through force from the hands of the Romans, except the lands, one-fifth of it is for the Imam, and that, the other four-fifths of it is for those that fought for it, based on the Quranic text: “And know that out of all the booty that you may acquire (in war), a fifth share is assigned to Allah and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer…”[109] The jurists have differed regarding the one-fifth of the booty into four popular views:

1. As-Shafi’ee, Ahmad and the Zahiris, held the view that, the one-fifth should be divided into five portions according to the Quranic text[110].

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[108] Kamali, M.H., Op. cit., P.109, Abu-Zahrah, M., Op. cit., P.167, Khudaree, M.B., Op. cit., p.156, Abu Zahrah, M., Op. cit., p.166-167.

[109] Q8:41

[110] Hamidee, A.K. Op. cit. V.1, P.252, Ibn Rushdy, M.A. (1975/1395): *Bidaayatul-Mujtahid*, Mustafa Al-baabee Al-halbee and son’s publication, Egypt, 4th Edition, V.1, P.390, , An-Nawawee, M.Y. (nd): AlMajma’, Vol.19, Shamela Library, 2nd version 2.11. p.369,

2. Another view is that, the one-fifth should be divided into four portions. Imam At-Tabaree held this view[111].

3. Both Abu-Hanifah and his companions, held the view that, the one-fifth should be divided into three portions, and that, the share of the Apostle of Allah (Peace Be Upon Him) and the near relatives, has been waived by the demise of the Apostle of Allah (Peace be upon him)[112].

4. Malik and majority of the jurists held the view that, the one-fifth is like fai'u (booty), it should be given to both the Wealthy people and the poor ones[113].

The cause of these differences revolve around the general and the specific, that is to say that, the mentioned categories in the text, is it that the purpose is to restrict the one-fifth to them or the purpose is just to create an awareness through them on behalf of other categories apart from them which will now be regarded as the specific provision that is intended with the general?[114]

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[111] Hamidee, A.K. Op. cit. V.1, P.252, Ibn Rushdy, M.A., op. cit., V.1, P.390, Ibn Abdul Barr, Y.A. (2000): *Al-Istidhkaar* , Daarul Kutubil ilmiyyah,Beirut, V.5, P.78-84,

[112] Hamidee, A.K. Op. cit. V.1, P.252, Ibn Rushdy, M.A.M.A., op. cit., V.1, P.390,
Ibn Jawzee, S.(nd): *Eethaarul insaaf fi Athaaril khilaaf*, Daarus Salaam, Cairo, 1st ed., P.235,

[113] Hamidee, A.K. Op. cit. Vol.1, P.253, Ibn Rushdy, M.A., Op. cit., V.1, P.390, Al-Qaraafee, A.I. (1994): *Adh-dhakhirah,* Daarul grabi, Beirut, Vol.3, p.431, Ibn Abdul Barr, Y.A., Op. cit. Vol.5, p. 78

[114] Hamidee, A.K. Op. cit. V.1, P.253, Ibn Rushdy, M.A., Op. cit., Vol.1, P.390

Thus, who among the jurists that have regarded it as the specific provision that is intended with the specific (khass), said: the one-fifth of the war booty cannot transit beyond the mentioned categories in the text, this is the view of the majority. And who among them that has regarded it as the specific provision that is intended to be general (aam), said; it is allowed for the Imam to direct it towards what he sees as beneficial to the Muslims.[115]

2.5 **Absolute and Qualified (Mutlaq and Muqayyad):**

A Mutlaq (lit. unconditional) text is one that is absolute in its scope, not limited to what it applies. It differs from the 'aam' in that the 'aam applies to all members that are included in its meaning simultaneously without exception, whereas the mutlaq can only apply to one member of its meaning. In other words, 'aam' applies to all the members of a specific set, whereas mutlaq only applies to any one member of a specific set[116].

An instance of a mutlaq text in the Qur'an is, "But those who divorce their wives by Zihar then wish to go back on the words they uttered, it is ordained that such a one should free a slave"…[117]

[115] Hamidee, A.K. Op. cit. Vol.1, P.253, Ibn Rushdy, M.A., Op. cit, Vol.1, P.390
[116] Qadhi, A.Y., Op. cit., P.229, Kamali, M.H., op. cit., P.110, Zaydanee, A., Op. cit., P.225, Al-Khalaaf, A., Op. cit., P.212, Abu-Zharah, M., Op. cit., P.170, As-shawkanee, M.A., Op. cit., Vol.2, p.5.
[117] Q58:3

The condition or quality of the slave has not been specified, so the text is mutlaq since only one slave must be freed, it is not 'aam'; had it applied to all slaves, then it would be 'aam.[118]

The Muqayyad (lit. qualified) occurs when a mutlaq is specified by an adjective. For example, the word 'house' is mutlaq, but 'a two-story house' is muqayyad, since there is a condition attached to the house. An instance of a muqayyad text in the Qur'an is, "whoever kills a believer unintentionally must free a believing slave" …[119] This text is muqayyad since it specifies that in this case the slave must be a Muslim.[120]

Mutlaq denotes a word which is neither qualified nor limited in its application. When we say, for example, a 'book', a 'bird', or a 'man', each one is a generic noun which applies to any book, bird or man without any restriction. In its original state, the mutlaq is unspecified and unqualified. The mutlaq differs from 'Amm, however, in that the latter comprises all to which it applies whereas the former can apply to any one of a multitude, but not to all.

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[118] Qadhi, A.Y., op. cit., P.229, Kamali, M.H., op. cit., P.110, Zaydanee, A., Op. cit., P.225, Al-Khalaaf, A., op. cit., P.212, Abu-Zharah, M., op. cit., P.170

[119] Q4:92

[120] Qadhi, A.Y., op. cit., P.229, Kamali, M.H., op. cit., P.110, Zaydanee, A., Op. cit., P.225, Al-Khalaaf, A., op. cit., P.212, Abu-Zharah, M., op.cit., P.170, As-shawkanee, M.A., op. cit., Vol.2, p.6.

An instance of a mutlaq text in the Qur'an is the expiation of futile oaths, Allah the Almighty says: … or the freeing of a slave"[121]

The command in this text is not limited to any kind of slaves, whether muslim or non-muslim.

When the mutlaq is qualified by another word or words, it becomes a Muqayyad, such as qualifying 'a book' as 'green book', or 'a bird' as 'a huge bird' or 'a man' as 'a wise man'.

The muqayyad differs from the khass in that the former is a word which implies an unspecified individual or group of persons who is merely distinguished by certain attributes and qualification.

Another instance of a muqayyad text in Qur'an is the expiation for erroneous killing. Allah the Almighty says: "whoever kills a believer unintentionally must free a believing slave…"[122]

In contrast to the first which is conveyed in absolute terms, the command in the second text is qualified in that the slave to be released must be a Muslim.[123]

[121] Q58:3
[122] Q4:92
[123] Kamali, M.H., op. cit., P.110, Zaydanee, A., Op. cit., p.225 -226, Al-Khalaaf, A., Op. cit., P.213, Abu-Zharah, M., op. cit., P.171, As-shawkanee, M.A., op. cit., Vol. 2, P.6.

2.5.1. **Ruling on Absolute (Mutlaq) and Qualified (Muqayyad)**

The Mutlaq remains absolute in its application unless there is a limitation to qualify it.

If there is no indication to qualify the terms of the Qur'anic command, it is to be implemented as it is.

But when a Mutlaq is qualified into a Muqayyad, the latter is to be given priority over the former[124].

2.5.2. Prevalence of the qualified over the absolute

When one text appears in mutlaq form, and a similar text for another case appears in maqayyad, if the two texts convey the same ruling but differ in their causes, the jurists disagree as to whether the mutlaq ruling is affected by the muqayyad. To illustrate this, we refer to the two Qur'anic texts on the subject of witnesses. 'And get two witnesses, out of your own men"[125]. 'And take for witness two persons from among you, endued with justice'[126]. The first of the two texts does not qualify the word 'men' when it provides 'and get two witnesses from among your men'. But the second text on same subject, that is, of witnesses, conveys a qualified command when it provides 'and take two just witnesses'. The ruling in both of these texts is

[124] Hamidee, A.K., Op. cit., Vol.1, P.34, Kamali, M.H., Op. cit., P.111, Zaydanee, A., Op. cit., P.226, As-shawkanee, M.A., Op. cit., Vol.2, p.6.

[125] Q2:282
[126] Q65:2

the same, namely the requirement of two witnesses, but the rulings differ in respect to their causes. The cause of the first text relates commercial transactions which must accordingly be testified to by two men; whereas the cause of the second ruling is the revocation of talaq (divorce). In the first text witnesses are not qualified, but they are qualified in the second text.

According to the majority opinion, the latter prevails over the former. But the Hanafis maintain that when the Muqayyad and the Mutlaq differ in their causes, none overrides the other and that each should be implemented independently[127].

To give another illustration, again of two texts, one Mutlaq, the other Muqayyad, both of which convey the same ruling but differ in respect of their causes. Hence we refer to the two Qur'anic texts on the subject of expiation. One of these, which requires the expiation for divorce by Zihar, is conveyed in absolute terms, whereas the second which requires the expiation for erroneous killings, is qualified. Where Allah The Almighty says: 'But those who divorce their wives by Zihar then wish to go back on their words they utttered, it is ordained that such a one should free a

[127] Kamali, M.H., op. cit., P.112, Qadhi, A.Y., op. cit., p.230, As-shawkanee, M.A., Op. cit., Vol.2, p.6-9.

slave…..'[128] 'Whoever kills a believer unintentionally must free a believing slave…..'"[129]

The first of these two texts does not qualify the word 'slave' when it provides 'such a one should free a slave'. But the second text on same subject, that is, of expiation, conveys a qualified command when it provides '….must free a believing slave'. The ruling in both of these texts is the same, that is, expiation, but the two rulings differ in respect of their causes. The cause of the first text, as already stated, is divorce by Zihar; whereas the cause of the second ruling is the erroneous killing. In the first text expiation is not qualified, but it is qualified in the second text.

According to the majority (the Shafi'ees, Malikees and Hambalees), in this case the Mutlaq is affected by the Muqayyad, and the slave that is freed in the case of zihaar must be a Muslim[130].

According to the Hanafees, on the other hand, the Mutlaq is not affected by the Muqayyad in this case, and it is allowed to free a non-Muslim slave in the case of zihaar[131].

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[128] Q58:3
[129] Q4:92
[130] Qadhi, A.Y., op. cit., p.230, See also; Abu-Zahrah, M., op. cit., P.171, Zaydanee., A., op. cit., P.227, Khalaaf, A., op. cit., P.213, As-shawkanee, M.A., op. cit., Vol.2, p.6-9.
[131] Qadhi, A.Y., op. cit., P.230, See also; Abu-Zahrah, M., op. cit., P.171, Zaydanee., A., op. cit., P.227, Khalaaf, A., op. cit., P.213, As-shawkanee, M.A., op. cit., Vol.2, p.6-9.

From the foregoing chapter, it has shown that texts in the Qur'an are divided into two main categories of clear and unclear. A ruling which is communicated in clear words may constitute the basis of obligation, without any recourse to interpretation. A ruling which is communicated in unclear words may not necessarily constitute the basis of obligation because the meaning which it conveys is ambiguous or incomplete and requires clarification.

The provisions of the Shari'ah are classified into definitive and speculative. A definitive text is one which is clear and specific, it has only one meaning and admits no other interpretations. The speculative texts of the shari'ah are on the other hand, open to interpretation and ijtihad.

The provisions of the shari'ah are also classified into the general and specific.The 'Aam or the general provision found in the text of the shari'ah is of three types; the 'Aam or the general provision which is absolutely general, the 'Aam which is meant to imply a khass (specific), and the 'Aam which is not accompanied by either of the foregoing two varieties.

Al-Mutlaq or unqualified denote a word which is neither qualified nor limited in its application. If we say for example, a 'book' a 'bird' or a 'man' each one is a generic noun which applies to any book, bird or man without any restriction. In its original state, the mutlaq is unspecified and unqualified. Al-Muqayyad or qualified occurs when a mutlaq is specified

by an adjective. When the mutlaq is quantified by another word or words, it becomes a muqayyad.

CHAPTER THREE
THE TEXTS OF THE SUNNAH

3.1 Introduction

The Sunnah is the second source of Islamic law, the first being the Qur'an – The Holy Qur'an and the Sunnah of the Holy Prophet (peace and blessing of Allah be upon him) are generally regarded and accepted as the primary sources and divine components of Islamic law. The Sunnah is an exposition and explanation of the concise provisions of the Holy Qur'an.

The Sunnah explains the general and specific ordinances, specifies or restricts many of the general and unrestricted commands of the Qur'an; explains the details and applications of the Qur'anic commandments and prohibitions; provides additional ordinances and regulations not found in the Qur'an but which are part of the religion of Islam; clarifies on the rules of abrogation and provides further details for incidents mentioned in the Qur'an.

The broadest and most comprehensive of all definitions of the Sunnah, according to the scholars of Hadith, is that, Sunnah is "What has been passed down from the prophet (peace and blessing of Allah be upon him) of his statements, actions, tacit approvals, manners, physical characteristics or

biography, regardless of whether it was before he was sent as a prophet or afterwards"[1].

The detailed evidences found in the Sunnah are divided as follows:

1. Texts which are definitive both in respect of authority and meaning. Where this kind of Sunnah is established, it is not subject to interpretation.

2. Texts which are authentic in their authority but speculative in meaning.

3. Texts which are of doubtful authority but definitive in meaning.[2]

4. Texts which are speculative with respect to both authority and meaning.

Interpretation does not apply to only the first of these mentioned categories, while in respect of the three others, interpretation plays role.

These foregoing characteristic features of the Sunnah as a binding proof are in addition to the characteristics features of legislation shared by both the Qur'an and the Sunnah.

The Sunnah, just like the Qur'an, may atimes in its meaning convey manifest meaning but not in harmony with the text in which it occurs.

A text of the Sunnah may appear in the general term but need not to be specified or might have been specified in or by another text.

Another text of the Sunnah may appear in the absolute form but need not be qualified or might have been qualified in or by another text of the Sunnah elsewhere. Similarly, a text may apparently convey command or

[1] Arsalan, M. (2014): *An Introduction on the Status of Sunnah as a Source of Islamic Law*, A.B.U. Press Limited, Zaria, p.3.

[2] Kamali, M.H, Op. Cit, P.316, Nyazee, I.K.A, Op. Cit, P.148

prohibition form, but the injunction in such command does not amount to a binding one, just as the injunction in such prohibition does not amount to a forbidding one.

However, it may be concluded that, it is these characteristic features that formulate the nature of the Sunnah, make the phenomenon for differences in interpretation regarding the Sunnah inevitable.

Thus, this chapter will show that the nature of the text of Sunnah itself as a source of law, contributed largely to differences among the jurists.

3.2 **Narration of the Sunnah**

The causes of juristic differences which developed among jurists over the narration and application of Sunnah may be subdivided as follows:

3.2.1 **Unawareness of some Hadith:**

Firstly, when the hadith did not reach the jurist, and if the Sunnah has not reached the jurist which he had said something regarding the matter, based on what manifests from the text of the Qur'an, or another Sunnah, or analogy, or principle of presumption, this may in one case agree with the Sunnah and in another disagree with it[3].

[3]Haamidee, A.K., Op.cit., Vol.1, P.182, Ibn Tarmiya, A. (1998/1408): *Raf'ul malaam an Aimatul 'aalam*, Darul Kutubil ilmiyah, Beirut-Lebanon, 2nd Edition, P.4, Al usaimin, M.A., *Alkhlaf bainal ulamaa*, Darul Watan Linashri, P.10, see Ad-Dahlawee, A.W. (1404): *Al-Insaaf fi Bayaan Asbaabil ikhtilaaf*, Daaru Nafaais, Beeirut, p.23.

Nafaais, Beeirut, p.23.

Secondly, the Sunnah might have reached the jurist, but its authenticity is doubted by him because the reporter or the person the reporter had reported from among the chain of transmission is unknown to him, or he is suspect, or he is a person of poor memory[4].

Thirdly, the Jurist may perceive that the sunnah is weak, based on juristic reasoning by which another jurist has held contrary opinion and he has failed to consider the fact that, correct opinion may be either with him or the other jurist, or that even both of them might be correct[5].

Fourthly, the sunnah might reached the jurist and he has no doubt, in its authenticity, but he had forgotten the particular sunnah[6].

3.2.2 **Instances on differences due to unawareness of the Sunnah**

Both Ali bn Abi Talib and Abdullahi bn Abbas, ruled that a pregnant woman whose husband dies will have to observe the longer duration at the waiting period, i.e., between four months and ten days and delivery of the child. That is, if the woman delivers before four months and ten days, she has not completed her waiting period, she will have to wait until she

[4] Haamidee, A.K., Op. cit., Vol.1, P.182, Ibn Taimiya, A., Op. cit., P. 5, Al usaimin, M.A., Op. cit., P.10
[5] Ibid
[6] Ibid

completes four months and ten days, and if she spends four months and ten days, before she could deliver, she will have to stay until she delivers[7].

Both Ali and Ibnu Abbas (may Allah be pleased with them) were not aware of the Sunnah of the holy Prophet (peace be upon him) regarding Subailatu Al-Aslamiyah whose husband died and the Prophet (peace be upon him) ruled that, her period ends with her delivery[8].

The case of Fatimah bintu Qais (may Allah be pleased with her) whose husband divorced her in three sittings, the guardian of the man sent food to her during her waiting period which she refused to take it. The matter got to the Prophet (peace be upon him) who ruled that, she has no right to shelter nor housing because the type of divorce here is irrevocable in which case the spending is not on the man except in the case of a pregnant woman, according to the text of the Qur'an.

The Sunnah was hidden to Umar (may Allah be pleased with him) who ruled that, woman in this condition has right to shelter and housing.

Umar (may Allah be pleased with him) rejected this hadith claiming that, Fatimah bintu Qais, who reported the Sunnah herself, might have forgotten,

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[7] Al- usaimin, M.S., Op. cit., P. 10, bn Taimiya, A., Op. cit. P. 6, Abdul Baar, A.M. (2006/1426): *Ar-Riwaayat At-Tafseeriyah,* Waqfus Salaam Al-khayree, 1st ed., V.3, p.1223, As-Sayutee, A.K. (1993): *Ad-Durrul Manthur,* Daarul Fikr, Beirut, p.203, Ibn Katheer, A.H., Op. cit., Vol.4p.352.

[8] Al usaimin, M.S., Op. cit., P. 11, Ibn Taimiya, A., Loc. cit., P.7, Al-ash'ath, A.S. (nd): *Sunan Abi Dawud,* Daaru kitabil 'Arabee, Beirut, Vol.2, P.262, Hadith No. 2308, Al-Qazwainee, M.Y. (nd): *Sunan Ibn Majah,* Daarul Fikr, Beirut, Vol.1, p.653, Hadith No. 2027.

when he said, i.e. Umar, "Are we to abandon the saying of our Lord, for the saying of a woman that we are not sure, who may have remembered correctly or forgotten"[9].

The leader of the Muslims – Umar – departed during his time from Medina with the companions for Sham. On the way, Umar (may Allah be pleased with him), was told that an epidemic had broken out in the land, Umar stopped and consulted the companions with him, the companions differed in their opinions for proffering solution to the matter. But the most prevailling view was that they should return back, while they were on this, Abdulr-Rahman who was unavoidably absent, came to meet them, and he said to them, I have knowledge as to the issue at hand, I heard the Messenger of Allah (peace be upon him) saying: "If you hear about it (an outbreak of plague) in a land, do not go to it; but if plague breaks out in a country where you are staying, do not run away from it". Umar thanked Allah and returned to Medina.

This law was hidden to all the companions until Abdulr-Rahman bin 'Auf informed them of the rule[10].

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[9] Al usaimin, M.S., Op. cit., P. 11, Ibn Taimiya, A., Loc. cit., P. 7, Ibn Al-Mahdee, A.M. (2002/1422): *Al-Bahrul Madeed* , Daatul Kutubil 'ilmiyyah, Beirut, Vol.8, p.107, Al-Qurtubee, M.A. (2003/1423): *Al-Jaamiu li Ahkaamil Qur'an,* Daarul 'Alamil Kutub, Riyadh, Vol.18,p.168, Ath-Tha'labee, M.A. (2003/1422): *Al-Kashfu wal Bayaan,* Daaru Ihyaau turaath al-ilmee, Vol.9, p.335.

[10] Al usaimin, M.S., Op. cit., P. 15, Ibn Taimiya, A., Loc. cit., P. 10, An-Naisaaburee, M.H. (nd): *Al-Jaamiu As-Sahih*, Daarul Jalee and Daarul Afaaq Al-Jadeedah, Beirut, Vol.7, p.29, Hadith No. 5915.

The case of Abubakr who was asked regarding the share of grandmother in inheritance. He said, "you have no share in the Book of Allah, and I do not know anything as regard the Sunnah, but I will ask the people". He asked them, and Al-Mugirah bin Shu'bah and Muhammad bin Maslamah- May Allah be pleased with them- both stood up and testified that the Apostle of Allah –peace be upon him- gave one-sixth (1/6) as her share.[11]

The case of Umar –May Allah be pleased with him- who used to prevent a pilgrim from putting scent when he is to assume Ihram and also before the Tawaf-round the Ka'abah after throwing the stones at 'Aqabah, and his son Abdullah bin Umar, and some other companions as well, this was because the Sunnah reported by 'Aisha, the wife of the Apostle did not reach them. 'Aisha narrated: "I used to scent Allah's Apostle when he is to assume Ihram and also on finishing Ihram before the Tawaf round the Ka'abah (Tawaf-al-ifada)"[12].

The case of Umar bin Khattab –May Allah Be pleased with him- who was asked concerning the man who becomes junub but has no water available. Umar said: "That man will not pray until he gets water". 'Ammar bin Yasir said to 'Umar; "Do you remember that you and I (become Junub while both

[11] Al usaimin, M.S., Op. cit., P. 22, Ibn Taimiya, A., Loc. cit., P. 10, Ad-Dahlawee, A.W., Op. cit., p.19.

[12] Al usaimin, M.S., Op. cit., P.23, Ibn Taimiya, A., Loc. cit., P.11, An-Naisaaburee, M.H., loc. Cit., Vol.4, p.10, Hadith No. 2882,2883&2884, Al-Bukharee, M.I. (1987/1407): Sahih Bukharee, Daaru Ibn Katheer, Beirut, Vol.2, P.624, Hadith, No. 1667.

of us) were together on a Journey and you didn't pray but I rolled myself on the ground and prayed? I informed the Prophet about it and he said, 'it would have been sufficient for you to do like this. 'The prophet then stroked lightly the earth with his hands and then blow off the dust and passed his hands over his face and hands".

Umar said to 'Ammar; fear Allah, 'Ammar said; if you like I will not say this again. Umar then said; "We shall leave you in this path you have chosen"[13]

This is a Sunnah that Umar witnessed, but he has forgotten, such that he gave a contrary verdict, and even when he was reminded by 'Ammar, he could not recall[14].

3.2.3. **Conditions for the acceptance of the Solitary Sunnah (Ahad)**

Another key cause of differences among jurists in the area of Sunnah, are the various conditions they placed on the acceptability of solitary Sunnah (ahad).

For example, Imam Abu Haneefah stipulated that a Hadeeth had to be Mash-hoor (well known) before being regarded as admissible evidence,

[13] Al-Bukharee, M.I., loc. Cit., Vol.1, P.133, Hadith No: 340, An-Naisaaburee, M.H., Op. cit., Vol.1, p.193, Hadith No: 846.

[14] Al usaimin, M.S., Op. cit., P. 22-23, Ibn Taimiya, A., Op. cit., P. 16,

whereas Imam Maalik stipulated among others that a Hadeeth must not contradict the customs of the Madeenites in order to be admissible.

On the other hand, Imam Ahmad considered Mursal Hadeeth acceptable as proof, while Imam Ash-Shaafi'ee accepted only the mursal Hadeeths of Sa'eed ibn Al-Mussayyib which most Hadeeth scholars felt were highly authentic[15].

The Hanafis stipulate three conditions for the Khabar al-wahid (solitary Sunnah):

1. That the narrator should not have acted against the implication of the report. If he does act against it, the reliance will be upon his reported act rather than on the report. A narrator does not act against a report from the prophet, unless he knows that the content of the report was abrogated.

2. That the report should not pertain to a matter of universal or occurrence, that is, something which is performed often and continuously repeated. Such an act requires that it be known to many people due to their need to know it prior to performance (Ma ta'ummubihil balwa).

3. That it should not run contrary to analogy (qiyas). By this is meant the general and fundamental principles. If a report opposes a general principle it ceases to be a valid proof for the ahkam (legal rules). The reason is that

[15] Philips, A.B., Op. cit., p.98, see also Nyazee, I.A.K, Op. cit., P. 176-177, Kamali, M.H. Op. cit., P.76, Haamidee, A.K., Vol.1, P. 183, Abu-Zahrah, M., Op. cit., P. 109-110, Zaydanee, A., Op. cit., P. 136-137.

the principle is usually not derived from a single text, but is based upon a number of texts, which together indicate a definitive meaning[16].

As compared to this, a Khabar al- wahid (Solitary Sunnah) a probable meaning that cannot be preferred over a definitive meaning[17].

Imam Malik stipulates for the Khabar al- wahid that it should not oppose the practice of the people of Medinah. If it does oppose it, the obligation is to follow the practice of the people of Medina and to forgo the rule indicated in the Khabar al- wahid. The reason is that the practice of the people of Medina amounts to a mutawatir report, and the mutawatir being definitive is to be preferred over the Khabarwahid, which is probable.[18]

Imam al-shafi'ee does not stipulate for the khabar al- wahid any other condition except that it should have a sound and complete chain of narration. If these conditions are met the report is to be accepted[19].

The condition stipulated by Ahmad ibn Hanbal is similar to that laid down by Imam al-shafi'ee, however, he sometimes accepted traditions that do not

[16] Nyazee, I.A.K, Op. cit., P. 176-177, Kamali, M.H. Op. cit., P.76, see Haamidee, A.K., Vol.1, P. 183-184, see Abu-Zahrah, M., Op. cit., P. 109-110, see Zaydanee, A., Op. cit., P. 136-137

[17] Nyazee, I.A.K, Op. cit., P. 176, Kamali, M.H. Op. cit., P.76, see Haamidee, A.K., V.1, P. 183, see Abu-Zahrah, M., Op. cit., P. 109, see Zaydanee, A., Op. cit., P. 136-137

[18] Nyazee, I.A.K, Op. cit., P. 176, Kamali, M.H. Op. cit., P.76, see Haamidee, A.K., Vol.1, P. 183, see Abu-Zahrah, M., Op. cit., P. 109, see Zaydanee, A., Op. cit., P. 136-137.

[19] Nyazee, I.A.K, Loc. Cit., P. 177, Kamali, M.H. Op. cit., P.76, see Haamidee, A.K., Vol.1, P. 184, see Abu-Zahrah, M., Op. cit., P. -110, see Zaydanee, A., Op. cit., P. 137

strictly meet this condition. He is reported to have preferred even mursal traditions over analogy[20].

3.2.4 **Instances on Differences of Opinion Due to Solitary Sunnah**

Abu Hanifah does not rely on the following Sunnah, narrated by Abu Hurrayrah(may Allah be please with him): "When a dog licks a dish, wash it seven times, one of which must be with clean sand".[21] Abu Hurrayrah did not act upon it himself, rather he had been seen washing his three times not seven times. Since the requirement of washing is normally three times, the report is considered weak, including its attribution to Abu Hurrayrah. The majority, on the other hand, take the view that discrepancies between the action and the report of a narrator may be due to forgetfulness or some other unknown factor. Discrepancies of this kind do not, by themselves, provide conclusive evidence to render the report unreliable[22].

The report, for example, that "Anyone who touches his genitals must take a fresh ablution"[23], is not accepted by the Hanafis. The Hanafis have explained: had this Sunnah been authentic, it would have become an

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[20] Nyazee, I.A.K, Op. cit., P. 177, Kamali, M.H. Op. cit., P.76, see Haamidee, A.K., Vol.1, P. 184, see Abu-Zahrah, M., Op. cit., P. 110, see Zaydanee, A., Op.cit., P. 137.

[21] . An-Naisaaburee, M.H., Op. cit., Vol. 1, p.161. Hadith No. 674

[22] Kamali, M.H., Op. cit., P. 76, see Zaydanee, A., Op. cit., p.136, see Abu-Zahrah, M., Op. cit., p. 109.

[23]. At-tibrizee,M.A. (nd): *Mishkaat al-Masaabeeh*, Al-maktabul Islaamee, Beirut, 3rd edition, vol. 1, p. 68, HadithNo. 319.

established practice among all Muslims, which is not the case. The Sunnah is therefore not reliable.

The majority of scholars, however, do not insist on this requirement on the analysis that people who witness or observe an incident do not necessarily report it.[24]

The Hanafis have rejected the Sunnah of Musarrat, that is the animal that is left unmilked deliberately so that its udders remain full and give a false impression as to the quality of the animal so as to impress the buyer. The Sunnah is as follows: "Do not retain milk in the udders of a she-camel or goat so as to exaggerate its yield. Anyone who buys a musarrat has the option for three days after having milked it, either to keep it, or to return it with a quantity of dates"[25].

The Hanafis regard this Sunnah to be contrary to qiyas, that is, to logic with the rules of equality between indemnity and loss. Abu Hanifah has held the view that the Sa' of dates may not be equal in value to the amount of milk the buyer has consumed[26].

[24] Kamali, M.H., Op. cit., P. 77, see Zaydanee, A., Op. cit., p.136, see Abu-Zahrah, M., Op. cit., p. 109

[25] An-Naisaaburee, M.H., Op. cit., vol.5, p. 6, Hadith No. 3910

[26] Kamali, M.H., Op. cit., P. 77, see Zaydanee, A., Op. cit., p.136, see Abu-Zahrah, M., Op. cit., p. 109

Hence if the buyer wishes to return the beast, he must return it with the cost of milk which was in its udders at the time of purchase, not with a fixed quantity of dates.[27]

The majority of scholars, including Malik, ash- shafi'ee, ibn Hambal and the disciples of Abu Hanifah, (Abu Yusuf and Zufar), have on the other hand accepted this Sunnah and have given it priority over qiyas.

According to the majority view, the compensation may consist of a Sa'of dates or of its monetary value. Dates were specified in the Sunnah as it used to be the staple food in those days, which may not be the case anymore[28].

The Malikis have refused to follow the Sunnah regarding the option of cancellation (Khiyar al-majlis) which provides that "The parties to a sale are free to change their minds so long as they have not left the venue of the contract"[29].The reason being that this Sunnah is contrary to the practice of the people of Medina[30].

The practice of Madinites on this point subscribed to be view that a contract is complete when the parties express their agreement through a valid offer and acceptance.

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[27] Kamali, M.H., Op. cit., P. 78, see Zaydanee, A., Op. cit., p.137, see Abu-Zahrah, M., Op. cit., p. 109.

[28] Kamali, M.H., Op. cit., P. 78, see Zaydanee, A., Op. cit., p.137, see Abu-Zahrah, M., Op. cit., P. 109

[29] .An-naisaaburee, M.H., Op.cit., V.5, P. 9. Hasith No. 3930.

[30] Kamali, M.H., Op. cit., P. 78, see Zaydanee, A., Op. cit., p.137, see Abu-Zahrah, M., Op. cit., p. 109

The contract is binding as of that moment regardless of whether the 'meeting of contract continues or not'[31].

3.3 **Definitive and Speculative Provisions of the Sunnah**

The Suunah, with respect to transmission, could be definitive, like the case of tawaatur or report by a large group of persons that cannot be expected to agree upon a lie, all of them together, and it could be speculative, as it is in the case of Sunnah which has not been transmitted in a form that reaches the level of tawaatur, like solitary Sunnah.

But the Sunnah, with respect to meaning, could be speculative or definitive, and the Sunnah, in this category, is like the Qur'an.

The meaning of Sunnah is speculative where the text conveys more than one meaning or when it is open to interpretation.[32]

[31] Kamali, M.H., Op. cit., P. 78, see Zaydanee, A., Op. cit., p.137, see Abu-Zahrah, M., Op. cit., p. 108

[32] Zaydanee, A., Op. cit., P.139, See Khalaaf, A., Loc. Cit., P.45, See Al-Shatibee, I.M., Op. cit., Vol.4, P.294, Ibn Taimiya, A., Op. cit., p.36

3.3.1 **Instances on Definitive Provisions of the Sunnah**

To give an example, the Sunnah which provides among the Sunnah that are regarded as definitive in regard to Zakah (alms) on camels that "A goat is to be levied on every five camels"[33] has a clear meaning, which is why the jurists are in agreement that there is no Zakah on less than five camels.

The prohibition regarding simultaneous marriage to the maternal and paternal aunt of one's wife has a clear meaning, which is why this case is often referred to as 'unlawful conjunction' or *maani'u bilibtida wad dawaam*[34].

3.3.2. **Instances on differences due to Speculative provision of the Sunnah**

An example is the Sunnah that says that: "There is nothing out of the inheritance for the Killer" or "The killer shall not inherit"[35]. The question is whether the killing here means qatlul-'amd (intentional homicide), or shibh al-'amd (quasi – intentional homicide), qatlulkhata' (mistaken homicide), or even homicide caused indirectly. The options of the jurists, therefore, vary.[36]

The jurists differed with regard to whether the killer shall inherit or not into four views:

[33] Abu Daawud, S.A., Loc. Cit., vol.2, p.8, Hadith No. 1570.
[34] Kamali, M.H., Op. cit., P.317, See Zaydanee, A., Op. cit., P.139
[35]. Abu Daawud, S.A., Op. cit., vol.4, p.313, Hadith No. 4566
[36] Nyazee, I.M.A., Op. cit., P. 148-149

A group said the killer shall not inherit at all.

Another group said the killer shall inherit. They are the minority.

A group differentiated between mistaken homicide and intentional homicide or qatlul khata and qatlul 'amd, and they said: the killer shall not inherit in the case of qatlul-amd or intentional homicide, but he shall inherit in the case of qatlul-khata or mistaken homicide only from the blood money or diyah. This is the view of Malik and his disciples.

Another group distinguish the cases of qatlul-amd or intentional homicide, i.e., whether it is justified or not; like the execution carried out for a capital offence and the case of unjustified killing.[37]

We may refer to the Sunnah which provides: i.e. "There is no Salah (prayer) without the recitation of Surah al-Fatihah"[38]. It is open to different interpretations in the sense that it could mean either that salah without the Fatihah is invalid, or that it is merely incomplete.

The Shafi'ts have held that salah without the Fatihah is invalid while the Hanafis have adopted that salah without the Fatihah is merely incomplete[39].

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[37] . Ibnu Rushdy, M.A., Op., cit., Vol.2, P. 360, As-Shirazee, I.A. (nd) : Al-*Muhadhab fi Fiqh As-Shafi'ee* , Vol.2, p.24.

[38] Abu Daawud, S.A., Op. cit., vol.1, p.302, Hadith No. 822, Al-bukharee, M.I., Daaru ibu katheer, Beirut, 3rdedition, vol.1,p.263, Hadith No.723

[39] Kamali, M.H., Op. cit., P.317, See Zaydanee A., Op. cit., P.139

3.3.3 **Instances on differences due to General and Specific provisions of the Sunnah**

3.3.3.1 **What is permissible for a person in the State of Ihram to kill among the Vicious Animals?**

The jurists agree on the prohibition of land hunting for a person in the state of Ihram, except the five kinds of vicious animals stated in the text of the Sunnah. But they differed regarding what should be added and what should not be added to these five among other similar vicious animals into three groups:

1. Al-Imam-Malik, held the opinion that, every vicious animal is permissible for person in the state of Ihram to kill, and that non vicious animals are prohibited for person in the state of Ihram.[40]

2. Al-Imam-Abu-Hanifah was of the opinion that, a person in the state of Ihram is not permitted to kill dogs infected with rabies, except domestic dog (that became rabid) and wolf.[41]

3. Al-Imam-As-Shafi', held the opinion that, every prohibited animal for consumption is similar to the five mentioned vicious animals in the text of

[40] Haamidee, A.K., Op. cit., Vol.1, P. 251-252, Ibn Rushdi, M.A., Op. cit., Vol.1, P,364, Ibn Abdul Barr, Y.A., Op. cit. vol.4, p. 152

[41] Haamidee, A.K., Op. cit.,Vol.1, P. 251-252, Ibn Rushdi, M.A., Op.cit., Vol.1., P.364, As-Samarqandee, A. (1954/1421):*Tuhfatul Fuqahaa*, Daarul Kutubil 'ilmiyyah, Beirut, Vol.1, p.422,

the Sunnah.While Al-Imam Ahmad, supported the killing of every harmful animal[42].

The cause of these differences is the general provision of the Sunnah, narrated by ‘Abdullah bin Umar and some others, which the Apostle of Allah (peace be upon him) was reported to have said that: “It is not sinful to kill five kinds of animals, namely: the crow(al-guraab), the kite(al-hud ah) the rat (al-farah), the scorpion(al-‘aqrab), and the dog infected with rabies(al-kalbul-‘uqoor)”[43].

Thus, the jurists differed over whether the five mentioned vicious animals depict the general provision that was intended to be the specific or the specific provision that was intended to be the general?[44]

3.3.3.2 **Things considered Riba (Usury) in Transactions**

All the jurists are in agreement that, both addition and delay are not permissible with regard to any commodity among the six commodities mentioned in the Sunnah, but they differed regarding other things beside the six mentioned commodities into two groups:

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[42] Haamidee, A.K., Op. cit., Vol.1, P. 251-252, Ibn Rushdi, M.A., Op. cit., Vol.1, P,364, An-Nawawee, M.Y., (nd), Vol.7, P.333, Shamela Library 2nd Version, 2.11.

[43] .Al-Bukharee, M.I., Op. cit., Vol.2, P.749, Hadith No.1731

[44]Haamidee, A.K., Vol.1, P. 251-252, Ibn Rushdi, M.A., Op. cit., Vol.1, P,364

1. The Zahiris held the view that, addition is only prohibited as regard to the six mentioned commodities, and that, what does not fall under them is left as permissible.[45]

2. The majority held the view that, what is similar to these mentioned commodities in resemblance should be regarded like them by extension[46].

The cause of these differences is the general provision of the Sunnah, narrated by 'Ubaidah bin as- Samit, in which the Apostle of Allah (peace be upon him) was reported to have said that: "I heard the Messenger of Allah (peace be upon him) prohibiting the selling of gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, except it is the same and type for type, who so ever adds or seeks for an addition, indeed, he has done the act of riba (usury)"[47].

Thus, the Zahiris, considered this to be the specific provision intended with specific rule, while the majority on the other hand, considered this to be the specific provision but intended as a general rule[48].

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[45] Haamidee, A.K., Op. cit., Vol.1, P. 253-254, Ibn Rushdi M.A., Op. cit., Vol.2, P.129,

[46] Haamidee, A.K., Op. cit., Vol.1, P. 253-254, Ibn Rushdi M.A., Op. cit., Vol.2, P.129, An-Nawawee, M.Y., Op. cit., Vol.9 p.403, An-Naisaaburee, M.H., Op. cit., Vol.5, p.43, Hadith No: 4145, Al-Bukharee, M.I., Op. cit., Vol.2,p.750, Hadith No: 2027

[47] Abu Daawud, S.A., Op. cit., vol.3, p.254, Hadith No. 3351.

[48] Haamidee, A.K., Op. cit., Vol.1, P. 253-254, Ibn Rushdi, M.A., Op. cit., Vol.2, P.129

3.3.3.3 **Permissible parts for the Husband from the Menstruating Wife**

The jurists differed regarding having sexual relations with a wife in her menses and in regard to what is permissible of her body into three views:

1. Malik, As-Shafi' and Abu-Hanifah, held the view that, whatever is above the waist line from the woman is permissible for the husband.[49]

2. Ahmad, in one narration, held the view that, it is permissible to relate sexually with woman in her menses with what is in between the navel and the knee.[50]

3. Sufyan Athawri, Dawud az-zahiri- and Ahmad in another view reported from him, held the view that, the husband must avoid the orifice of blood only[51].

The cause of these differences revolve around whether the general provision in the text of Qur'an is specified by the Sunnah or it is that type of general text but which is intended to be specific.

Many traditions have been reported in regard to this issue, among which is the narration of Thabit bin Qais, from the Apostle of Allah (peace be upon him), who said: "Do everything with the menstruating woman except

[49] Haamidee, A.K., Op. cit., V.1, 259-260, Ibn Rushdi, Op. cit., Vol.1, P. 56-57, Ibn Abdul Barr, Y.A., Op. cit., Vol.1, p.320.

[50] Haamidee, A.K., Op. cit., V.1, 259-260, Ibn Rushdi, Op. cit., Vol.1, P. 56-57, Al-Bahutee, M.Y. (1402): *Kashaaful Qannaa'u,* Beirut, Vol.1, P.198, , As-Shirbeenee, M.A. (nd): *Mugnee Almuhtaaj,* Daarul Fikr, Beirut, Vol.1, p.110.

[51] Haamidee, A.K., Op. cit., V.1, 259-260, Ibn Rushdi, Op. cit., Vol.1, P. 56-57

having sexual intercourse"[52]. And the speculation in the Quranic text (Say: They are a hurt and pollution, therefore, keep away from women during menses…[53] is between regarding it as general except it is specified by another text or it is regarded as general but intended with specific, based on the text "say, it is a pollution", and pollution is usually on the orifice of blood[54].

3.3.3.4 **What should be the Selected time for Subhi prayer (Dawn Prayer)**

The jurists are in agreement that, the time for the Subhi prayer is the appearance of the true Fajir (dawn), and the last time for it is the appearance of the Sun; except what was reported by ibnu Al-Qasim and also by some of the Shafis, that the last time for it is Al-isfar, (brightness of the dawn), but they differed as regard to the selected time for Subhi into two views:

1. The jurists in Kufa, Abu-Hanifah and his companions, Athawri and many among the Iraqee jurists, held the view that, brightness of the dawn or Al-isfar is more preferable.[55]

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[52] An-Naisaaburee, M.H., Op. cit., Vol.1, p.169, Hadith No: 720.
[53] Q2:222
[54] Haamidee, A.K., Op. cit., Vol.1, 259-260, Ibn Rushdi, Op cit., Vol.1, P. 56-57.
[55] Hamidee, A.K., Op. cit., V.1, P. 264-266, Ibn Rushdi, Op. cit., Vol.1, P. 97-98, As-Samarqandee, A., Op. cit., p.102,

2. Malik, Ash-Shafi'i and his companions, Ahmad bin Hambal, Abu-Thawr and Dawud, held the view that, darkness of the dawn or at-taglis is more preferable[56].

The cause of these differences is the general and specific provisions of the Sunnah regarding this issue. Rafi' Ibn Khadij, (May Allah be pleased with him), narrated that, the Apostle of Allah (peace be upon him) said: "Allow brightness of the dawn, because whenever you allow the brightness of it, it is the biggest of reward"[57].

In another report, the Apostle of Allah (peace be upon him) was reported to have said when he was asked, which of the deeds is more reward able? He said: "prayer at the early time of it".

Thus, who among jurists, that regards the first report to be specific and the second to be general, based on his ruling on the common rule that says that, specific prevails over the general, and that the dawn prayer is exempted from the general[58].

[56] Hamidee, A.K., Op.. cit., V.1, P. 264-266, Ibn Rushdi, Op. cit., Vol.1, P. 97-98, Al-Mugdisee, M.M. (2003/1424): *Al-Furu'*, Muasasatur Risaalah, 1st ed., Vol.1, p.434.

[57] Abu Daawud, S.A., Op. cit., Vol.1, p.162, Hadith No. 424, Al-'ash'ath, A.S., Op. cit.,Vol.1, P.163, Hadith No: 426

[58] Hamidee, A.K., Op. cit.,Vol.1, P. 264-266, Ibn Rushdi, Op. cit.,Vol.1, P. 97- 8

3.3.3.4 Instances on differences due to the absolute and The qualified provisions of the Sunnah

3.3.3.4.1. Ruling of Zakah on animal that are not livestock

The jurists have differed regarding Zakat (alms) on camels, cows and sheep that are not livestock into three views:

1. No Zakat on any of these mentioned three if it is not livestock. This is the view of the classical jurists.[59]

2. Zakat is compulsory on any of these three whether they are livestock or not, Malik and al-Laith held this view.[60]

3. Zakat is compulsory on camel and sheep whether they are live stocks or not, but is not compulsory on cows except if they are live stock. This is the view of Abu Muhammad Bn Hazmin.[61]

The cause of these differences is the prevalence of the absolute over the qualified.

As for the absolute the Messenger of Allah was reported to have said; "In every forty sheep, one sheep"[62].

And as for the qualified, the Messenger of Allah was reported to have said: "On livestock of sheep there is Zakat"[63].

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[59] Hamidee, A.K., Op.. cit., Vol.2, p.581, As-Samarqandee, A., Op. cit., Vol.1, P.285.
[60] Hamidee, A.K., Op. cit., Vol.2, p.581, Ibn Abdul Barr, A.M., Op. cit., Vol.3, P.184.
[61] Hamidee, A.K., Op.cit., Vol.1, p.581.
[62] Abu Daawud, S.A., Op.cit., Vol.2, p.8, Hadith No. 1570.

Therefore, the jurists that take the absolute to prevail over the qualified held that: Zakat shall be levied on livestock and non livestock.

On the other hand, the jurists that take the qualified to prevail over the absolute, held: Zakat is on livestock only.

However, the prevalence of qualified over the absolute is the most popular.[64]

3.3.3.4.2 **Funeral Prayer on the Embryo**

The jurists differed on whether funeral prayer should be performed with regard to the embryo into three views:

1. Both Malik and ash- shafi'i held the view that funeral prayer is not performed on the baby until he is able to cry out.[65]

2. Abu Hanifah and Ibn Abi Laila held the view that the funeral prayer is performed, provided life has been blown to it, that is to say, the embryo must have stayed four months or more in the womb.[66]

3. Ahmad held the view that funeral prayer is performed on the embryo, provided it has stayed four months, even if it did not cry out.[67]

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[63] Ibid. Vol. 2, p. 9, Hadith No. 1569.
[64] . Hamidee, A.K., Op. cit., vol.1, p.20
[65] Ibid., Vol.1, p.317, see also Ibn Abdul Barr, A.M., Op. cit., Vol.3, p.39.
[66] Ibid. Vol.1, p.317.
[67] Ibid Vol.1, p.317,see also Al-Bahutee, M.Y., Op.cit., Vol.2, p.101.

The cause of these differences is the prevalence of the absolute over the qualified.

Imam TIrmidhi has narrated on the authority of Jabir bin Abdullahi from the Apostle who said: "Funeral Prayer is not performed on the baby, he does not inherit and he cannot be inherited, until he cries out".[68]

And he narrated also on the authority of al-Mugirah bin Shu'bah from the Apostle who said: "Funeral prayer is performed on the baby".[69]

Therefore, the jurists that rely on the sunnah of Jabir, held the report of Al-Mugirah is absolute, and this one is qualified, so therefore, what is obligatory is to give prevalence of the absolute over the qualified, which will now make the report of Al-Mugirah to mean "Funeral prayer is not performed on the baby until he is able to cry out".[70]

And the jurists that rely on the report of Al-Mugirah, held: it is known that what is considered in the performance of prayer is Islam and life, and the baby if he moves he is alive, and his ruling is that he is a Muslim and any Muslim that is alive, if he dies, funeral prayer is performed on him. Thus, the jurists who hold this view prefer this absolute signification over that qualified because it agrees with analogy.[71]

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[68] .At-trimidhi, M.I. (nd): *Al-jamu' AS-Sahih At-trimidhi,* Daaru Ihyaa At-tutaath Al-arabee, Beirut, Vol.3, P.350, Hadith No. 1032

[69] . Ibid., Vol.3, P. 349, Hadith No. 1031

[70] . Hamidee, A.K., Op. cit., Vol.1, P.318

[71] Ibid, vol.1, p. 318

3.5 **Apparent conflict of Texts**

Conflict occurs when each of two texts of equal strength indicates the opposite of the other. This would mean that if one of them affirms something, the other would negate it at the same time and place.[72]

A conflict is thus not expected to arise between two texts of unequal strength, as in this case the stronger of the two evidences would naturally prevail. Thus a genuine conflict cannot arise between a definitive and a speculative text nor could there be a conflict between the explicit ruling and consensus, nor between consensus and analogy, as some of these are stronger than others and would prevail over them[73].

A conflict may, however, be encountered between two texts of the Qur'an, or between two rulings of Hadith, or between a Quranic text and a mutawatir Hadith, or between two non-mutawatir Hadith, or between two rulings of qiyas. When there is a conflict between two Quranic texts, or between one Hadith and another Hadith, or between one qiyas and another analogies, it is a case of conflict between equals, because strength does not consist in number and consequently a single text, Hadith or qiyas is not necessarily set aside to make room for the pair.[74]

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[72] .Kamali, M.H. Op. cit., p.307, Zaydanee, A., Op.cit., p.305, Khalaaf, A.,Op. cit., p.252.

[73] . Kamali, M.H. Op. cit., p.307, Abu Zahrah, M., Op. cit., p.185.

[74] . Kamali, M.H., Op. cit., P.307

Conflict can only arise between two evidences which cannot be reconciled, in the sense that the subject matter of one cannot be distinguished from the other, nor can they be so distinguished in respect of the time of their application.[75]

A genuine conflict can arise between two speculative (Zanni) evidences, but not between definitive (qat'i) proofs.

In this way, all cases of conflict between the definitive rulings of the Qur'an and Sunnah are deemed to be instances of apparent, not genuine, conflict[76].

The Ulema have maintained the view that a genuine conflict between two ayat or two Hadith, or between an ayah and a Hadith, does not arise; whenever a conflict is observed between these proofs, it is deemed to be only apparent (Zahiri), and lacking in reality and substance.

The all pervasive wisdom of the Lawgiver cannot countenance the enactment of contradictory laws. It is only the Mujtahid who is deemed unstable to envision the purpose and intention of the Lawgiver in its entirety who may therefore find cases of apparent conflict in the divinely – revealed law[77].

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[75] Ibid., P.307

[76] Ibid., P.307, Khalaaf, A., Op. cit., p.253, Zaydanee, A., Op. cit., p.305.

[77] Kamali, M.H, Op. cit., P.307, See Haamidee, A.K., Op. cit., Vol.1, P.70, Zaydanee A., Op.cit., P.305, Khalaf, A., P.252-253, Abu-Zahrah, M., P.309

3.5.1 **Conditions for Apparent Conflict**

To admit the case of textual apparent conflict, the following conditions must be fulfilled:

1. The two texts should be equal in the case of both the definitive and the speculative in terms of transmission and implication. There is no conflict between definitive provisions and speculative provisions and nothing like conflict between a text and an analogy.[78]

2. The two evidences should be equal in strength with regard to their implications. That is to say that, implicit for implicit and explicit for explicit provisions, but if they differ in strength, there is no conflict.[79]

3. The two evidences must agree in both ruling and chronological order, but if differences occur either in ruling or time, there is no conflict[80].

3.5.2 **Ways to Harmonize Apparent Textual Conflicts**

When there is a case of apparent conflict between the rulings of the nusus, one must try to discover the objective of the Lawgiver and remove the conflict in the light of that objective. Indeed, the rules of reconciliation and preference proceed on the assumption that no genuine conflict can exist in

[78] Haamidee, A.K., Op. cit., Vol.1, P. 70-71, See Zaydanee, A., Op.cit., P.310, Khalaf, A., Op. cit., P.253, Abu Zahrah, M., Op. cit., p.183.
[79] Haamidee, A.K., Op. cit., Vol.1, P. 70-71, See Zaydanee, A., Op.cit., P.310, Khalaf, A., Op.cit., P.253, Abu Zahrah, M., Op. cit., P.183.
[80] Haamidee, A.K., Op. cit., Vol.1, P. 70-71, See Zaydanee, A., Op. cit., P.310, Khalaf, A., Op.cit., P.253, Abu Zahrah, M., Op. cit., p.183.

the divine laws; hence it becomes necessary to reconcile them or to prefer one to the other. This would mean that either both or at least one of the evidences in issue can be retained and implemented. The mujtahid must therefore try to reconcile them as far as possible, but if he reaches the conclusion that they cannot be reconciled, then he must attempt to prefer one over the other. If the attempt at reconciliation and preference fails, then one must ascertain whether recourse can be had to abrogation.

Reconciliation: (Al-jamu')

To reconcile two evidences both of which are general ('Amm), one may distinguish the scope and subject matter of their application from one another by recourse to allegorical interpretation (ta'wil)[81].

Preference: (At-tarjeeh)

Should the attempt at reconciliation fail, the next step in resolving a conflict is to give preference to one over the other. Investigation may reveal that one of the two texts is supported by stronger evidence, in which case we are basically dealing with two texts of unequal strength. To prefer the one overt the other in this case may even amount to a form of clarification or explanation of one by the other. Inequality in strength may be in content

[81] Kamali, M.H., Op. cit., P.308, Zaydanee, A., Op. cit., 305, Khalaaf, A., Op. cit., p.253.

(matn) or in proof of authenticity (riwayah). The former is concerned with the clarity or otherwise of the language of the text, and the latter with the historical reliability of the transmitters[82].

Abrogation: (An naskh)

If the attempt at reconciling two conflicting texts or at preferring one over the other, have both failed, recourse may be had to abrogation which should be considered as the last resort. Abrogation would necessitate an enquiry into the occasions of revelation, the relevant materials in the Sunnah, and chronological order between the two texts. If this also proves unfeasible, then action must be suspended on both and the Mujtahid may resort to inferior evidences in order to determine the ruling for the issue[83].

3.5.3 **Instances on differences due to apparent textual conflict**

3.5.3.1 **Number of confessions that necessitate capital punishment**

The jurists are in agreement that, adultery can be established through admission, but they differed on the number of confessions that can lead to the punishment into two views:

[82] Kamali, M.H., Op. cit., P.310-311, Zaydanee, A., Op.cit., p.310, Khalaaf, A., Op. cit., P.254.

[83] Kamali, M.H., Op. cit., P.312, See Haamidee, A.K., Op. cit., Vol.1, P.71, Khalaf, A., P.253-255

1. Malik, As-Shafi'i, Abu-Thaur and at-Tabari, held the view that, one confession alone is enough to establish the capital punishment.[84]

2. Abu-Hanifah and his companions, Ishaq and ibnu-Abi Laila, held the view that, the punishment cannot be established except with four admissions one after the other[85].

The cause of this difference is the conflict in the evidences provided by the two groups:

The first group, rely on the narration of Abu-Hurrayrah and Zaid bin Khalid Al-Jah nee, where the Apostle of Allah (peace be upon him) is reported to have said: "Give your wife respite till the next day, O you Unais, if she confesses, stone her"[86]. The wife confessed and she was stoned to death, and no number of confessions was mentioned.

The second group, rely on the narration of Sa'eed bn Jabair from Ibnu 'Abbas, where the Apostle of Allah (peace be upon him) is reported to had ignored Mai'z until he (Mai'z) admitted four (4) times before the Apostle ordered that he should be stoned[87].

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[84] Haamidee, A.K., Op. cit., Vol.2, P.774, ibn Rushdi, M.A., Op.cit., Vol.2, 438, Ibn Abdul Barr, Y.A., Op.cit., Vol.7, p.468,

[85] Haamidee, A.K., Loc. Cit., Vol.2, P.774, ibn Rushdi, M.A., Op.cit., Vol.2, 438, Al-Jawzee, S., Op. cit., p.213.

[86] An-Naisaaburee, M.H. Op.cit., Vol.5, p.121, Hadith No. 4531

[87] Haamidee, A.K., Op.cit., Vol.2, P.775, ibn Rushdi, M.A., Op. cit., Vol.2, P.439, An-Naisaabuee, M.H. Op. cit., Vol.5, p.117,118,119 & 120, Hadith No. 4520, 4524, 4527&4528.

3.5.3.2 Required blood money for Non Muslims in Mistaken Homicides

The jurists differed regarding this case into three (3) views:

1. Their blood money is half that of the Muslim; their males are to receive half of what male Muslims receive, their females are to receive half of what female Muslims receive. This is the view of Malik, Ahmad, and Umar bin Abdil'Azeez.[88]

2. Their blood money is one-third that of the Muslim. This is the view of As-Shafi' and also reported to be the view of Umar bin al-Khattab, Uthman bin 'Afan and some group of people among the Tabi'een (The followers of the companions).[89]

3. Their blood money is equal to that of the Muslims. This is the view of Abu-Hanifah, and at-thawri, which is also reported to be the view of Ibnu Mus'ud, Umar, Uthman and some groups of people among the Ta'bi'un (the followers after the companions)[90].

The cause of these differences is the conflict in the evidences provided by the groups.

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[88] Haamidee, A.K., Op.cit., Vol.2, P. 770, Ibn Rushdi, M.A., Op. cit., Vol.2, P.414 Ibn Abdul Barr, A.Y., Op.cit., Vol.8, p.80.

[89] Haamidee, A.K., Op.cit., Vol.2, P. 770, Ibn Rushdi, M.A., Op. cit., Vol.2, P.414.

[90] Ibid. see also Ibn Shihabideen, M.A. (1984): *Nihaayatul Muhtaaj ila Shirhil Minhaaj*, DaarulFikr,Beirut, Vol.7, p.320, Al-Haskafee, M.A. (1386): *Ad-Durr Al-Mukhtaar,* Daarul Fikr, Beirut, V.6, p.575

The first group rely on the narration of Umar and Ibn Sa'eed from his father, from his grandfather, from the Apostle of Allah (peace be upon him), who is reported to have said: "Blood money of the disbeliever is half of the that of the Muslim".[91]

The Hanafis rely on the general provision of the Quranic text: "… If the deceased belonged to a people with whom you have a treaty of mutual alliance, blood money should be paid to his family, and a believing slave be freed"[92].

From the Sunnah also, is the report of Ma'mar from Az-Zuhri who said: "Blood money of the Jew and Christian, and all other non Muslims is the equivalent of that of the Muslim"[93] He said: "It was like this during the time of the Messenger of Allah (peace be upon him)", Abubakr, Umar, Uthman, and Aliyu, not until the time of Muawiya who gave half of it to the treasury-house, and the remaining half to the family of the victim, and thereafter, Umar bin Abdilazeez gave half of the blood money and ignored the remaining half which Muawiya kept in the treasury[94].

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[91] . An-nasaaee, A.S. (1991): *Sunnan An-nasaaee Al-kubraa*, Daaru al-kutubil-ilmiyah, Beirut, 1st edition, Vol.4, P.235, Hadith No. 7009, Abu Abdullah, M.Y. (nd): *Sunan Ibn Maajah*, Daaru al-fikir, Beirut, Vol.2, P. 883, Hadith No. 2644, At-trimidhi, M.I., Op. cit., Vol.4, P.25, Hadih No. 1413, Abu Daawud, S.A., Op.cit., Vol.4, P.319, Hadith No. 4585

[92] Q4:92

[93] . Al-baihaqee, A.H., *Ma'rifatus-sunan wal aathaar*, (nd) Vol.13, P.292, Hadith No. 5183, Shamela Library, 2nd version 2.11.

[94] Haamidee, A.K., Op. cit., V.2, P. 771, Ibn Rushdi, M.A., Op. cit., Vol.2, P.414.

3.5.3.3 **Ruling on Sales with Condition**

The jurists differed regarding sales with condition into five (5) views:

1. The sale is null and void and the condition is allowed. As-Shafi' and Abu-Hanifah, held this opinion.[95]

2. The sale is allowed and the condition is also allowed. This is the view of Ibn Abi Shibrimah.[96]

3. The sale is allowed and the condition is null and void. This is the opinion of Ibn Abi Laila.[97]

4. The sale is allowed with just one condition but with two conditions, is null and void, Ahmad, held this view.[98]

5. Malik, differentiated between that type of sale with condition which engulf in cheating and usury (Riba) and that with a bit of cheating and usury or in between the two.[99]

The cause of these differences is the conflict in the authorities provided by the groups.

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[95] Haamidee, A.K., Op. cit., Vol.2, P. 723, Ibn Rushdi, M.A., Op. cit., Vol.2, P. 159, An-Nawawee, M.Y., Op.cit., Vol.9, p.363,

[96] Haamidee, A.K., Op. cit., Vol.2, P. 723, Ibn Rushdi, M.A., Op.cit., Vol.2, P. 159,

[97] Haamidee, A.K., Op.cit., Vol.2, P. 723, Ibn Rushdi, M.A., Op. cit., Vol.2, P. 159, Ibn Abdul Barr, A.M., Op.cit., Vol.6, p.296,

[98] Haamidee, A.K., Op.cit., Vol.2, P. 723, Ibn Rushdi, M.A., Op. cit., Vol.2, P. 159, Al-Mugdisee, A.Q. (1405): *Al-Mugniy,* Daarul Fikr, Beirut, V.4, p.63,

[99] Haamidee, A.K., Op. cit., Vol.2, P. 723, Ibn Rushdi, M.A., Op.cit., Vol.2, P. 159, Ibn Jazee, M.A., *Alqawaanin Al-fiqhiyah* (nd): Vol. 2, p. 124.

Firstly, the narration of Jabir who said, "The Messenger of Allah (peace be upon him) bought a camel, and he stipulated riding it to the city of Madeenah"[100].

Secondly, the narration of Bareerah, that the Messenger of Allah (peace be upon him) said; "Any kind of condition that is not in the Book of Allah is null and void even if it is hundred conditions".[101]

Thirdly, the narration from Jabir (Allah be please with him), who reported that, "Allah's Messenger (may peace be upon him) had forbidden Muhaqala or selling of crop on the field for grains with a measure, Muzabana or the sale of fresh dates on the tree for dry dates with a measure, Mukhabara or that which a waste land is given by a person to another and he makes an investment in it and then gets a share in the produce, Al-Mu'awamah or sale years ahead, and Athaniyaa or making exceptional but he gave concession in case an exemption of araayaa or donation of a tree or two in which case the members of a family sell dry dates and buy fresh dates for eating them".[102]

Also on this case, is what was reported from Abu-Hanifah, who reported the Messenger of Allah (peace be upon him) to have forbidden sale with condition".

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[100] . Al-Bukharee, M.I., Op. cit., Vol.2, P.968, Hadith No. 2569.
[101] . Ibid., Vol.2, P.980, Hadith No. 2583
[102]. An-naisaaburee, M.H. Op.cit., Vol.5, P.17, Hadith No. 3989

Therefore, the jurists differed because of conflict of evidence regarding sale with condition.[103]

3.5.3.4 Description of Prostration in Prayer

The jurists differed regarding whether the person performing prayer, should go down knees first or hands first. Two views have been recorded from the jurists:

1. Ahmad, Abu-Hanifah and As-Shafi'i, held the opinion of prostrating on the two knees first before the two hands.[104]

2. Malik and the Zahiris, held the opinion of prostrating on the two hands first before the two knees[105].

The cause of these differences is the conflict in the two evidences provided on this case.

Firstly, it is found in the narration of Ibn Hujir, who said, "I saw Allah's Messenger (peace be upon him) when he prostrated he put his two knees first before his two hands, and when he rose he lifted his hands before his knees".[106]

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[103] Haamidee, A.K., Op.cit., Vol.2, P. 724, Ibn Rushdi, M.A., Op.cit., Vol.2, P. 160.

[104] Haamidee, A.K., Op.cit., Vol.2, P. 508, Ibn Rushdi, M.A., Op.cit., Vol.1, P.138, As-Samarqandee, A., Op. cit., Vol.1, p.134.

[105] Haamidee, A.K., Op.cit., Vol.2, P. 508, Ibn Rushdi, M.A., Op.cit., Vol.1, P.138, Ibn Jazee, M.A., Op.cit., Vol.1, p.69.

[106] Abu Daawud, S.A., Op. cit., Vol.1, p. 309, Hadith No. 838.

Secondly, the narration by Abu-Hurayrah, who said, the Apostle of Allah (peace be upon him) said: "when any of you makes prostration, he should not prostrate in the way the Camel does, but he should put his two hands first, before his two knees".[107]

As the conclusion drawn from this chapter, the causes of juristic differences which developed among jurists over the narration and application of the Sunnah are subdivided into:

1. Unawareness of some Hadith, in some cases, the hadith did not reach the jurist, which he had said something regarding the matter. The Sunnah might have reached the jurist, but its authenticity is doubted by him. The jurist may perceive that the Sunnah is weak based on juristic reasoning by which another jurist has held contrary opinion. The Sunnah might reach the jurist and he has no doubt in its authenticity but he had forgotten the particular Sunnah.
2. Among the jurists have placed various conditions for the acceptability of solitary Sunnah.

   Apparent conflict of text occurs when each of two evidences of equal strength indicates the opposite of the other. A conflict is thus not expected to arise between two evidences of unequal strength, as

[107] Haamidee, A.K., V.2, P. 509, Ibn Rushdy, M.A., Op.cit., V.1, P.138, Abu Daawud, S.A., Op. cit., Vol.1, p.311, Hadith No. 840.

in this case the stronger of the two evidences would naturally prevail.

CHAPTER FOUR

SILENCE OF THE TEXTS

4.1 Introduction

It is obvious that the texts of the shariah are apparently silent regarding some matters. In other words, some matters are not expressly mentioned in the Qur'an nor the Sunnah, as to whether they are prohibited or permitted.

The Lawgiver has not left out anything for which a rule has not been laid down. This is based on the Quranic verses among which is the statement of Allah that says; "We have neglected nothing in the Book (of our decrees)"[1]. Even when the rule has not been expressly stated, it still exists implicitly. Efforts have to be made to discover it in the primary sources. This is why the requirement for juristic reasoning must proceed from the principles of the Qur'an and the Sunnah.

Juristic reasoning that was carried out by the jurists during their time, produced various methodologies that came to be known as secondary sources of Islamic law.

Therefore, this chapter is to examine silence of the texts as a cause of difference of opinion among the jurists in Islamic law with a view showing that the apparent silence of the Shari'ah regarding some matters has contributed on a large scale, to difference of opinion among the jurists,

[1] Q6:38

believing that this will provide a ground for correcting the misgivings that many reserve against our past and present jurists and judges on cases where they differ.

4.2 The Ruling in Cases Where Both the Qur'an and the Sunnah are Silent

Silence of the texts accounts for one of the major causes of differences in interpretation among the jurists.[2]This cause of differences is seen in the following ways:

4.2.1 **Acceptance or otherwise of the Acceptance of Certain Principles**

There were among the Imams some who developed a number of controversial principles on which they based some of their rulings. As a result, both the rulings and the principles became sources of differences among jurists. For example, the majority of jurists recognized the validity of Ijmaa' among the generation after the sahaabah, but Imam Ash-Shaafi'ee questioned its occurrence while Imam Ahmad rejected it outrightly.[3] Similarly Imam Malik's reliance on the precedents of the Madeenites as a

[2] Zaydanee, A. (2009) : *Al-wajeez fi usul-at-fiqh,* Resalah publishers, Beirut, 1st Edition, P. 337-339, Al-khalaaf, A. (2010) : *'Ilmu Usil Al-fiqh,* Darul Ghad Al-gadeed, Egypt, 1st ed., P. 239, Zuhailee, W. (nd): *Al-Fiqul-Ismalee wa Adilatuhu,* Daru Ifakir, Damascus-Syria, 4th edition, vol.1., P.67, Ad-Dahlawee, W. (nd): *Al-insaaf fi Bayaan Asbaab Al-ikhtilaaf* , P. 22-23, Khudaree, M.B. (2007): *Tareekh At- ashree' Al-islaamee* Muassasatul Mukhtar, Egypt, 1st ed., P. 122.

[3] Philips, B.A. (1990): *The Evolution of Fiqh,* International Islamic publishing House, 3rd Edition, p. 99-100, Abu-Zahrah, M. (1958): *Usul-al-fiqh,* p. 200-202, Khudaree, M.B. (1998): Usul Fiqh, Daarul fikr, Beirut, P. 285.

source of legislation was rejected by majority of jurists. And Imam Abu Haneefah's principles of istihsaan and Maalik's istislaah were both disallowed by Imam Ash-shaafi'ee as being too independent of the Qur'an, the Sunnah, and ijmaa'. That is to say, they relied too much, in his opinion, on human reasoning. On the other hand, Imam Ash-shafi'ee held that the opinion of the sahaabah had to be accepted on legal matters, while others felt that it was only reasoning on their part, which was not binding on later generations.[4]

One way of approaching the problem is to say that whatever is not mentioned expressly in the texts, and which cannot be dealt with through analogy (qiyas), is permissible, that is, it belongs to the category called Mubah. This, in fact, is a principle of Islamic Law, which in general terms states: The original rule for everything is that of permissibility (Ibahah) or al-aslu fil ashyaa al-ibahah, unless a legal evidence prohibits it[5].

This would imply that anything that is not expressly mentioned in the texts need not be assigned a hukm (ruling) and should be left to function under the original rule of permissibility. In other words, anything that has not

[4] Philips, B.A., loc. Cit. p. 99-100 See, Haamidee, A.K. (2009): *Al-jaamiul mufeed fi asbaab ikhtilaafil fuqaa,*1ST ed. Daar ibn hazmi, Lebanon, Vol.2, P. 322, Zaydanee, A. Op. cit., P.125, P. 188 and 208, Abu-Zahrah, M., Op. cit., P. 280 and 294, Zuhailee, W. (nd): *Al-Fiqul-Ismalee wa Adilatuhu,* Daru Ifakir, Damascus-Syria, 4th edition, Vol.1., P.67.

[5] Nyazee, I. K. (2007): *Theories of Islamic law,* Adam Publishers, India, P. 4, see Khalaaf, A. Op. cit., P.85, see also, As sa'dee, A.N. (2002): *Al-qawaa'id wal usul Al-jaami'ah,* Maktabatus Sunnah, Cairo, 1st ed., P.72, Khudaree, M.B., Op.cit., P.353, Zaydanee, A., Op. cit., P. 184.

been specifically prohibited by Allah is permissible. This principle forms the foundation for the shafi'ites principle of istishab[6].

The Hanafis uphold the opposite principle: "The original rule for each thing is prohibition, unless the Shariah permits it. One does find some of the Hanafis invoking the principle of permissibility at times, but the general approach of the Hanafites seems to confirm the principle of prohibition as a basic methodology. This could be one reason why the Hanafis feel the need for invoking istihsan based on darurah for declaring permissible things that appear to be permissible on the face of it, like hire (ijarah) for example, for which evidences can be found in the texts.[7] The Shafi'ee and the Hanbali schools have subscribed to *istishab al-wasf* or continuity of attributes absolutely, whereas the Hanafi and Maliki schools accept it with reservations.[8]

The case of the missing person is discussed under this type of istishab, as the question is mainly concerned with the continuity of his life – life being the attribute. Since the missing person (mafqud) was alive at the time when he disappeared, he is presumed to be alive unless there is proof that he has died. He is therefore entitled, under the Shafi'ee and Hanbali doctrines, to inherit from a relative who dies while he is still a missing person. But no

[6] Nyazee, I. K., Op. cit., P. 49, see Khalaaf, A., Op. cit., P.85, Zaydanee, A., Op. cit., P. 184, Abu-Zahrah, M., Op.cit., P.290-291.

[7] Nyazee, I. K. Op. cit., P. 49, see Khalaaf, A., Op. cit., P.85, Khudaree, M.B., Op. cit., P.336, Zaydanee, A., Op. cit., P. 184.

[8] Kamali, M.H. (1991): *Principles of Islamic jurisprudence*, Islamic Text Society, Malaysia, 2nd Edition,P. 262, Abu Zahrah, M., Op.cit., P.299.

one is entitled to inherit from him for the obvious reason that he is presumed alive. Yet under the Hanafi and Maliki law, the missing person neither inherits from others nor can others inherit from him. The Hanafis and Malikis accept istishab al wasf only as a means of defense, that is, to defend the continued existence of an attribute, but not as a means of proving new rights and new attributes. Istishab can therefore not be used as a means of acquiring new rights for the missing person, but can be used so as to protect all of his existing rights. To use a common expression, istishab can only be used as a shield, not as a sword. If, for example, the missing person had owned property at the time of his disappearance, he continues to be the owner. Similarly his marital rights are presumed to continue, just as he remains responsible to discharge his obligation until his death is established by evidence or by a judicial decree. But for as long as he remains a missing person, he will not be given a share in inheritance or bequest, although a share will be reserved for him until the facts of his life or death are established. If he is declared dead, the reserved share will be distributed among the other heirs on the assumption that he was dead at the time of the death of his relative. Upon declaration of his death his own estate will be distributed among his heirs as of the time the court declares him dead. This is the position under the Hanafi and Maliki schools, who maintain that although the mafqud is presumed to be alive, this is only a

presumption, not a fact, and may therefore not be used as a basis for the creation of new rights.[9]

4.2.2 **Methods of Qiyas**

The various approaches which jurists took in their application of Qiyas were perhaps the largest source of differences among them. Some narrowed down the scope of Qiyas by setting a number of pre conditions for its use, while others expanded its scope. Because this principle was based on opinion to a greater extent than any of the others, there were no hard and fast rules with which to contain it, and thus a wide range of differences developed.[10]

The mujtahids are of different views regarding the process of enquiry on the effective cause of a ruling, this is what is referred to as al-sibrwal-taqsim or elimination of the improper and assignment of the proper cause of the ruling, if one mujtahid sees an attribute to be proper, the other may not see it so. This difference is traced back to difference in understanding and assimilation of the proper attribute. Examples for this are numerous, for instance, the Sunnah reported by Ubadat bn as-Samit, that the Prophet of Allah (Peace be upon him) said: "Gold for gold, sliver for silver, wheat for

[9] Kamali, M.H., Op.cit., P. 262-263, see Khalaaf, A., OP. cit., P. 98, Zaydanee, A., Op.cit., P.214, Abu Zahrah, M., Op. cit., P.298, As-Shawkanee, M.A., (1999): *Irshadul fahul*, Daarul Kitabil 'Arabee, 1st ed., Vol.2, P. 174-175.

[10] Philips, B.A., Op. cit., P. 100, see Zuhailee, W., Op. cit., Vol. 1, P. 76, Abu-Zahara, M. Op. cit., P. 250.

wheat, barley for barley, dates for dates and salt for salt, type for type, the same for the same, hand to hand, but if all mentioned categories are different, then sell them the way you wish, provided it is hand to hand"[11] The scholars differed regarding the effective cause in the prohibition of the sale of any of these mentioned items with increment. The sunnah comprises two sentences, first, conveys the two currencies, and second, conveys the four types of commodities. We observe that the mujtahid, in his research through the process of al-sibr wal-taqsim regarding the cause of the prohibition, it is possible for him to conclude through his research, that the effective cause in the two currencies is the weight together with the type, and in the four mentioned commodities; is measurement together with the type whether it is foodstuff like rice or not, like dye, this is the view of Abu Hanifah and Ahmad. He may atimes conclude through his research, that the effective cause in the two currencies is prevalence of the worth, therefore the effective cause is limited to the gold and the sliver, this is the view of both Malik and Ash-sha'fiee, and the four mentioned commodities, in Malik's view, the effective cause is the foodstuff and storage, and in Ash-shafi'ee's view, is the foodstuff together with the same type. Thus,

[11] . An-Naisaaburee, M.H., Loc Cit., vol.5, p.44, Hadith No.4147, Al-'ashath, A.S., Op.cit., Vol.3, P.254, Hathid No. 3351, Al-qazwainee, I. (nd): *Sunnan Ibn Majah,* Daarul fikr, Beirut, Vol.2, P.757, Hadith No. 2253, An-Nasaa ee, A.S. (1991): As-Sunnan Al-kubraa, Daarul kutubil 'ilmiyyah, Beirut, Vol.4, P. 26,Hadith No. 6153.

based on the effective cause that the scholars are able to deduce, so shall the Qiyas (analogy) be based.[12]

The majority view maintains that the rules of Shariah are founded in their causes (‘illah), not in their wisdoms (hikam), from this, it would follow that a hukm shar’i is present whenever its illah is present even if its hikmah is not, and a hukm shar’i is absent in the absence of its ‘illah even if its hikmah is present. The jurists and the judge must therefore enforce the law whenever its ‘illah is known to exist regardless of its hikmah. The illah in pre-emption for example, is joint ownership itself, whereas the hikmah of this rule is to protect the partner or the neighbour against a possible harm that may arise from sale to a third party. As such, the hikmah is not constant and may therefore not constitute the illah of pre-emption. Hence it would be erroneous for the judge to grant the right of pre-emption to a person who is neither a partner nor a neighbouring owner on the mere assumption that he may be harmed by the sale of the property to a certain purchaser[13].

The Malikis and Hanbalis, on the other hand, do not draw any distinction between the ‘illah and the hikmah. In their view, the hikmah aims at

[12] Baqnah M; A. (nd): *Al-‘ilatu ‘indal usu leen,* Al-shamila library, 2nd version 2.11, P.18, Ibn Rushdi, M.A. (1975) : Bidaayatul Mujtahid Wa nihaayatul Muqtasid, Vol. 2, P. 130-131.

[13] Kamali, M. H., Loc. Cit., P. 189, Khalaaf, A., Loc. Cit., 67-70, Zaydanee, A., Op. cit., P.298-160, Abu Zahrah, M., Loc. Cit., P. 237-238, Khudaree, B.M., Op. cit., P. 289-299, As-Sa’dee,A.N., Loc. Cit., p. 199, see Aamidee, ‘A.M. (1404 A.H.): *Al-Ihkaam fi usulil-ahkaam*, Darul-Kitabil-‘Arabee, Beirut, 1st Edition, Vol.3, P.224-227.

attracting an evident benefit or preventing an evident harm, and this is the ultimate objective of the law. When, for example, the law allows the sick person not to observe the fast, the hikmah is the prevention of hardship to them. Likewise the hikmah of retaliation (Qisas) in deliberate homicide, or of the hadd penalty in theft, is to protect the lives and property of the people. Since the realization of benefit (Maslahah) and prevention of harm (Mafsadah) is the basic purpose of all the rules of shari'ah, it would be proper to base analogy on the hikmah[14].

The Hanafis and the Shafi'is however maintain that the 'illah must be both evident and constant. In their view the 'illah secures the hikmah most of the time but not always. Their objection to the hikmah being the basis of analogy is that the hikmah of the law is often a hidden quality which cannot be detected by the senses, and this would in turn render the construction of analogy upon them unfeasible. The hikmah is also variable according to circumstances, and this adds further to the difficulty of basing analogy on it. The hikmah, in other words, is neither constant nor well-defined, and may not be relied upon as a basis of analogy.

To give an example, the permission granted to travelers to break the fast while traveling is to relieve them from hardship. This is the hikmah of this ruling. But since hardship is a hidden phenomenon and often varies according to person and circumstances, it may not constitute the effective

[14] Kamali M.H., Loc. Cit., P. 190, Khalaaf, A., Op. cit., P. 67, Abu Zahrah, M. Op. cit., P.237.

cause of an analogy. The concession is therefore attached to traveling itself which is the 'illah regardless of the degree of hardship that it may cause to individual travelers. [15]

It is well know that Al-Shafi'ee accepted qiyas (analogy) as a source of law, and insisted that it is qiyas alone that is ijtihad. He rejected istihsan used by the Hanafis as being null and void. It may be noted here that the Malikis also used istihsan as a source or principle for deriving the law. Al-Shafi'ee did accept qiyas as a source of law, but it is important to note that qiyas has meant different things to different jurists in different ages, and the detailed description of qiyas given later by al-Ghazali, for example, does not conform completely with what al-shafi'I considered to be the valid modes of qiyas.[16]

Al-Ghazali begins his book, (shifa' al- Ghazali), with a description of the methods for discovering the underlying cause directly from the texts as well as through consensus (ijma'). The method of discovering the illah through the text (nass) covers several techniques. In these cases the text is itself said to indicate the underlying cause, either directly or indirectly. When this is not the case the underlying cause may be determined by consensus of the jurists. This is known as the method of determining the 'illah through ijma'. The methods of discovering through the text and ijma', the illah may

[15] Kamali, M.H., Op. cit., P.190, Khalaaf, A., Op. cit., 71-72.
[16] Nyazee, I.A.K. Op. cit., P. 184,see, As-shafi'ee, M.I. (nd): *Ar-risaalah*, Daarul kutubil ilmiyyah, P.477.

be derived (Mustanbitah). It is a method over which Muslim jurists have disagreed extensively. The underlying cause discovered through the text or through ijma' is also known as the effective (Mu'ath-thir) cause, while the derived illah is known as the suitable or appropriate (munasib) cause.[17]

4.2.3 **Identification of the Objectives of the Law**

Another ground for differences in interpretation that has also emerged among the jurist through silence of the law is that, some of the jurists adopted the method of ta'lil or identification of the objective of the law where this is not explicitly mentioned in the text.

The Qur'an is also expressive, in numerous places and a variety of contexts, of the goal, purpose, rationale and benefit of its laws. This idea of the identification of rationale and purpose, technically known as ta'lil (ratiocination), and the search for such in the context of ijtihad, is valid in usul al-fiqh only with reference to worldly affairs (the mu'amalat), but not with regard to devotional matters or 'ibadat'. The Qur'an itself is expressive of its rationale and purpose even in the area of 'ibadat. Thus with reference to prayer, it is declared: "For prayer restrains from shameful and unjust deeds"[18]. Zakah is imposed on property "So that wealth may not circulate only among the rich"[19], with reference to jihad, the text proclaims:

[17] Nyazee, I.A.K. Op. cit., P. 200.
[18] Q29 V. 45
[19] Q59 V.7

"permission was granted to those who fight because they have been wronged"[20], and with reference to qisas, it is declared. "And in qisas (just retaliation) there is life for you O people of understanding"[21].

One can add many examples to demonstrate how the Qur'an is expressive of the goals and purpose of its laws. Even in cases where the text does not identify its own rationale and purpose, it is generally held that the underlying intention of the laws of shari'ah is realization of benefit (maslaha) or prevention of prejudice and harm (mafsada). Mercy (rahmah) in the Qur'anic phrase is to all intents and purposes used synonymously with maslahah and benefit to mankind, which is the over-riding objective of all of the laws of Shariah. Justice ('adl) on which the Qur'an is clearly emphatic also partakes of maslaha.[22]

The ulema differed in their approach to the identification of maqasid and the values that they sought to defined. At issue basically was the question whether the maqasid were to be confined to what was identified by the clear text.

The Zahiri school insisted on this and maintained that the clear nusus, especially those containing commands and prohibitions, were the carriers of

[20] Q22 V.39
[21] Q2 V.179
[22] Kamali, M. H., *Issues in the Legal theory of Usul and Prospects for Reform,* paper delivered 13th June 2000, Banquet Hall, - Level 5, Central Complex, International Islamic University Malaysia (IIUM)., P.12-13., See Al-Shatibee, I.M. (1997): *Al-muwa faqaat fi 'ulum-sharaiah,* Daru Ibn 'Afaan, 1st Edition, Vol.2, P. 9-13, Ghazalee, A.M. (1413 A.H): *Al-Mustasfaa,* Daarul kutubil 'ilmiyyah, Beirut, 1st ed., P. 308.

the maqasid. The maqasid, according to this view, had no separate existence and was to be found in the explicit and normative (tasrihi,ibtidai), as opposed to implicit and subsidiary, injunctions of the Qur'an and Sunnah. This approach was, once again inclined towards literalism and turned a blind eye to the rationale and effective cause of the text and its underlying intention.

The majority of ulema on the other hand looked into both the text as well as its rationale, 'illah and hikmah in the determination of the maqasid. Yet as already noted, their view of illah and rationale was somewhat restrictive and so was their view of the maqasid[23].

Ibrahim, Abu Ishaq al-Shatibi, the chief exponent of the maqasid who took a comprehensive view of this subject by adding the inductive method (al-istiqra) to the existing approaches.

To identify the maqasid, al-shatibi spoke affirmatively of the need to observe the explicit injunctions, but added that adherence to the text must not be so rigid as to alienate the rationale and purpose of the text from its words and sentences. The preferred approach was naturally the integrated approach of reading the text, in conjunction with its rationale, objective and purpose.[24]

[23] Kamali, M. H. (*Issues in the Legal* .....) Op. cit., P. 13
[24] Ibid. P.17, see Al-Shatibee, I.M., Op. cit., Vol.2, P. 11-13.

The ulema have held different views on this issue. The opponents of ta'lil maintain that divine injunctions embodied in the clear text have no causes unless the Law giver provides us with clear indication to the contrary. Thus it would not only be presumptuous on the part of the mujtahid to adopt an inquisitive approach to divine injunctions, but searching for the cause (illah) or the objective hikmah of the Quranic rules amounts to no more than an exercise in speculation. Besides, the opponents of ta'lil have argued that the believer should surrender himself to the will of God, which can best be done by an unflinching acceptance of Allah's injunctions.

To look into the motive, purpose and rationale of such injunctions, and worse still, to accept them on their rational merit, is repugnant to sincerity in submission to Allah.

Furthermore, in his attempt to identify the rationale of an injunction, the mujtahid can only make a reasonable guess which cannot eliminate the possibility of error.

There may even be more than one cause or explanation to a particular ruling of the Qur'an, in which case one cannot be certain which of the several causes might be the correct one. This is the view of the Zahiris[25].

The majority of ulema have, however, held that the ahkam of the Shari'ah contemplate certain objectives, and when such can be identified, it is not only permissible to pursue them but it is our duty to make an effort to

[25] Kamali, M. H., Op. cit., P. 42, see Al-Shatibee, I.M., Op. cit., Vol.2, P. 11-13

identify and to implement them. Since the realization of the objectives (maqasid) of the shari'ah necessitates identification of the cause/rationale of the ahkam, it becomes our duty to discover these in order to be able to pursue the general objectives of the law giver.

Thus it is the duty of the mujtahid to identify the proper causes of divine injunctions, especially in the event where more than one 'illah can be attributed to a particular injunction. The majority view on ta'lil takes into account the analysis that the rules of Shari'ah have been introduced in order to realize certain objectives and that the lawgiver has enacted the detailed rules of Shari'ah, not as an end in themselves, but as a means to realizing those objectives. In this way, any attempt to implement the law should take into account not only the externalities of the law but also the rationale and the intent behind it.[26]

4.3 Instances of Differences due to Silence of the Texts

4.3.1 What is the Period for Shortening of Prayer for the Traveler who had Decided to Stay

The Jurists differed regarding the period that the traveler should shorten his prayer if he stays in the land into three (3) views:

[26] Kamali, M. H., P. 41-42, Ibn Hazm, 'A.A. (1404 A.H): *Al-ihkaam fi usul al-ahkaam,* Daarul Hadith, Cairo, 1st ed., Vol.8, P. 573-575, see, Aamidee, 'A.M., Op. cit., Vol..3, P. 232-234, Baqnah, M.A., Op. cit., P. 39-40, Ghazalee, M.A. Op. cit., P. 338-340.

1. Malik, As-Shafi'ee and Ahmad (in a report), held the view that, if the traveler had concluded to stay for four days, he should offer the full prayer.[27]

2. Abu-Hanafah, Sufyan and ath-thawriy, held the view that, if the traveler had concluded to stay for fifteen days, he should offer the full prayer.[28]

3. Ahmad and Dawud, held the view that, if the traveler had concluded on staying more than four days, he should offer the full prayer[29].

The cause of these differences is the silence of the law with regard to this issue and, more so, the agreement by all the jurists that, using the principle of analogy to prescribe the period is a weak exercise[30].

Therefore, all the groups resorted in taking evidence from circumstances which were reported in them that the Messenger of Allah (peace be upon him) either stayed and shortened the prayer or offered the prayer in them as a traveler.

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[27] Haamidee, A. K., Op. cit.,., Vol.1, P.324, Ibn Rushdy, M.A., Op. cit., Vol.1, P.169, Ibn Abdul Barr, Y.A., Op. cit., Vol. 2, p. 243.
As-shirazee, I.A. (nd): Beirut, Vol.1, p.103, Al-bahutee, M.Y. (1996): Sharhu *Muntaha Al- iraadat*, Alamul kutub, Beirut, Vol.1, p.295.

[28] Haamidee, A. K., Op. cit., Vol.1, P.324, Ibn Rushdy, M.A., Op. cit., Vol.1, P.169, Al-haskafee, M.A. (1386): *Ad-Durr Al-Mukhtar* Beirut, Vol.2, p125, Al-kassaanee, A., (1982): *Badaa'iu As-sanaa'iu fi tarteeb As-sharaa'i*, Daaryl kutubil Arabee, Beirut, Vol.1 p.97.

[29] Haamidee, A. K., Op. cit., Vol.1, P.324, Ibn Rushdy, M.A., Op. cit., Vol.1, P.169, Ar-Raheebanee, M.A. (1961): *Mutalib Awlaa An-Nahyi*, Al-maktab Al-islaamee, Damascus, Vol.1, p728, At-tamimee, M.A., (nd): *Mukhtasar Al-insaaf wa As-sharhu Al-kabeer*, P.179, Shamela Library, 2nd version, 2.11.

[30] Haamidee, A. K., Op. cit., Vol.1, P.324, Ibn Rushdi, M.A., Op. cit., Vol.1, P.169.

The first group supported their view with the report that, Allah's Messenger (peace be upon him), stayed in Mecca for three days during his 'Umrah or small pilgrimage during which he shortened the prayer. This although, it is not a proof for the length of shortening the prayer, but rather, a proof for shortening in three days and below it[31].

The second group supported their school view with the report that, the Messenger of Allah (peace be upon him), stayed in Mecca in the year of conquest, shortening the prayer, and the staying, according to one report, was fifteen days, in some other reports, seventeen days, eighteen days and nineteen days, all were reported by al- Bukhari, on the authority of ibn Abbas.

Third group supported their view with the report from al- Bukhari that, Allah's Messenger (peace be upon him), stayed during his pilgrimage in Mecca for four (4) days.[32]

4.3.2 Ruling on Marriage During Waiting Period

The jurists are in agreement that, marriage during waiting period is not permissible, be it waiting during menstruation, or period of pregnancy, or waiting after death of the husband, but they differed regarding one who

[31] Ibid
[32] Ibid

married his wife during her waiting period and the marriage has been consummated, into two views[33].

1. Malik, Ahmad (in one report), Al-Awza'ce and Al-Laith, held the view that they should be separated, and the woman shall not be lawful for the man again.[34]

2. As-shafi'ee, Abu-Hanifah, (most preferred) by Ahmad, and Ath-thawri, held the view that they should be separated, and when the woman finishes her period, there is no harm in the man remarries her for the second time[35].

Silence of the law regarding this issue has caused a difference between the jurists right from the time of the companions. Malik reported on the authority of ibn Shihab from Sa'eed bn Al-Musaiyib and Sulaiman bn Yasar that, Umar bn Al-Khatab (May Allah be pleased with him), dissolved the marriage between Talhah Al-Asadiyah and her husband – Rashid Athaqafee- when they both married during her waiting period from a second husband, and he said: "Whenever a woman marries during her

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[33] Haamidee, A. K. , Op. cit., Vol.1., P. 346, Ibn Rushdi, M.A. (1975): *Bidaayatul-Mujtahid*, Mustafa Al-baabee Al-halbee and Son's publication, Egypt, 4th edition, Vol.2, P. 47.

[34] Haamidee, A. K. , Op. cit., Vol.1., P. 346, Ibn Rushdi, M.A. Op. cit., Vol.2, P.47, Ibn Jazee, M.A. (nd): *Al-qawaanin Al-fiqhiyah*, Vol.2, P.66, AlMuqdisee, 'A.Q. (nd): *Al-kaafee*, Vol.3, P.26, Ibn Abdul Barr, Y.'A. (2000): *Al-istidhkaar*, Daarul kutubil ilmiyyah, Beirut, Vol.5, P.473, Al- Muqdisee, 'A.Q. (1405 A.H): *Al- Mugniy*, Daarul fikr,Beirut, Vol.7, P.344.

[35] Haamidee, A. K. , Op. cit., Vol.1., P. 346, Ibn Rushdi, M.A. Op. cit., Vol.2, P. 47, Al-bahutee, M.Y. (1996): *Sharhu Muntaha Al-iraadah,* Alamul kutub, Beirut, Vol.2, P.659-660.

waiting period, and the marriage has not been consummated, the marriage should be dissolved, and the woman will observe the rest of her waiting period from the first man, and the second man is like a proposer from other proposers, but if the marriage has been consummated, the marriage should be dissolved and the women should complete her waiting period from the first husband, and after she should observe waiting period from the second husband, and both of them shall not be allowed to remarry again". Sa'eed said: "The woman is entitled to dowry for what the man has made lawful to himself in the woman[36].

Both Imam 'Ali and ibn Mas'ud disagreed with Umar (peace be upon them), when Imam 'Ali was reported to have said that, as soon as the woman finishes her waiting period from the first man, she is of the choice if she wants to re-marry the second man.[37]

4.3.3 Inheritance of the Divorced Woman at the Point of death sickness of the Husband

The jurists have differed regarding the position of a wife divorced irrevocably by her sick husband, who died as a result of the sickness into four (4) views:

[36] Haamidee, A. K. , Op. cit., Vol.1., P. 346, Khudaree, M.B. (*Tareeh tashree'*) Op. cit., P. 72, Ibn Rushdy, M.A. Op. cit., Vol.2, P. 47.

[37] Haamidee, A. K. , Op. cit., Vol.1., P.347, Khudari, M.B. Op. cit., P.72, Ibn Rushdy, M.A. Op. cit., Vol.2, P. 47.

1. Malik, Al-Laith and some groups, held the views that, she will inherit whether she is still in her waiting period or not, and whether she had remarried or not.[38]

2. Ahmad and Ibn Abi-laila, held the view that, she will inherit provided she has not remarried.[39]

3. Abu-Hanifah, his disciples and Al-Thawri, held the view that, she will inherit provided she is still in her waiting period.[40]

4. As-Shafi'ee and some groups, held the view that, she will not inherit[41].

The sick person in this situation is being alleged to have divorced his wife during his death illness, in order to prevent her from inheritance. Therefore, those among the jurists that hold on to the principle of Saddu al-dharee'a or blocking the means, allow her a share in inheritance, and those that do not hold on to the principle of Saddu al-dharee'a or blocking the means, will not give her share in inheritance, this group believes that, if the divorce has taken place, then it most be observed with all its rulings,

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[38] Haamidee, A.K., Op. cit., Vol.1., P.348, Ibn Abdul Barr, Y.A. (2000): Al-istidhkaar, Daarul kutubil ilmiyyah, Beirut, Vol.6, P.113-114, Abdur-Rahman, I.D. (1984): *Shari'ah The Islamic Law*, Taha publishers, London, United Kingdom, p.82.

[39] Haamidee, A.K., Op. cit., Vol.1., P.348, Al-Muqdisee, A.Q., (*Al-kaafee)* Op. cit., Vol.2, P.313, Alaau deen, A.S. (1419 A.H): *Al-insaaf fi ma'rifati Ar-Rajih minal khilaaf,* Daaru ihyaa At-turaath 'Arabee, Beirut, Vol.7, P.266, Al-Muqdisee, A.Q., (*Mugniy*) Op. cit., Vol.7, P.228, Abdur-Rahman, I.D. Op. cit., P.82.

[40] Haamidee, A.K., Op. cit., Vol.1. P.348, Ibn Al-Jawzee, S. (nd): *Eethaarul insaaf fi Athaaril khilaaf,* Daarus Salaam, Cairo, 1st ed., P.179, Abdur-Rahman, I.D. Op. cit., p.82.

[41] Haamidee, A.K., Op. cit., Vol.1. P. 348, Abdur-Rahman, I.D. Op. cit., p. 82.

because the husband too cannot inherit her, if she had died, but if divorce had not occurred, the marital relationship would have continued with all its rulings.[42]

4.3.4 Persons upon whom zakatulfitir is compulsory

The jurists are in agreement that, Zakatulfitir is compulsory on the individual, and that, it is a purification of the body not purification of wealth, and it is compulsory on the individual upon his dependants, if they are not wealthy, but they differed regarding the wife into two views:

1. Malik, As-Shafi'ee and Ahmad, held the view that, it is compulsory on the husband upon whom the law has placed responsibility for her.[43]

2. Both Abu-Hanifah and his disciples, held the view that, the wife should purify herself[44].

The jurists in this case, as a result of absence of the law, resorted to identification of the objective of the law.

Therefore, those jurists that regarded the objective behind ZakatulFitir to be guardianship, said, it is compulsory on the guardian to give Zakat upon every person under him[45].

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[42] Haamidee, A.K., Op. cit.,Vol.1, P.349.

[43] Haamidee, A. K. Op. cit., Vol.1, P.380, Ibn Rushdi, M.A., Op. cit., Vol.1, P. 279, Alaau deen, 'A.S., Op. cit., Vol.3, P.118, Al-qurtubee, Y.A. (1980): *Al-kaafee fi Fiqh Ahlil Medinah*, Maktabatur Riyaad Al-Hadithah, Saudi Arabia, P. 322, As-Shiraazee, I.A. (nd): Al-Muhadhab, Beirut, Vol.1, P.164.

[44] Haamidee, A. K., Op. cit., Vol.1, P.380, Ibn Rushdi, M.A., Op. cit.,Vol.1, P. 279,
279, Al-haskafee, M.A., Op. cit., Vol.2, P.363,

And those that regard the objective behind zakatulfitir to be the spending said, it is compulsory on the person who is spending to give Zakat upon every person he is spending on according to the law.

So therefore, Malik, held the view that, the objective is the act of spending, and Abu-Hanifah, held the view that, the objective is the guardianship.[46]

In conclusion, it is submitted that silence of the texts accounts for one of the major causes of differences in interpretation among the jurist. The early jurists were faced with matters which an explicit ruling could not be found in the Qur'an or the Sunnah and it was difficult to find a ruling for it on the basis of strict analogy. In this kind of circumstances, some jurists evolved certain secondary legal principles and made rulings based on them.For example, the majority of jurists recognized the validity of Ijmaa' among the generation after the sahaabah, but Imam Ash-Shaafi'ee questioned its occurrence while Imam Ahmad rejected it outrightly.[47] Similarly Imam Malik's reliance on the precedents of the Madeenites as a source of legislation was rejected by majority of jurists. And Imam Abu Haneefah's principles of istihsaan and Maalik's istislaah were both disallowed by Imam Ash-shaafi'ee as being too independent of the Qur'an, the Sunnah, and

[45] Haamidee, A. K. Loc. Cit., Vol.1, P.381. Ibn Rushdi, M.A., Loc. Cit., Vol.1, P. 280.

[46] Ibid

[47] Philips, B.A. (1990): *The Evolution of Fiqh,* International Islamic publishing House, 3rd Edition, p. 99-100, Abu-Zahrah, M. (1958): *Usul-al-fiqh,* p. 200-202, Khudaree, M.B. (1998): Usul Fiqh, Daarul fikr, Beirut, P. 285.

ijmaa'. That is to say, they relied too much, in his opinion, on human reasoning.

The rules governing the deductive procedures or methods of Qiyas varied among the jurists which resulted in variation in their rulings on similar issues. The various approaches which jurists took in their application of Qiyaas were perhaps the largest source of differences among them. Some narrowed down the scope of Qiyaas by setting a number of pre conditions for its use, while others expanded its scope.

The ulema differed in their approach to the identification of maqasid and the values that they sought to define.

CHAPTER FIVE

SUMMARY AND CONCLUSION

This chapter contains the summary of what has been discussed in the previous chapters; it makes some findings regarding the problem concerning causes of juristic differences in interpretation in Islamic law and finally proffers some recommendations with a view to solving the problems observed.

5.1 Summary

Causes of juristic differences in interpretation under Islamic law are discussed in order to acquaint the reader with a better understanding of why the usual divergence of opinion occurs in issues which the law is silent about, and where such provisions are speculative.

Texts in the Qur'an are divided into two main categories of clear and unclear. A ruling which is communicated in clear words may constitute the basis of obligation, without any recourse to interpretation. A ruling which is communicated in unclear words may not necessarily constitute the basis of obligation because the meaning which it conveys is ambiguous or incomplete and requires clarification.

The provisions of the Shari'ah are classified into definitive and speculative. A definitive text is one which is clear and specific, it has only one meaning

and admits no other interpretations. The speculative texts of the shari'ah are on the other hand, open to interpretation and ijtihad.

The provisions of the shari'ah are also classified into the general and specific.The 'Aam or the general provision found in the text of the shari'ah is of three types; the 'Aam or the general provision which is absolutely general, the 'Aam which is meant to imply a khass (specific), and the 'Aam which is not accompanied by either of the foregoing two varieties.

Al-Mutlaq or unqualified denote a word which is neither qualified nor limited in its application. If we say for example, a 'book' a 'bird' or a 'man' each one is a generic noun which applies to any book, bird or man without any restriction. In its original state, the mutlaq is unspecified and unqualified. Al-Muqayyad or qualified occurs when a mutlaq is specified by an adjective. When the mutlaq is quantified by another word or words, it becomes a muqayyad.

The causes of juristic differences which developed among jurists over the narration and application of the Sunnah are subdivided into:

1. Unawareness of some Hadith, in some cases, the hadith did not reach the jurist, which he had said something regarding the matter. The Sunnah might have reached the jurist, but its authenticity is doubted by him. The jurist may perceive that the Sunnah is weak based on juristic reasoning by which

another jurist has held contrary opinion. The Sunnah might reach the jurist and he has no doubt in its authenticity but he had forgotten the particular Sunnah.

2. Among the jurists have placed various conditions for the acceptability of solitary Sunnah.

Apparent conflict of text occurs when each of two evidences of equal strength indicates the opposite of the other. A conflict is thus not expected to arise between two evidences of unequal strength, as in this case the stronger of the two evidences would naturally prevail.

Silence of the texts accounts for one of the major causes of differences in interpretation among the jurist. The early jurists were faced with matters which an explicit ruling could not be found in the Qur'an or the Sunnah and it was difficult to find a ruling for it on the basis of strict analogy. In this kind of circumstances, some jurists evolved certain secondary legal principles and made rulings based on them.

The rules governing the deductive procedures or methods of Qiyas varied among the jurists which resulted in variation in their rulings on similar issues. The various approaches which jurists took in their application of Qiyaas were perhaps the largest source of differences among them. Some narrowed down the scope of Qiyaas by setting a number of pre conditions for its use, while others expanded its scope.

The ulema differed in their approach to the identification of maqasid and the values that they sought to define.

5.2. Findings

Below are the findings made in this work:

1. The provisions from both the Qur'an and the Sunnah bear some things in common that make the phenomenon of differences in interpretation among the jurists regarding some matters in Islamic law inevitable. These common characteristic features are:

i. The language of the Qur'an and the Sunnah regarding some matters is definitive, such that there is no difference over them among the jurists.

ii. Disagreement among the jurists on some matters is based on the speculative and probable provisions from the Qur'an and the Sunnah regarding them. In other words, the language of the Qur'an and the Sunnah on the other hand, is open to interpretation and gives room for ijtihad.

iii. The characteristic features of the Qur'anic legislation and the Sunnah such as the general and the specific, and the absolute and the qualified, give room for differences in interpretation. This is further illustrated as follows:

The legislation in the Qur'an and the Sunnah in some cases is totally general which precludes specification of any kind. It remains absolutely general and include all to which it applies without any exception.

The legislation in the Qur'an and the Sunnah in some cases may be general, but is meant to imply the specific.

The legislation in the Qur'an and the Sunnah in some cases is general, but specified, either in the same text that convey the general, or in another text somewhere else in the Qur'an.

The legislation in the Qur'an and the Sunnah in some cases one text will appear in mutlaq form, and a similar text for another case will appears in muqayyah form and the two texts convey the same ruling but differ in their causes.

vi. The Sunnah, as a source of Islamic law, has some unique characteristic features that formulate the nature of its provisions. These peculiarities have given the room for differences in interpretation among the jurists. These unique features are seen as follows:

a) The Sunnah of the Prophet (peace be upon him) regarding some matters, did not reach some of the jurists, otherwise they would have decided to the contrary based on what manifests from the texts of the Qur'an, or another Sunnah, or analogy, or principle of presumption. This atimes may disagree with the Sunnah.

b) Some of the jurists had doubted authenticity of some reports of the Sunnah because, the reporter or the person the reporter had reported from among the chain of transmission was unknown to them, or his character or memory was suspect. In order words, some of them had regarded some

precedents from the Sunnah to be weak, based on juristic reasoning which another jurist has held different opinion and none of them has given the thought that the correct opinion is with one of them, or even both of them might be correct.

c) Among the jurists some do forget some Sunnahs which had reached them and they had no doubt in its authenticity.

d) All the classical jurists have stipulated one condition or the other for the acceptance of the Khabaruwahid or solitary Sunnah based upon their distinct methodologies and approach to legal questions.

e) The difference among the jurists over some matters was as a result of apparent conflict in the texts of the Sunnah.

2. Silence of the texts from both the Qur'an and the Sunnah regarding some matters, is one of the major causes why the jurists differed in opinion among themselves.

3. The differences of opinionamong the jurists occurred due to their variance in approach to application of Qiyas, and cumulatively, this gave us the big picture of fiqh so that we can;

a) be guided on the variant approaches to solving legal issues,

b) being reassured that the opinions we give today have a basis in the formation of fiqhand

c) that we can use the primitive and fundamental theories of the jurists to soar to the highest heights of juristic excellence.

4. The jurists did not restrict themselves to any single methodology for the derivation of rulings in Islamic law, but rather, they used several sources or theories of interpretation to interpret Allah's purpose to man.

5.3 Recommendations

In the preceding chapters, causes of juristic differences in interpretation in Islamic law have been discussed and instances given regarding all of the causes. Based on the observations of this research, below are some of the proposed solutions for solving the enumerated problems.

1. The study of sources of Islamic law in our universities should comprise the nature of textual authorities in both the Qur'an and the Sunnah, so that the common characteristic features bear by both the Qur'an and the Sunnah, and those points that make the phenomenon of differences in interpretation among the jurists regarding some matters in Islamic law inevitable could be studied, understood and taught to scholars.

2. In order to put the understanding on difference of opinion among the jurists where the texts are silent, in proper perspective, the study of classical works of the jurists should be strongly promoted, by so doing, it will be discovered that they have encouraged adherence to the Qur'an and the Sunnah and discouraged people from following their own opinion where it disagrees with ruling from the Qur'an or the Sunnah. Some classical works of scholars in Islamic law need to

be translated and subjected to extensive commentary, so as to facilitate a better understanding of differences of opinion among the juristswhere the texts are silent. Some of these include Raf'ul Malaam 'anil-Aimmatil 'Aalaam, Imam Ibnu Taimiyah, Ahmad bin Abdul Halim, Daarul Kutubil 'Ilmiyyah, Beirut, Lebanon, 2nd edition, 1408 A.H. 1988.

Al-khilaaf Bainal 'Ulama, Muhammad, bin Salih bin Muhammad Al-'Usaimin, Daarul-Watan, publication, (1423). http://www.raqamiya.org

The authors of these works discussed the causes of differences among the companions of the Prophet of Allah (peace be upon him), and gave instances of matters that they differed upon with regards to all causes mentioned. The writers were able to capture the causes with respect to the Sunnah.

al-Albanee, M.N. (nd). Sifatus Salaatin Nabiy , Maktabatul Mu'arif, Riyadh. The writer of this work in his introduction to the book has excessively discussed how strongly the jurists have encouraged adherence to the Qur'an and the Sunnah while discouraging people from following their own opinion where it disagrees with ruling from the Qur'an or the Sunnah.

Al-Jaami'ul Mufeed Fi Asbaabi Ikhtillafil Fuqahaa, Dr. Abdulkareem Hamidee, Daaru ibn 'Azmi, Beirut, 1st edition, 1430 A.H./2009.

This book is a unique work in this area. The writer of the work explained Ibnu Rushdin's intention on his work; BidayatulMujtahid wa Nihayatul Muqtasid which is purposely to explain causes of juristic differences. The writer of the book was able to indentify twelve textual causes of juristic differences among the classical jurists in the book; Bidayatul Mujtahid.

3. To have a better understanding on why differences of opinion among the jurists that occur due to their variance in approach to application of Qiyas, scholars in Islamic law should take upon themselves the responsibility of enlightening people so that they should not see the works of the jurists as a mere academic exercise but as an exercise in ijtihad or juristic reasoning on their part which evidently, is encouraged within the texts of the Shari'ah. The Holy Prophet (peace be upon him) says:

"When anyone exercises Ijtihad (Juristic reasoning) and he is correct in his opinion, he will have two rewards, but if he errs in his effort, he will still have earned one reward" This also suggests that the grounded people of knowledge in Islamic law who have mastered other language(s) than the original language of the Shari'ah should write more books, journal articles,

contribution in magazines, use mosques and public lectures to spread the better understanding.

4. All higher institutions of learning where the study of fiqh is in operation should be used as institutions of learning, in which no Madh-hab or school of law is given preference over another. By so doing, the positions of the various Madha-hib as well as several sources or theories of interpretation used by the jurists to interpret Allah's purpose to man with regard to any issue could then be analyzed rationally and objectively. In addition, there is the need to establish a fiqh Academy or commission that will bring together scholars from all parts of the Muslim world with expertise in all of the madhahib.

The suggestions put forth above by this research when closely looked at, will assist in solving the enumerated problem.

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