

**AN ANALYSIS OF THE CONCEPT OF ABROGATION (NASKH)  
IN ISLAMIC LAW**

**BY**

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## DECLARATION

I declare that the work in this thesis entitled: “*An Analysis of the Concept of Abrogation (Naskh) in Islamic Law*” has been performed by me in the Department of Islamic Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this Thesis was previously presented for another degree or diploma at this or any other Institution.

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## CERTIFICATION

This dissertation titled: “*An Analysis of the Concept of Abrogation (Naskh) in Islamic Law*” by Saeed BELLO meets the regulations governing the award of the degree of Master of Laws – LL.M of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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## **DEDICATION**

This thesis is dedicated to Almighty Allah for His favour on me and for the hope of His mercy on the Day of Judgment.

## **ACKNOWLEDGEMENTS**

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## GLOSSARY

Áhád	-	A solitary report
Al-Ansáb	-	Altar stones, in whose vicinity sacrifices were offered (before the advent of Islam).
Al-Azlám	-	Arrows used for lotteries to make decisions (before the advent of Islam).
Al-Badá	-	To become apparent
Al-Izálah	-	Taking away or eradication
Baitul-Maqdis	-	Jerusalem
Bi'r Ma'únah	-	A well in the land of Huzail which is located between Makkah and Asfaan.
Zanniy	-	Speculativeness
Dinár	-	Gold coins
Ghaib	-	The unseen and unknown
Hadith	-	Sayings of Prophet Muhammad (SAW)
Hudaibiyah treaty	-	A place where Prophet Muhammad (S A W) signed a treaty with the Makkans
Ijmá	-	Consensus of Muslim jurists
Ka'abah	-	The holy house of Allah in Makkah
Kulliyy	-	Something being in a general form
Lauhul Mahfúz	-	The Preserved Tablet which contains the fate of the universe.
Mansúkh	-	The abrogated ruling
Mutawátir the	-	This is a report which is decisive in its certainty through number of its reporters and their reliability.
Mu'tazilah the	-	They are the followers of Waasil bin Ataa who rejected attributes of Allah (the Most High).
Nàsikh	-	The abrogating ruling

Naskh	-	Abrogation
Qat'I	-	A definitive knowledge
Qiblah	-	The direction to face during prayers
Qiyas	-	Analogical deduction
Qur'an (S AW)	-	The holy book of Islam revealed to Prophet Muhammad
Ramadán which	-	The ninth month in the Islamic lunar months during fast is obligatory
Rizqan Hasanah	-	A goodly provision
Sahábah	-	Companions of Prophet Muhammad (S AW)
Sakaran	-	Intoxicants
Saláh	-	Special prayers which special rituals rites are performed; the obligatory ones are five in a day
S . A . W Allah	-	SallaalLahu alaihi wasallam (peace and blessings of be upon him)
Saum	-	Fast
Shari'ah	-	Islamic Law
Sunnah	-	Sayings, practice and approval of others' actions by Prophet Muhammad (S.A.W)
Tabi'un	-	Followers of the Companions of Prophet Muhammad (S.A.W)
Takhsís	-	Specification
Tauràt	-	Torah
Usúliyyún	-	Specialists in principles of jurisprudence

## **ABSTRACT**

*Abrogation is generally aimed at bringing about what will be of general good to mankind. In abrogation, an existing legal ruling is replaced with another better or similar ruling. However, there have been efforts by some modernists such as Abdullahi Saeed to reinterpret some texts of the Qur'an under the guise of abrogation. This in itself represents an attempt to render some provisions of Islamic Law obsolete and or impotent. This research work therefore examines in details the extent to which abrogation is allowed in Islamic Law and whether or not abrogation can be an ongoing process? At the end of it was found that abrogation can only be applicable within the context of Qur'an and Sunnah and that abrogation cannot be an ongoing process. The research work gave recommendations which include reference to the understanding of Companions of the Prophet (S.AW) in interpreting the texts of the Qur'an. The provisions of Islamic Law are adequate enough to address societal needs at all times without necessarily reinterpreting some texts the Qur'an.*



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# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1 Introduction

Abrogation in Islamic Law has to do with replacing an existing legal injunction with a better one or similar.<sup>1</sup> In abrogation, there are always two texts involved: the abrogating (Násikh) and the abrogated (Mansúkh) texts, which are revealed at different points in time. In fact, the abrogating text (Násikh) comes after the abrogated text (Mansúkh).<sup>2</sup> Both the abrogating and the abrogated ruling must deal with the same subject matter.

Abrogation implies that the application of the first ruling has been completely replaced. This is one of the differences between the concept of abrogation and another similar concept known as Takhsís (Particularisation). “Particularisation” involves a situation where a text limits or restricts the application of a general ruling found in another text.<sup>3</sup>

Abrogation in Islamic Law is only related to legal rulings, and not belief. In other words, abrogation cannot occur with regards to belief in Allah, His names and attributes, the Day of Judgment, and other matters related to the fundamentals of belief.<sup>4</sup> It is in this regard Allah (the Most High) says:

“He (Allah) has ordained for you the same religion (Islam) which He ordained for Nuh (Noah), and that which we have inspired in you (O Muhammad, S.A.W), and that We

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<sup>1</sup>. Al-Bukharee, A.A.M. (1307 A.H) Kashful Asraar, Maktabatus Sanayi', Cairo. p.875.

<sup>2</sup>. Abu Zahrah, M. (1958) Usúlu Fiqh, Daarul Fikr il Arabiy. Beirut. p.185.

<sup>3</sup>. Qadhi, A.Y. (1999) An Introduction to the Sciences of the Qur'an, Al-Hidaayah Publishing and Distribution, Birmingham. p.233.

<sup>4</sup>. Ibid. at p.233.

ordained for Ibrahim (Abraham), Musa (Moses) and Iesa (Jesus) saying you should establish religion and make no division in it...”<sup>5</sup>

In abrogation, there are instances where the rulings in some texts have been abrogated before its application. In the same vein, there are instances of abrogation where the text containing a particular ruling ceases to remain but the ruling is continuously applicable.

Abrogation as a concept is one of the areas of uniqueness of Islamic Law for many reasons. One of which is to bring about “ease” in complying with Islamic injunctions.<sup>6</sup> However, the concept of abrogation in Islamic Law has been misunderstood by some groups such as the Shi’ites and the Jews which has generated a lot of controversy. Despite the lapse of fifteen hundred years since the revelation of the Qur’an, which is the first primary source of Islamic Law, the controversy over abrogation is as fresh today as it might have been at its early stage.

More importantly, there have been efforts by some modern scholars to re-interpret some texts of the Qur’an in an attempt to render them obsolete and or impotent under the guise of abrogation.

This research work, therefore, seeks to show whether or not abrogation can still be an on-going process.

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<sup>5</sup>. Al-Hilali, M.T. & Khan, M.M. (1427)AH Translation of the Meanings of the Noble Quran in the English Language, King Fahd Complex for the printing of the Holy Quran, Madina K.S.A Q 42.13 (This translation shall be maintained throughout the research)

<sup>6</sup> As-Suyuutee, J.(1951) Al-Itqán Fee Ulúmil Qur’an Daarul Fajr Lit Turaath, Cairo, P. 54.

## **1.2 Statement of the Problem**

The efforts by some modern scholars to reinterpret some texts of the Qur'an under the guise of abrogation represent an attempt to render some texts obsolete and or impotent. This has threatened the correct understanding and application of the concept of abrogation in Islamic Law. Some modern scholars have called for the reinterpretation of some texts of the Qur'an through abrogation. They argued that in view of the current problems many Muslims are facing in their effort to implement the Shari'ah, they believe that Naskh (abrogation) provides a strong basis for the reinterpretation of some texts of the Quran in order to best link the Quran to the needs of Muslims today. They added that, in the early Islamic Community, amputation was used to punish and prevent theft. So, without changing the underlying objective, one could argue that, a Muslim community could today find a means of prevention that is more in line with its own circumstance. The questions therefore are that whether or not abrogation can still be an on-going process and can abrogation be the basis for suggesting alternative punishments to hadd punishments like amputation in cases of theft?

## **1.3 Objectives of the Study**

The following are the objectives of the research.

- i. To examine the extent to which abrogation is allowed in Islamic Law.
- ii. To examine whether or not there is any derivable benefits in the application of abrogation in Islamic Law.
- iii. To analyse the differences between abrogation and other similar concepts with a view to showing whether or not abrogation can still be an on-going process.

- iv. To examine the relevance or otherwise of the various classifications and conditions for the application of abrogation in Islamic Law.

#### **1.4 Justification**

Understanding the concept of abrogation in Islamic Law will help in appreciating the flexible and dynamic nature of Islamic Law. Hence, this research will be of importance to students of Islamic Law.

It is hoped that the work would contribute to knowledge and be useful as reference material on the subject matter of this research.

#### **1.5 Scope of the Study**

The research deals with the arguments as to whether abrogation can be an ongoing process despite the fact that the period of revelation has ceased. Texts in the Qur'an and Sunnah relating to the concept of abrogation in Islamic Law as well as the arguments of the scholars in the leading Sunni schools will be critically analysed.

#### **1.6 Methodology**

This research work will be mainly doctrinal in nature. The doctrinal method of research is a library oriented research where books, articles, journals, internet, etc. are consulted and duly acknowledged.

#### **1.7 Literature Review**

Many scholars have made great contributions on the subject matter of this research work. This work will review some of the earlier works written on this area as follows:

- An-Nuhhás, A.M.I. An Násikh Wal Mansúkh Fil Qur'anil Kareem:<sup>7</sup>

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<sup>7</sup> An-Nuhhás, A.M.I. (1988) An-Násikh Wal Mansúkh Fil Qur'aanil Kareem, MaktabatuAalaamulFikr, Cairo.

This author discussed the concept of abrogation. He mentioned the statements of scholars on the concept of abrogation. In fact, he compiled almost all that have been said by scholars on abrogation even if those statements are not valid in his own opinion. However, this author does not discuss the differences between the concept of abrogation and other similar concepts such as Takhsís (Particularisation).

- Al-Muqree, H. S. N. An Násikh Wal-Mansúkh:<sup>8</sup>

This author discussed the concept of abrogation in Islamic Law. He adopted the style of al-Imam Az-Zarkashee by listing the chapters of the Qur'an containing instances of the abrogating verses only, those containing the abrogated verses only and those containing both the abrogating and the abrogated verses. However, this author did not mention some of those groups who rejected the concept of abrogation and neither did he respond to their criticisms.

- Ibnul-Jawzee, A. Al-Mussaffá Min Ilmin Násikh Wal Mansúkh:<sup>9</sup>

This author discussed the concept of abrogation in Islamic Law. He categorically mentioned all the probable arguments in support of abrogation based on the texts of the Qur'an, opinions of companions (Sahábah) of the Prophet (SAW), views of Tabi'ún (Successors of the companions of the Prophet (S.A.W)). However, this author also did not discuss the allegation of those who questioned the existence of verses containing abrogation in the Qur'an and neither did he respond to their criticism.

- Ibnul-Arabee, A. M. An-Násikh Wal Mansúkh Fil Qur'ánil Kareem<sup>10</sup>.

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<sup>8</sup> Al-Muqree, H.S.N. (1984) An-Násikh Wal-Mansúkh, Al-MaktabatulIslaamee, Beirut.

<sup>9</sup>.Ibnul Jawzee, A. (1995) Al-Mussaffaa Min Ilmin NásikhWal Mansúkh, Mu'assasaturRisaalah, Beirut.



This author discussed the concept of abrogation extensively. He examined the instances of abrogation in some of the chapters of the Qur'an. He mentioned some legal maxims (qawá'id) relating to the concept of abrogation some of which include; any statement or action after the (demise) of the Prophet (SAW) cannot be considered abrogating (Násikh) even if it is a consensus. However, the author did not discuss the conditions for the application of abrogation in Islamic Law.

- Az-Zarqaanee, M. A. Manáhilul Irfán Fí Ulúmil Qur'an.<sup>11</sup>

This author discussed the concept of abrogation extensively. He discussed with relevant examples from the Qur'an and Sunnah the logical scenarios of abrogation in Islamic Law. He mentioned the arguments of some of those who reject the concept of abrogation and responded to those arguments. In fact, the level to which this author analysed the subject matter of this research is of admirable erudition.

- Al-Karmí, M.Y.A Qalá'idul Marján Fí Bayánin Násikh Wal Mansúkh Fil Qur'an<sup>12</sup>

This author discussed the concept of abrogation in the Qur'an extensively. He went further to give a list of all the chapters in the Qur'an that contain instances of abrogation. He discussed the different categories of abrogation in great details. However, the author did not discuss the occurrence of abrogation in the Sunnah.

- Assaduusee, Q. D. Q. An Násikh Wal Mansúkh<sup>13</sup>.

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<sup>10</sup>.Ibnul Arabi, A.M. (2006) An-Násikh Wal Mansúkh Fil Qur'aanil Kareem, DaarulKutubillmiyyah, Beirut.

<sup>11</sup>Az-Zarqaanee, M.A.(1943) ManaahilulIrfaan Fee Uluumil Qur'an, Al-MaktabtulAsriyyah, Cairo.

<sup>12</sup>.Al-Karmí, M.Y.A. (1400 A.H) Qalaa'idul Marjaan Fee Bayaanin Násikh Wal Mansúkh Fil Qur'an, Daarul Qur'anil Kareem, Kuwait.

This author discussed the instances of abrogation in some of the chapters of the Qur'an. This is in addition to the list of chapters containing instances of the abrogating (Násikh) verses only, the abrogated (Mansúkh) verses only and chapters containing both the abrogating and the abrogated verses. The author, however, did not discuss the allegation of those who reject abrogation in totality and neither did he respond to their allegations.

- Al-Qattaan, M. K. Mabáhih Fí Ulúmil Qur'an<sup>14</sup>.

This author discussed the concept of abrogation in details. He analysed the views held by the Jews, Shi'ites and others on the concept of abrogation.

He went further to discuss the criticisms against abrogation and responded to those criticisms accordingly. The author also responded to those who questioned the existence of texts containing abrogation in the Qur'an.

### **English Sources**

- Saeed, A. (2006) Interpreting the Qur'an: Towards a Contemporary Approach<sup>15</sup>  
This author discusses the concept of abrogation and its relevance to flexibility in interpretation and application of the Qur'an in different times and circumstance. He posited that abrogation has been given little attention by Muslim Jurists and Scholars as an important method in dealing with changes to law in a substantial way. He argued that abrogation provides a strong basis for the reinterpretation of some texts of the Qur'an in order to best link the Qur'an to the needs of Muslims today. The approach by this author to the concept of abrogation suggests an attempt to render some verses of the Qur'an irrelevant.
- Qadhi, A.Y. (1999) An Introduction to the Sciences of the Qur'an<sup>16</sup> This author discussed the concept of abrogation to the extent that abrogation with respect to

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<sup>13</sup>. Assaduusee, Q.D.Q. (1400 A.H) An-Násikh Wal Mansúkh, Muassasatur Risaalah, Beirut.

<sup>14</sup>. Al-Qattaan, M. K. (2007) Mabáhih Fí Ulúmil Qur'an, MaktabatuWahbah, Cairo.

<sup>15</sup>. Saeed, A.(2006) Interpreting the Qur'an: Towards a Contemporary Approach Routledge Taylor & Francis Group, London and New York.

the Qur'an is of two types. There is a general abrogation that was revealed to other nations, and there is the specific abrogation, in which some verses of the Qur'an abrogated others. The author mentioned the fact that the Qur'an abrogates the previous scriptures without the details of whether those previous scriptures are part of the Islamic Law and whether Muslims should abide by those laws or not?

- Kamali, M. H (1991) Principles of Islamic Jurisprudence.<sup>17</sup>

This author discussed the concept of abrogation extensively. Unlike some other writers, he discussed the two types of abrogation which include the explicit (sarih) and the implicit (dimni) abrogation. He also dedicated a topic in his work to make a distinction between abrogation and Takhsis (Particularisation). He equally discussed the arguments against the concept of abrogation in brief and mentioned also the majority of scholars in support of abrogation without having to go into the details of their arguments.

## **1.8 Organizational Layout**

The structure of the work is anchored on a five chapter format. Chapter one deals with general introduction which presents the subject matter of the research, highlighting its problems, objectives, scope, Methodology, literature review, justification and structure of the thesis. Chapter two deal with the primary and the secondary sources of Islamic Law. Chapter three discusses the concept of abrogation in Islam. Chapter four deal with the conditions and classification of abrogation. Chapter five concludes the work with findings and recommendations.

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<sup>16</sup>. Qadhi, A.Y. (1999) An Introduction to the Sciences of the Qur'an. Al-Hidayyah Publishing and Distribution, United Kingdom

<sup>17</sup>. Kamali, M. H (1991) Principles of Islamic Jurisprudence<sup>17</sup> Islamic Texts Society, United Kingdom.

## CHAPTER TWO

### SOURCES OF ISLAMIC LAW

#### 2.1 Nature of Islamic Law

Islamic Law, known as Shari'ah, is a comprehensive system that regulates human being's relationship with his Creator, with his fellow human beings, and with his society. The Shari'ah is not merely a system of law, but a comprehensive code of behavior that embraces both private and public activities.<sup>1</sup>

Muslim Jurists categorise Shari'ah into Ibadát (acts of worship) Mu'amalát (transactions and contracts), Adáb (behavior, morals and manners), I'tiqádát (beliefs) and Uqúbát (punishments). The Shari'ah is a system that seeks to create a harmonious and peaceful society in which justice, equality, affection, tolerance and freedom apply to all the people.

There are certain main objectives of the Shariah. These are the general aims that the Shariah strives to fulfill with respect to the human life as well as the specific aims that particular legal injunctions have been set down in order to achieve. These objectives, therefore, can be classified into two broad categories: general and specific. The general objectives of the Shari'ah are those that aim at realizing the general human welfare, both in this world and in the hereafter. This is achieved by the Shari'ah through the legislation of a body of legal injunctions. The specific objectives of the Shari'ah are those that the Shari'ah seeks to realize in a narrower domain of human activity, such as family life, economics or political order. The general objectives of the Shari'ah includes; the preservation of life, religion, intellect, lineage and wealth.<sup>2</sup>

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<sup>1</sup>.Ibn Taimiyya, A. (2004) Majmu'ul Fatawah, Mujamma'u Malik Fahd, Saudi Arabia, vol.19 p.309.

<sup>2</sup>.Ibn Ashur, M.A.(2004) Maqasidu Shari'ah, Wizaratul Auqaf, Qatr.

## 2.2 Sources of Islamic Law

### 2.2.1 The Qur'an

Qur'an, literally, is a root word which means "reading" or "recitation."<sup>3</sup> Technically, the Qur'an has been defined in various ways. Thus, according to Al-Amidi, Qur'an is "the speech of Allah, the Most High, revealed to the messenger of Allah (peace be upon him) in Arabic language as a challenge (to mankind) by its shortest chapter, preserved in the Mushafs, transmitted to us by way of tawatur, the recitation of which is a worship, it begins with Suratul Fatihah and end with Suratun Nas."<sup>4</sup>

Al-Bazdawi defines the Qur'an as: "the revealed book to the messenger of Allah, Muhammad (Peace be Upon Him), which is preserved in the Mushaf, transmitted to us by way of tawatur without doubt."<sup>5</sup>

Az-Zarqanee defines the Qur'an as: "the Arabic speech (Kalaam) of Allah which He revealed to Muhammad (Peace be Upon Him) in wording and meaning, and which has been preserved in the Mushafs and has reached us by way of Mutawatir, and it's a challenge to mankind to produce something similar to it."<sup>6</sup>

One thing to note from all the above definitions is that they differ in wordings. However they all convey one message which is that the Qur'an has its origin from

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<sup>3</sup>.Muslim, I. Az-Zayyaat, A. et al (n.d) Al-Mu'jam Al-Waseet, Daar Ad-Da'wah. P.775.

<sup>4</sup>. Al-Amidi, A.M. (1404 AH) Al-Ihkam fi Usululil Ahkam, Darulkitabul Arabiy, Beirut, P.

<sup>5</sup>. Al-Bazdawi, A.M (n.d) Kanzul Wusul Ila Ma'rifatil Usul, Matba'atu Jawid Bris, Karatchi. Vol.1, pp.21-23.

<sup>6</sup>. AZ-zarqanee,

Allah (the Most High) to Prophet Muhammad (S.A.W) and that it is a divine message to mankind.

The Qur'an is the authoritative guide for Muslims and the first source of Islamic Law.<sup>7</sup> There are 114 chapters (Suwar) in the Qur'an. Each chapter has a separate title. The sequence of the chapter were re-arranged and finally determined by the Prophet in the year of his demise. By this arrangement, the Qur'an begins with Suratul Fatihah and ends with Suratun Nas.<sup>8</sup>

### **2.2.1.1 Characteristics of Qur'anic Legislation**

The Qur'an is quite expressive of the purpose, reason, objective, benefit, reward and advantage of its injunctions. This is why the Qur'an will often mention the benefit that may accrue by the observance of its commands or the harm that is prevented by its prohibitions. The characteristics of the Qur'anic legislation are hereby discussed in details as follows:

#### **i. The Definitive (Qat'i) and Speculative (Zanni) Nature of the Qur'an**

The texts of the Qur'an are definitive in nature in terms of their authenticity. By this, all the texts of the Qur'an are authentic to be from Allah (the Most High) to Prophet Muhammad (S.A.W) and the Prophet conveyed it to the Muslims without any alteration.<sup>9</sup>

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<sup>7</sup> . Zaidan, A. (2004) Al-Wajiz Fi Usulil Fiqh, Mu'assasatur Risalah, Beirut, P.119.

<sup>8</sup> . Ibid

<sup>9</sup> . Khallaf, A. (2014) Ilmu Usulil Fiqh, Darul Gaddil Jadid, Cairo, P.36

The texts of the Qur'an can also be classified based on the rulings conveyed by the texts.

**Definitive (Qat'i) Text:** A definitive text has only one meaning and admits of no other interpretations.<sup>10</sup> An example of this is the text on the entitlement of the husband in the estate of his deceased wife, as follows: "In what your wives leave, your share is a half, if they leave no child."<sup>11</sup> This text is a definite ruling on the rule that the husband is entitled to a half of his deceased and wife's estate not more where she leaves no child.

Another example is the ruling relating to the fornicators. Allah (the Most High) say: "the fornicatress and fornicator, flog each of them with a hundred stripes..."<sup>12</sup> This is a definitive ruling in the in the sense that it provides for the punishment for specific offences are also examples of definitive ruling in the Qur'an.

**Speculative (Zaniyy) Texts:** A speculative text is open to more than one meaning and admits of interpretations.<sup>13</sup> In cases where a text is open to more than one meaning, the best interpretation is that which can be obtained from the Qur'an, that is, by looking at the Qur'an as a whole and finding the necessary elaboration elsewhere in a similar or even a different context.<sup>14</sup> An example of a speculative text is the provision of the Qur'an where Allah (the Most High) says: "and divorced women shall wait (as regards their marriage) for three *quru*..."<sup>15</sup> The word *quru* in Arabic language has two meanings which are purity and menstrual period. Hence, the text can be interpreted as

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<sup>10</sup> . Kamali, M.H op. cit. P.28

<sup>11</sup> . Al-Qur'an ch.24 v.2

<sup>12</sup> . A-Qur'an ch.24 v.2

<sup>13</sup> . Khallaf, A op.cit. p. 38

<sup>14</sup> . Kamali, M.H op.cit. p.28.

<sup>15</sup> . Al-Qur'an ch. V.228

three purity and well as three menstrual periods. This is why Muslims Jurists have differed on the waiting period of divorce women.<sup>16</sup>

ii. **Brevity and Detail (al-ijmal wat-tafsil)**

The Qur'an being the primary source of Islamic Law provides the general guidelines on almost every major topic in Islamic Law. The Qur'an provides the general principles of Islamic Law such that its contents require a great deal of elaboration.<sup>17</sup> In this regard, Abu Zahrah concurs with Ibn Hazm's assessment that "every single chapter of fiqh finds its origin in the Qur'an which is then explained and elaborated by the Sunnah."<sup>18</sup>

The provision of Qur'an chapters 6:38 "We have neglected nothing in the Book" all evidenced the fact that the general law and religion, are exhaustively treated in the in the Qur'an. Further details of the content of the Qur'an is often provided, although not exhaustively, by the Sunnah. If the Qur'an provides the general principles of Islamic law, then most of the provisions of the Qur'an will be compact and brief in nature. The detailed provisions of the law will be minimal in the Qur'an. For instance, the following text of the Qur'an provides the textual authority for the sources of Islamic Law, namely the Qur'an, the Sunnah, Ijma, and Qiyas. The text reads: "O you who believe; obey Allah and His Messenger and those of you who are in authority; and if you differ in anything amongst yourselves, refer it to Allah and His Messenger..."<sup>19</sup> To "obey Allah" in this text refers to the Qur'an as the first source, and "obey the

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<sup>16</sup>. Khallaf A. op. cit. p. 38

<sup>17</sup>. Abn Zahrah, M. op. cit. p. 80 referred to by Kamali, M.H., P.37

<sup>18</sup>. Ibid (See Kamali, M.H, P.37)

<sup>19</sup>. Al-Qur'an ch.4 v.58.



Messenger” refers to the Sunnah of the Prophet, and “those of you who are in authority” authorises the consensus of Islamic Scholars. The last part of the text (and if you differ...) validates qiyas. This is because a difference which is dispute can only be referred to Allah and to His Messenger by extending the rulings of the Qur’an and Sunnah through analogy to similar cases.<sup>20</sup>

Al-Shatibi further observes that wherever the Qur’an provides specific details it is related to the exposition and better understanding of its general principles.<sup>21</sup> Most of the legal contents of the Qur’an consist of general rules, although it contains specific injunctions on matters which are deemed to be unchangeable, but in matters which are subject to change, it merely lays down general guidelines.<sup>22</sup>

### **2.2.2 The Sunnah**

Sunnah literally means “a known path”<sup>23</sup> which is followed again and again or “a commendable precedent or bad precedent.” The literal meaning of the word Sunnah is used in the Hadith of the Prophet (S.A.W) as reported by Muslim that,

“Whoever establishes a good practice (Sunnah) in Islam has its reward and (also partake in the) reward of those who adhere to it without any decrease in their reward till the Day of Judgment. Likewise whoever establishes a bad practice (Sunnah) bears its burden and the burden of those who act upon it without decreasing anything from the original punishment till the Day of Judgment.”<sup>24</sup>

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<sup>20</sup> . Ash-Shatibi,I.M.(n.d) Al-Muwafaqat Fi Usulil Fiqh, Darul Ma’arif, Beirut, p.31.

<sup>21</sup> . Ibid

<sup>22</sup> . Kamali, M.H. op. cit. p. 35

<sup>23</sup> . Mustapha, I. op. cit. p.502

<sup>24</sup> . Muslim, A.M. op. cit. vol.4 P.705

Technically, Sunnah is defined variously by the scholars based on their areas of specialisation. Specialists in the Principles of Jurisprudence (Usúliyún), define Sunnah as “anything that is reported to have come from the Prophet (S.A.W) which is not the Holy Qur’an and which contains words, action or tacit approvals, and is validly approved to be a legal source.”<sup>25</sup>

According to Scholars of Hadith (Muhaddithun), Sunnah is “what has been passed down from the Prophet (S.A.W) 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”<sup>26</sup>

According to Muslim Jurists (Fuqaha), Sunnah means “what is established to have come from the Prophet (S.A.W) and is not from the class of *fard* or obligatory acts.”<sup>27</sup>

From the above definitions, it will be observed that specialists in the Principle of Jurisprudence (Usúliyún) exclude the description of the physical features of the Prophet (S.A.W) from the definition of Sunnah. Hence, for the purpose of this research, the definition of Scholars of Hadith (Muhaddithun) will be adopted. This is because Sunnah includes the physical features of the Prophet (S.A.W) that is validly approved to be a legal source.

### **2.2.2.1 The Legal Position of Sunnah**

The Muslim Jurists are unanimous on the fact that Sunnah is a source of legislation under Islamic Law and that in its rulings with regard to what is permissible (halal) and

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<sup>25</sup>. Al-Khatib, M.A. Usulul Hadith Ulumuhu wa Mustalahuhu, (2001) Daarul Fikr, Beirut, p.13.

<sup>26</sup>. Ibid

<sup>27</sup>. Ibid

what is prohibited (haram) it stands on the same footing as the Qur'an.<sup>28</sup> Though, it is the second source of legislation in Islamic Law.<sup>29</sup>

The following texts of the Qur'an testified to the authority of the Sunnah. Allah (the Most High) says: "Nor does he speak of (his own) desire. It is only revealed."<sup>30</sup> Allah (the Most High) also says: "...And whatsoever the Messenger (Muhammad S.A.W) gives you, take it and whatever he forbids you abstain (from it)..."<sup>31</sup> Muslims have also been enjoined to submit to the ruling of the Prophet (S.A.W). This is because it forms part of the Muslim faith. Allah (the Most High) says: "But no, by your lord, they can have no faith, until they make you (Muhammad S.A.W) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept them with full submission."<sup>32</sup> Allah (the Most High) also says: "it is not for a believer, man or woman, when Allah and His Messenger have decreed a matter that they should have any option in their decision."<sup>33</sup> Allah (the Most High) also says:

"O you who believe! Obey Allah and obey the Messenger (Muhammad S.A.W), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Messenger (S.A.W), if you believe in Allah and in the last Day. That is better and more suitable for final determination."<sup>34</sup>

Allah (the Most High) also says: "He who obeys the messenger (Muhammad (S.A.W)) has indeed obeyed Allah, but he who turn away, then we have not sent you (O

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<sup>28</sup>. Ash-Shaukane, M.A.M (1999) Irshadul Fahul Ila tahqiqil Haq Min Ilmil Usul, Darul Kitabil Arabiy. p. 33

<sup>29</sup>. Az-Zuhaili, W.(2011) Al-Wajiz Fi Usulil Fiqh, Darul Fikr, Lebanon, p. 39

<sup>30</sup>. Al-Qur'an ch. 53 v. 3-4.

<sup>31</sup>. Al-Qur'an ch. 59 v.7

<sup>32</sup>. Al-Qur'an ch. 4 v. 65

<sup>33</sup>. Al-Qur'an ch. 33 v.36

<sup>34</sup>. Al-Qur'an ch.3 v.59

Muhammad (S.A.W)) as a watcher over them.”<sup>35</sup> Allah (the Most High) also says: “...and let those who oppose the Messenger’s (Muhammad S.A.W) commandment (i.e his Sunnah) beware, lest some Fitnah (disbelief, trials, and afflictions...) should befall them or painful torment be inflicted on them.”<sup>36</sup>

There are also authorities from the Hadith of the Prophet (S.A.W) justifying the authoritativeness of Sunnah as a source of Legislation in Islamic Law. Abu Daud and Tirmidhi reported that the Prophet (S.A.W) says: “I was given the Book (i.e The Qur’an) and its like (Sunnah) together with it.”<sup>37</sup> It is also reported in another Hadith that the Prophet (S.A.W) says: “You should hold on to my Sunnah and the Sunnah of my rightly- guided caliphs, hold on to it firmly.”<sup>38</sup> Similarly, the Prophet (S.A.W) is reported to have said: “If I forbid something for you, stay away from it, and if I command you to do something, do it to the best of your ability.”<sup>39</sup>

It can be concluded from the above cited authorities that Sunnah is a source of legislation which has to be reckoned with in all legal matters.

The Sunnah provides explanations and elaborates meaning of the Qur’an. It explains and determines the precise meaning of the Qur’an. In situations where the text of the Qur’an suggests more than one meaning or when it is conveyed in general terms, it is the Sunnah which specifies the meaning that must prevail.

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<sup>35</sup>.Al-Qur’an ch.3 v.80

<sup>36</sup>.Al-Qur’an ch.24.v.64

<sup>37</sup>.Abu Dawud,S.A.(n.d)Sunan Abu Dawud, Darul Kitabil Arabiy, Beirut. Vol. 4 p.328.

<sup>38</sup>.Ibid at p.329.

<sup>39</sup>.Ibn Majah, M.Z. Sunan Ibn Majah, Darul Fikr, Beirut, Vol. 1, p.3

The explanatory role of the Sunnah in relation to the Qur'an has been determined by the Qur'an itself, where we read in an address to the Prophet in chapter 16, verse 44: "We have sent down to you the Remembrance so that you may explain to the people what has been revealed to them."<sup>40</sup>

### 2.2.3 Ijma

Literally, Ijma is the verbal noun of the Arabic word ajma'a which has two meanings: to determine, and to agree upon something. To give an example of the former, the expression ajma'a fulan ala amr, means so and so decided upon such and such. The other meaning of ajma'a is "unanimous agreement." Thus it is said; ajma'a al-qawm ala kadha meaning, "the people reached a unanimous agreement on such and such."<sup>41</sup>

Technically, Ijma is defined as the unanimous agreement of the Mujtahidun of the Muslim community of any period following the demise of the Prophet Muhammad (S.A.W) on any legal matter.<sup>42</sup>

From this definition, Ijma is something that emanates from Mujtahidun. That is those who possess the ability and qualification to do Ijtihad. It precludes the unanimous agreement of the laymen and those who lacks requisite qualification to make legal deduction in the Shari'a. Also, it has be unanimous agreement of all the Mujtahidun. Hence, it will not be considered as Ijma' if it is an agreement of most Mujtahidun , or

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<sup>40</sup>. Al-Qur'an ch.16 v.44

<sup>41</sup>. Muslim, I. op.cit. P.778 referred to by Kamali, M.H, p.229.

<sup>42</sup>. Amidi,Ihkam,vol.1,p.196; Shaukani,op. citp.71 referred to by Kamali, M.H, p.230

an agreement of Mujtahidun in Makka, or an agreement of Mujtahidun in Basrah and Kufah alone, and so on.<sup>43</sup>

Also, it will not be considered as Ijma if it is a unanimous agreement of a community other than the Muslim community. This is because, Ijma in this sense is being discussed within the confines of Islamic Law. Also, a matter will not be considered as Ijma if it is during the life time of Prophet (S.A.W). This is because if the Prophet (S.A.W) agrees with his companions on a ruling, such a ruling is then confirmed by the authority of the Sunnah and not Ijma.

Lastly, a matter will not be considered as Ijma if it is not on a legal ruling. For instance, a matter being lawful or haram (prohibited). Hence, there can be no Ijma on other matters such as war strategies, customs and conventions, politics etc.

### **2.2.3.1 Essential Requirements (Arkán) of Ijma**

For there to be an Ijma, the following conditions must be fulfilled:

1. A number of Mujtahidun must be available at the time of Ijma. This is because Ijma cannot emanate from one Mujtahid. More so, the requirement of a unanimous agreement cannot be achieved except within a number of Jurists. If it is only one or two Mujtahidun involved on the matter in question, it will not be Ijma.<sup>44</sup>
2. All the Mujtahidun must reach a consensus on a legal issue at the time the issue arises. This is regardless of their locality, colour or school. Where there is

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<sup>43</sup>. Ibid

<sup>44</sup>. Khallaf, A. op. cit. p.49

a dissenting view on such a legal issue, it will cease to be an Ijma. If for instance, the Mujtahidun of Makka and Madinah, or those of Iraq, or the Mujtahidun of the family of the Prophet, or the Sunni Scholars without the agreement of their Shi'ite counterparts agree upon a ruling, no Ijma will materialize. This is because, there can be no Ijma, except with the unanimous agreement of all the Mujtahidun in the Muslim world during the occurrence of the issue.<sup>45</sup>

3. The Mujtahidun must demonstrate their agreement on a legal issue expressly. This may be verbal, in writing, in group or separately. This may be by way of a judgment issued by a judge. Most importantly, the different rulings issued by different Mujtahidun should be expressly made thereby indicating their agreement on the issue.<sup>46</sup>
4. The agreement of the Mujtahidun must be demonstrated by their expressed opinion on a particular legal issue. This may be verbal or in writing such as by giving a Fatwah in either of these forms, or it may be actual, when, for example, a judge decides the issue in question, or it may be that every Mujtahid expresses an opinion, and after gathering the views, they are found to be in agreement. Similarly, the Mujtahidun may give their views collectively when, for example, the Mujtahidun of the Muslim world assemble at the time an issue is encountered and reach a consensus over its ruling.<sup>47</sup>
5. The agreement must emanate from Mujtahidun that are just and stay away from innovation in the religion. Allah (the Most High) says: "O you who

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<sup>45</sup> .Kamali, M.H. op. cit. p.233.

<sup>46</sup> .Az-Zuhaili, W. op.cit. p.47

<sup>47</sup> .Ibid

believe! Obey Allah and obey the Messenger, and those of you who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and his Messenger, if you believe in Allah and the last day ...”<sup>48</sup> On the issue of being just on the part of the Mujtahid, it is because the requirement needed to partake in Ijma is the same requirement needed in giving evidence, and the requirement for giving evidence is being a just person. On the need to avoid innovation in religion, on the part of the Mujtahid, if it is an innovation that leads to disbelief, such a Mujtahidun would not be considered a Muslim. But, if it is an innovation that does not lead to disbelief and he invites people to it, he would have lost his status of being just and opinion will not be accepted in determining an Ijma for the community. This is why the dissenting view of the Shi’ites on the leadership of Abubakar and Umar (May Allah be pleased with them) is not considered in determining the validity of the Ijma on that. Also the dissenting view of the Khawarij on the leadership of Aliyu (May Allah be Please with Him) is not considered in determining the validity on the Ijma on that.

6. The Mujtahidun should rely on a legal basis either from a text or Qiyas in reaching an Ijma. This is because issuing a verdict without a legal basis for that is an error which has been discouraged. Allah (the Most High) says: “And say not that of which we have no knowledge”<sup>49</sup>

When Ijma fulfils the foregoing requirements, it becomes binding (Wajib) on everyone. Consequently, the Mujtahidun of a subsequent age are no longer at

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<sup>48</sup>. Al-Qur’an ch. 4 v. 59

<sup>49</sup>. Al-Qur’an ch.17 v. 36



liberty to exercise fresh Ijtihad over the same issue. For once it is conducted, Ijma is not open to amendment or abrogation (naskh). The rules of naskh are not relevant to Ijma' in the sense that Ijma can neither repeal nor be repealed. This is the majority view, although some jurist have stated that the constituents of Ijma' themselves are entitled to repeat their own Ijma and to enact another one to its place. But once an Ijma is finalized, especially when all of its constituent has passed away, no further Ijma may be concluded on the same subject. Should there be a second Ijma on the same point, it will be of no account.<sup>50</sup>

#### **2.2.3.2 Proof (Hujjah) of Ijma**

Muslim Jurists have cited a number of authorities both from the Qur'an and Sunnah to justify Ijma to be a source of legislation in Islamic Law. For instance in the Qur'an the following authorities were cited: Allah (the most high) says: "O you who believe! Obey Allah and obey the Messenger, and those of you who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and his Messenger, if you believe in Allah and the last day ..."<sup>51</sup> Allah (the Most High) also says: "And whoever contradicts and opposes the Messenger after the right path has been shown clearly to him, and follows other than the believers' way, We shall keep him in the path that he has chosen, and burn him in hell – what an evil destination!"<sup>52</sup>

According to Imam Ibn Katheer, while commenting on the above verse of the Qur'an, he says: following other than the believers' way could be by way of

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<sup>50</sup> . Khallaf, A. op.cit.p.49

<sup>51</sup> . Al-Qur'an ch. 4 v. 59

<sup>52</sup> . Al-Qur'an ch.4 v.115

opposing or contradicting what the Muslim community had agreed on (i.e Ijma) this is because the Muslim community has been guaranteed protection from falling into error collectively.<sup>53</sup>

Allah (the Most High) also says: “And hold fast, all of you together, to the rope of Allah (i.e this Qur’an), and be not divided among yourselves, and remember Allah’s favour on you...”<sup>54</sup>

This text clearly forbids division (tafarruq) since opposing what the Muslim community has agreed upon which is Ijma is a form of tafarruq, it is therefore prohibited.<sup>55</sup>

The following authorities from the Sunnah are cited in support of Ijma. Al-Mugirah Ibn Shu’bah said: I heard the Messenger of Allah (S.A.W) saying: “A group of my ummah shall continue to remain in the right path. They will be the dominant force and will not be harmed by the opposition of opponents.”<sup>56</sup> Also, Abu Hurairah (R.A) said, the Prophet (S.A.W) said: “Whoever separates himself from the community and dies, dies the death of ignorance (Jahiliyyah)”<sup>57</sup>

These are some of the authorities relied upon by scholars in support of Ijma.

### **2.2.3.3 Types of Ijma**

There are two types of Ijma considering the manner of its occurrence. They are:

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<sup>53</sup>. Ibn Khatheer, I. U op.cit. vol. 2 p. 365

<sup>54</sup>. Al-Qur’an ch. 3 v. 103

<sup>55</sup>. Al-Amidi, A. M. (1404 AH) Al-Ihkam fi Usúli Ahkam, Darul Kitabil Arabiy, Beirut, vol. 1 p. 217

<sup>56</sup>. Bukharee, M.I op. cit. p.290

<sup>57</sup>. Muslim A.M op. cit. vol. 6 p. 20

a) Explicit Ijma (al-Ijma al-Sarih)

This occurs when every Mujtahid expresses his opinion either verbally or by an action. This is the real Ijma and according to the majority of scholars it is definitive and binding.<sup>58</sup>

b) Tacit Ijma (al-ijma al-sukuti)

This occurs where some of the Mujtahidun of a particular age express an opinion concerning an issue while the rest remain silent. Tacit Ijma is presumptive (I'tibari) in nature. It creates probability but does not preclude the possibility of fresh Ijtihad on the same issue. The scholars differ over its authority as a proof. According to majority of scholars, Tacit Ijma is not a proof and does not amount to more than the view of some individual Mujtahidun. However, the Hanafis considered it to be a proof provided it is established that the Mujtahidun who remain silent is aware of the opinion of the other Mujtahidun and had enough time to enquire and express an opinion, but he still chose to be silent. Provided the silent of the Mujtahidun was not due to fear, or wariness of inviting disfavor and ridicule, his silent on an issue where he ought to have express his own opinion will amount to agreeing with the existing opinion.<sup>59</sup>

The opinion of the majority of the scholars on this matter is considered to be preferable. This is because the silent of the Mujtahidun could be for a number of reasons, and would be arbitrary to say that silent definitely indicates

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<sup>58</sup>. Khallaf, A. op. cit. p. 54 referred to by Kamali, M.H, pp.248-249

<sup>59</sup>. Ibid

consent. Be that as it is, most of what is considered Ijma falls under the category of Tacit Ijma.

#### **2.2.3.4 Basis (Sanad) of Ijma**

The basis (sanad) of Ijma is the textual authority or Ijtihad relied upon in reaching an Ijma. According to the majority of scholars, Ijma may be founded on a textual authority or an Ijtihad. They added that Ijma may be based on the text of the Qur'an or the Sunnah.<sup>60</sup> However, scholars differ on whether Ijma can be based on a ruling in the secondary sources such as Qiyas or Maslahah. There are three views on this point. The first view is that Qiyas cannot be relied upon as a basis (sanad) for Ijma. They argue that Qiyas itself is subjected to doubts. More so, scholars differ on the authority of Qiyas as a source of legislation, how then could Qiyas be a basis for Ijma? It is further observed that the companions of the Prophet (S.A.W) did not reach a consensus on anything without the authority of the Qur'an or sunnah.<sup>61</sup> For instance, the consensus of the Companions of the Prophet (S.A.W) on not to share the booty of war based on a Qur'an text which is: "And what Allah gave as booty (fai') to His Messenger (Muhammad S.A.W) from them, for this you made no expedition with either cavalry or camelry. But Allah gives power to his Messengers over whomsoever he wills and Allah is Able to do all things."<sup>62</sup>

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<sup>60</sup>. Al-Amidi, A.A op.cit vol. 1 p. 261

<sup>61</sup>. Abu Zahra, M. op.cit. p.191-192

<sup>62</sup>. Al-Qur'an ch. 59 v. 7

The second view is that Qiyas in all of its types may form the basis of Ijma. This is because it derives its authority from a text. Relying on Qiyas is therefore equivalent to relying on a textual authority, and when Ijma is based on a Qiyas, it relies not on the personal views of the Mujtahidun but on the text of the Shariah.<sup>63</sup>

The third view is that when the effective cause (illah) of Qiyas is clearly stated in the text, or when the illah is obvious and not hidden, then Qiyas may validly form the basis of Ijma. However, when the illah of Qiyas is hidden and no clear indication to it can be found in the texts, then it cannot form a good basis for Ijma. According to Abu Zahrah, when the Illah of Qiyas is indicated in the texts, reliance on Qiyas is the same as relying on the text itself.<sup>64</sup>

#### **2.2.4 Qiyas (Analogical Deduction)**

Literally, Qiyas means to measure or to ascertain the length, weight, or quality of something. It is said in Arabic language that, “qasat al-thaub bi'l-dhira”. Meaning “the cloth was measured by the yardstick.”<sup>65</sup> Qiyas also means to compare something with another thing that is similar to it.<sup>66</sup>

Technically, Qiyas is the extension of a legal ruling from an original case with a textual authority to a new case without a textual authority because the two cases have the same effect cause (illah).<sup>67</sup> It is because of the existence of a common cause effect

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<sup>63</sup>. Abu Zahrah, M. op. cit. p.192

<sup>64</sup>.Ibid

<sup>65</sup>. Amidi, Vol iii, referred to by Kamali, M.H. p.264

<sup>66</sup>.Ibid

<sup>67</sup>.Khalaf, A. op. cit. p. 56

(illah) in the two cases, that is, the original case and the new case, that is why the application of Qiyas is justified.<sup>68</sup>

The following examples of Qiyas will further expatiate the above definition.

1. The Qur'an provides the authority for the prohibition of wine which is a drink that intoxicates and it is made from grapes. Allah (the Most High) says: "O you who believe! Intoxicants and gambling, and Al-Ansáb, and Al-Azlám (Arrows for seeking luck or decision) are an abomination of Shaitan's handiwork. So avoid (strictly all) that (abomination) in order that you may be successful<sup>69</sup>. The Mujtahid understood that the cause effect (illah) for the prohibition is intoxication and in it there is harm and a cause of ruin in the religion, worldly life, health and living together as a community. It also brings about enmity and hatred amongst people.<sup>70</sup> The Mujtahid also discovered that someone can get intoxicated by taking other drinks that are made from grains and fruits when they become intoxicants. That is what is referred to as Nabiz. Thus, the legal ruling of wine will be extended to Nabiz with respect to the prohibition of taking it.<sup>71</sup>

ii. The Prophet (S. A. W) prohibits someone who takes the life of another person from inheriting the victim. He (S. A. W) says: "The killer shall not inherit (from his

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<sup>68</sup>.Ibid.

<sup>69</sup>. Al-Qur'an ch.5 v.90

<sup>70</sup>. Az-Zuhaili,W. op.cit. p.50

<sup>71</sup>. Ibid

victim)”.<sup>72</sup> The cause effect (illah) in the prohibition is hastening the occurrence of something before its time, hence the punishment will be the denial of that thing.

By analogy (Qiyas) this ruling is extended to bequest also in the sense that the killer cannot benefit from the will of his victim.<sup>73</sup>

iii. The Qur’an prohibits buying and selling when the call for Juma’ah prayer has been made on a Friday. Allah (the most High) says: “O you who believe! When the call is proclaimed for the Salat (prayer) on Friday (Juma’ah Prayer), come to the remembrance of Allah and leave off business. That is better for you if you did but know!”<sup>74</sup> The cause effect (illah) in the prohibition is being engaged in business at the expense of Salat. By analogy (Qiyas), this ruling is extended to other activities such as leasing, mortgage, and writing. This is because the cause effect (illah) is the same which is being engaged with other things at the expense of Salat.<sup>75</sup>

#### **2.2.4.1 Proof (Hujjiyyah) of Qiyas**

The majority of scholars are of the view that Qiyas is one of the sources of Islamic Law and that it is the fourth in order of authoritativeness of the source of Islamic Law.<sup>76</sup> On the other hand, others such as the Mu’atazilite, the Imamiyya Shi’ites and the Zahiris reject the authority of Qiyas as a source of legislation in Islamic Law.<sup>77</sup>

The proponents of Qiyas relied on the following authorities in support of their views:

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<sup>72</sup>. Ibn Majah, M.Y. (n.d) Sunan Ibn Majah, Darul Fikr, Beirut. Vol. 2, P. 913

<sup>73</sup>. Khallaf, A. op. cit. p. 57

<sup>74</sup>. Al-Qur’an ch. 62 v. 9

<sup>75</sup>. Az-Zuhaili, W. op. cit. p. 57

<sup>76</sup>. Khallaf, A. op. cit. p.57

<sup>77</sup>. Ibid

- i. Allah (the Most High) says: "...(And) if you differ in anything amongst yourselves, refer it to Allah and his Messenger, if you believe in Allah and in the last day. That is better and suitable for final determination."<sup>78</sup> The scholars have said that a dispute can only be referred to Allah and to the Messenger by following the indications that we find in the Qur'an and Sunnah. One way of achieving this is to identify the rationale of the legal rulings and apply them to disputed matters, and this is precisely what Qiyas is all about.<sup>79</sup>
- ii. Allah (the Most High) says:

"He it is who drop out the disbelievers among the people of the scripture (i.e the Jews of the tribe of Banú An-Nadir) from their homes at the first gathering. You did not think that they would get out. And they thought that their fortresses would defend them from Allah! But Allah's (Torment) reached them from a place whereof they expect it not, and he cast terror into their heart so that they destroy their own dwellings with their own hands and the hands of the believers. Then take admonition, O you with eyes (to see).<sup>80</sup>"

In the above cited text, Allah (the Most High) mentioned what became of the Jews of the tribe of Banú an-Nadir. Meaning the disbelievers should make an analogy (Qiyas) between themselves and Banú an-Nadir in the sense that, should the believers do as Banú an-Nadir did, what happen to Banú an-Nadir will equally happen to them. i. e the believers.<sup>81</sup>

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<sup>78</sup> . Al-Qur'an ch.4 v.59

<sup>79</sup> Abu Zahra, M. op.cit. p.202

<sup>80</sup> . Al-Qur'an ch.59 v.2

<sup>81</sup> . Khallaf, A. op.cit.p59



#### 2.2.4.2 Essential Requirements (Arkán) of Qiyas

There are four essential requirements (Arkán) of Qiyas as follows:

##### i. Original case (Asl)

Asl has two meanings. Firstly, it refers to the source, such as the Qur'an or the Sunnah which reveals a particular ruling. The second meaning of Asl is the subject matter of that ruling.<sup>82</sup> For instance, in the prohibition of Nabiz, the Asl is both the Qur'an, which is the source, and wine which is the original case or the subject matter of the prohibition.

##### ii. The New Case (Far')

The Far' is an incident or a case whose ruling is sought by recourse to analogy.<sup>83</sup> The Far' must fulfill the following three conditions.

1. The new case must not be covered by the text or Ijma.<sup>84</sup>
2. The effective cause (illah) of analogy must be applicable to the new case in the same way as to the original case.<sup>85</sup>
3. The application of Qiyas to a new case must not result in altering the law of the text, for this would mean overruling the text by means of Qiyas which is ultra vires.<sup>86</sup>

##### iii. The Hukm

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<sup>82</sup> . Abu Zahrah, M. op cit. p. 108 and Shawkani; pp 204-205 referred to by Kamali, M.H. p.268.

<sup>83</sup> . Kamali, M.H. op. cit. p. 273

<sup>84</sup> . Al-Zuhaili, W. op. cit. p. 58

<sup>85</sup> . Kamali, M.H. op. cit. p.270

<sup>86</sup> . Ibid

A Hukm is a legal ruling that is provided for by the Qur'an, Sunnah or Ijma, and analogy seeks its extension to a new case.<sup>87</sup>

#### iv. The Effective Cause (Illah)

This is perhaps the most important of all the requirements of Qiyas. Illah is an attribute of the Asl which is constant and evident and bears a proper (Munasib) relationship to the legal ruling (Hukm).<sup>88</sup> It may be a fact, a circumstance, or a consideration which the Lawgiver has contemplated in issuing a Hukm. In the works of Usul, the illah is alternatively referred to as manát al-hukm (i.e the cause of the hukm), the sign of the hukm (amárah al-hukm), and sabab.<sup>89</sup>

#### 2.2.5 Istihsan

Istihsan literally means “to approve, or to deem something preferable.”<sup>90</sup> It is from the Arabic word hasuna which means being good or beautiful.

Technically, Istihsan is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law.<sup>91</sup>

Applying the existing law may prove to be detrimental in certain situations, and a departure from it may be the only way of attaining a fair solution to a particular problem. The jurist who resorts to Istihsan may find the law to be either too

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<sup>87</sup> . Ibid

<sup>88</sup> . Shawkani, M.A.M. op. cit. p.270 referred to by Kamali, M.H. p. 275.

<sup>89</sup> . Ibid.

<sup>90</sup> .Kamali, M.A. op.cit. p.325

<sup>91</sup> .Al-Zuhaili, W. op.cit p.90.

general, or too specific and inflexible. In either case, Istihsan may offer a means of avoiding hardship and generating a solution which is harmonious with the higher objectives of the Shari'ah.<sup>92</sup>

The following cases have been cited as instances where Istihsan was resorted to. The ruling of Umar B. Al-Khattab (R.A) not to enforce hadd penalty of amputation of the hand for theft during a widespread famine, and the ban which he imposed on the sale of slave-mothers (Ummahat al-awlad), and marriage with the people of the book (Kitabiyahs) in certain cases were all instances of Istihsan. Umar bn. Al-Khattab (R.A) set aside the established law in these cases on grounds of public interest, equity and Justice.<sup>93</sup>

Muslim Jurists have relied on the following in support of Istihsan.

- i. It is part of Istihsan that ease is preferred above difficulty and it is part of the fundamentals of the Deen.<sup>94</sup> Allah (the Most High) says: “Allah intends for you ease, and He does not want to make things difficult for you.”<sup>95</sup>
- ii. For Istihsan to be established, it has to rely on authority that is agreed upon which can be a text, Ijma, Qiyas al-Khafiy (Hidden Qiyas), Urf or Maslahah.<sup>96</sup>

The opponents of Istihsan rely on the following arguments to reject Istihsan.

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<sup>92</sup> . Kamali, M.A. op. cit. p. 218

<sup>93</sup> . Ibid

<sup>94</sup> . Az-Zuhaili, W. op. cit. p. 90

<sup>95</sup> . Al-Quran ch. 2 v.185

<sup>96</sup> . Az-zuhaili, W. op. cit. p.90

- i. Making a ruling (Hukm) is not permissible without a text or a Qiyas relying on a text. This is because to do that will mean making a legislation based on desires and Allah (the Most High) says: “And so judge (you O Muhammad S.A.W) among them by what Allah has revealed and follow not their vain desires.”<sup>97</sup>
- ii. Intellect is the basis for Istihsan and in that the knowledgeable and ignorant are equal. With that, it will be permissible for everyone to make a new law.<sup>98</sup>
- iii. The Prophet (S.A.W) does not give Fatwah by way of Istihsan. He, rather, waits for a revelation.<sup>99</sup>

The opponents of Istihsan by these arguments are against making a legislation by following desires and this is agreed upon by all Muslims. But the reality about Istihsan, according to its proponents, is to work with the most cogent of the two authorities in question.

Istihsan is not considered as a source on its own, it works together with Qiyas, Maslahah and so on.<sup>100</sup>

### **2.2.5.1 Types of Istihsan**

Istihsan has been divided into the following types with regards to the authority that establishes it.

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<sup>97</sup>. Al-Qur’an ch. 5 v. 49

<sup>98</sup>. Ibid

<sup>99</sup>. Ibid

<sup>100</sup>. Ibid

- i. Istihsan with text (Nass): This is when there is a particular text that conveys a ruling that is different from the general rule that is established on an issue. The text can either be from the Qur'an or Sunnah.<sup>101</sup> For instance, a bequest (Wasiyya) is generally not permissible. This is because it is the transfer of ownership of something after the death of someone. However, bequest (Wasiyya) is an exception to that general rule. Allah (the Most High) says: “---after payment of legacies that they may have bequeathed or debts.”<sup>102</sup>
- ii. Istihsan in Ijma: This is when the Mujtahidun issue a legal verdict (fatwah) on an issue that negates the established legal verdict on similar issues or their silence on what people do without rejecting it.<sup>103</sup>
- iii. Istihsan in Urf: This is when people customarily do something in a way that negates Qiyas or the general rule out of necessity. For instance, the practice of the use of a public toilet for a particular amount without specifying the quantity of water to be used and the duration of time to be spent in the toilet. Generally it is not permissible because it is based on lack of knowledge. However, it is permissible because of necessity.<sup>104</sup>
- iv. Istihsan in Darurah (Necessity): This is where there is the necessity that makes a Mujtahid abandon Qiyas and work with the contrary. For instance,

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<sup>101</sup> . Zaidan, A. (1976) Al-Wajiz Fi Usul Fiqh, Muassastur, Risalah, p.183

<sup>102</sup> . Al-Qur'an ch. 4. V.12

<sup>103</sup> . Az-Zuhaili W. op. cit. p.88.

<sup>104</sup> . Ibid

purifying a well that filth (najásah) felt in it by removing the quantum of water affected by the filth.<sup>105</sup>

- v. Istihsan in Maslaha: This is when there is an overriding public interest that will warrant setting aside a general rule.<sup>106</sup>

## 2.2.6 Maslahah Mursalah

Literally, Maslahah means “benefit” or interest”.<sup>107</sup> When it is qualified as Maslahah Mursalah, it refers to unrestricted public interest.<sup>108</sup>

Technically, Maslahah Mursalah is defined as a consideration which is proper and harmonious with the objectives of the Shariah; it secures a benefit or prevents a harm; and the Shari’ah provides no indication as to its validity or otherwise.<sup>109</sup> For instance, the Companions of the Prophet (S.A.W) decided to issue currency, to establish prisons, and to impose tax on agricultural lands in the conquered territories despite the fact that no textual authority could be found in favour of these.<sup>110</sup>

### 2.2.6.1 Types of Maslahah

Generally, the Masalih are divided into three, namely, the imperative (doruriyyat), the equitable consideration (hajiyyat), and the embellishments (tahsiniyyat).

- i. Doruriyyat (The Imperative): These are the essential masalih on which the lives of people depend, and if neglected it can lead to chaos and total

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<sup>105</sup> . Zaidan, A. op. cit. p. 184

<sup>106</sup> . Ibid

<sup>107</sup> . Kamali, M.H, op. cit. p.351.

<sup>108</sup> . Khallaf, A. op. cit p. 87

<sup>109</sup> . Az-Zuhaili, W. op. cit p. 92

<sup>110</sup> . Khallaf A. op. cit p. 87

disruption. They consist of the five essential values (al-doruriyyat al-khamsah) namely religion, life, intellect, lineage and property.<sup>111</sup> All these must be promoted and protected against any threat that may affect them. This is why the Shari'ah has prohibited certain things such as Zina, wine drinking, false accusation, theft and so on, in order to promote and protect those five essential values.

- ii. Hajjiyyat (The Equitable Consideration): Basically these are supplementary to the five essential values. It is resorted to in order to lift and do away with hardship. Where it is absent, people would fall into difficulty and hardship. Thus, in the aspect of Ibadat the Shari'ah granted concessions (rukhas) to reduce the units of Salat and also the sick is given similar concession to reduce units of Salat in such condition.<sup>112</sup>
- iii. Tahsiniyyat (The Embellishment). These Masalih have to do with the realisation and attainment of that which is desirable. For instance, good virtues, purification for observing Salat, neatness and using perfume, avoiding extravagance and so on, are all instance of tahsiyyat.<sup>113</sup>

#### **2.2.6.2 Conditions (Shurut) of Maslahah Mursalah**

The following conditions must be fulfilled in order rely on Maslaahah Mursalah.

- i. The Maslahah must be in agreement with the objectives of the Shari'ah. It should not negate any of the fundamentals of the Shariah. For instance, there is the argument that Maslahah in modern times would require the

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<sup>111</sup> . AZ-Zuhayli, W. op. cit. p. 92

<sup>112</sup> . Ibid

<sup>113</sup> . Ibid

legalisation of usury (riba) on account of the change in the circumstances in which it is practiced. This comes into conflict with the clear text of the Qur'an. The view that riba in the way it is practiced in modern banking does not fall under the Qur'anic prohibition, as Abu Zahrah points out, violates the text and therefore negates the whole concept of Maslahah.<sup>114</sup>

- ii. The Maslahah must be genuine (haqiqiyya) and not a mere conjecture. This means the Maslahah must be such that a proper legislation that will bring about good or do away with a harm should be made out of it. Example of this according to Khallaf, would be to abolish the husband's right of divorce by vesting it entirely in a court of law.<sup>115</sup>
- iii. The Maslahah must be general in nature such that it secures benefit, or prevent harm, to the people as a whole and not to a particular person or group of persons. This means a hukm that is based on Maslahah should be for the benefit of the largest possible number of people.<sup>116</sup>

### 2.2.6.3 Proof of Maslahah Mursalah

The proponents of Maslahah Mursalah rely on the following in support of it.

- i. The Shari'ah is established on the principle of bringing about goodness to mankind. Allah (the Most High) says: "And We have sent you (O Muhammad (S.A.W)): not but as a mercy for the Alamin (mankind, jinn and all that exists)"<sup>117</sup>

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<sup>114</sup> . Abu Zahrah, M. op. cit p. 219

<sup>115</sup> . Khallaf, A. op. cit. p 90

<sup>116</sup> .Az-Zuhaili, W. op. cit p.96

<sup>117</sup> . Al-Qur'an ch.21 v. 107.



- ii. The Companions have validated Maslahah Mursalah and have formulated the rules of Sharia on its basis. For instance, the Companions collected the Qur'an together into a single Mushaf.<sup>118</sup>
- iii. What will be of benefit to mankind changes from time to time considering the change in time and situations. Hence, it will not be possible to summarize everything ahead of their occurrence. That is why the Lawgiver guides man to protect and promote what will be of good to mankind at any point in time.<sup>119</sup>

On the other hand, the opponents of Maslahah Mursalah are of the view that the Lawgiver has provided for all mankind what will be of benefits to them and He is not unmindful of that. Resorting to Maslahah Mursalah suggests that the Lawgiver left out some of what will be of benefit to mankind without providing for them.<sup>120</sup> More so, Allah says: “does man think that he will be left neglected?”<sup>121</sup>

This argument appears to be cogent on the face of it. However, it is weak in the sense that the Shari'ah protects and promotes what will be of good to mankind generally. But the Shari'ah did not textually provide for every detail till the end of time. It only provides for the promotion of what will be of good which is in agreement with the objective of the Shariah. Hence, it is for the Mujtahid to resort Maslahah Mursalah and apply it to events and

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<sup>118</sup> . Zaidan, A. op. cit. p. 191

<sup>119</sup> . Ibid

<sup>120</sup> . Ibid

<sup>121</sup> . Al- Qur'an ch.75 v. 36

issues as they unfold from time to the time in the overriding interest of humanity.

### **2.2.7 ‘Urf (Custom)**

Literally ‘Urf means “that which is known”.<sup>122</sup> Technically, ‘Urf is the recurring practices of a people or statements which is known to convey a particular message and not otherwise when it is heard.<sup>123</sup> For a custom to be valid as a basis for legal decisions, it must be sound and reasonable. Hence, recurring practice among some people in which there is no benefit or which partake in prejudice and corruption are excluded from the definition of Urf.<sup>124</sup>

#### **2.2.7.1 Types of ‘Urf (Custom)**

Urf has been divided into verbal (qauli) and actual (fi’ili). ‘Urf whether it is verbal (qauli) or actual (fi’li) is further divided into two types as follows:-

- i- Al-Urf al-ám (General Urf): This one is prevalent everywhere and on which the people agree regardless of the passage of time. An example of this is the customary practice of charging a fixed price for entry to public toilets.<sup>125</sup>

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<sup>122</sup>. Mustapha, I. Zayyad, A. op. Cit. p. 646

<sup>123</sup>. Az-Zulayhi, w. op. cit. p. 97

<sup>124</sup>. Kamali, M.H op. cit. p. 248

<sup>125</sup>. Az-Zuhaili, W. op. Cit. p. 97

- ii- Al-Urf al-Khás (Specific Urf): This one is prevalent in a particular locality, profession or trade. For instance, the use of the word “Dábbah” customarily by the people of Iraq to refer to horse only.<sup>126</sup>

From the viewpoint of whether it conforms with the Shari’ah or not, ‘Urf has also been divided into the following two types.

- i. Al-Urf al-Sahih (Valid Custom): This is an ‘Urf which is observed by the people at large without there being any indication in the Shariah that it contravenes any of its principles. For instance, the custom that a woman will not relocate to the house of her newly-wed husband until she collects part of the dowry.<sup>127</sup>
- ii. Al-Urf al-Fásid (Disapproved Custom): This is a custom practiced by the people but it negates the principles of the Shari’ah. For instance, the free mixing of male and female during ceremonies, dealing with usury, dealing with riba based institution and so on.<sup>128</sup>

### **2.2.7.2 Proof (Hujjiyyah) of ‘Urf**

The Muslim jurists have made reference to some authorities from the Qur’an in support of ‘Urf which are as follows. Allah (the Most High) says: “Show forgiveness, enjoin what is good (‘Urf) and turn away from the ignorant”.<sup>129</sup> The reference to ‘Urf in the above text is to the literal meaning of the word, that is, goodness and not to

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<sup>127</sup>. Ibid

<sup>128</sup>. Ibid

<sup>129</sup> Al-Qur’an ch. 7. V. 199

custom. Hence, it is a weak authority to rely on.<sup>130</sup> Some other scholars have quoted a statement from Abdullahi bin Mas'ud that "what the Muslim deem to be good is good in the sight of Allah". Although many scholars have considered this to be a Hadith from the Prophet (SAW), it is however, a statement from Abdullahi bin Mas'ud and that it is even an evidence in support of Ijma not 'Urf.<sup>131</sup>

'Urf is contemplated in the Shariah and the Shariah indeed preserved the good customs and practices of the Arab. For instance, different types of trade such as Muda'rabah, Musharaka (Partnership) and so on are all practices of the Arab which the Shariah adopts and promotes.<sup>132</sup>

### **2.2.8 Istisháb (Presumption of Continuity)**

Literally, Istisháb means "to accompany" or "companionship"<sup>133</sup>. Technically, Istisháb means applying a ruling (hukm) on something the way it should be until there is a reason to state otherwise. It also means applying a previous ruling to the present situation until there is a proof for the change in circumstance.<sup>134</sup>

Istisháb is upheld by the Shafi'i, the Hambalis, the Zahiris and the Shi'ah Imamiyyah, but the Hanafis and the Malikis do not consider it a proof in its own right. The opponents of Istisháb are of the view that establishing the existence of a fact in the past is no proof of its continued existence. The continued existence of the original state

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<sup>130</sup> Zaidan, A. op. cit. p. 202

<sup>131</sup> . Ibid

<sup>132</sup> . Ibid.

<sup>133</sup> . Mustapha, I. Az-Zayyat, A. Op. cit. p. 553

<sup>134</sup> . Khallaf, W.

is still in need of proof in the same way as the claim which seeks to establish that the original condition has changed.<sup>135</sup>

According to the proponents of Istisháb, it denotes continuation of that which is proven and the negation of that which had not existed. Istisháb, in other words, presumes the continuation of both the positive and the negative until the contrary is established by evidence. In its positive sense, Istisháb requires, for example, that once a contract of sale is conducted, it is presumed to remain in force until a transfer of ownership can be established by evidence.<sup>136</sup>

### **2.2.8.1 Types of Istisháb**

Istisháb is divided into the following types as follows:

- i- Presumption of original absence (Istishab al-adam al-asl). This means that a legal obligation which had not existed in the past is presumed to be non-existent until the contrary is proved. For instance, if someone claims that another person is indebted to him. It is on the claimant to establish his claim with proof. Where the claimant fails to do so, the other person is presumed to be free from the debt in question.<sup>137</sup>
- ii- Istishab al-Hukm:- This means that what is established by experts in the Principles of Jurisprudence (Usuliyyun) is that the presumption in all matters that are beneficial are permissible. Also, the presumption in all matters that are

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<sup>135</sup>. Abu Zahrah, M. op. cit. p. 266

<sup>136</sup>. Ibid

<sup>137</sup>. Az-Zuhaili w. op. cit. p. 114

harmful are forbidden (haram).<sup>138</sup> Allah (the Most High) says: “He it is who created for you all that is on earth”.<sup>139</sup> Also, Allah (the Most High) says: “Say (O Muhammad SAW): “Who has forbidden the adornment with clothes given by Allah, which He has produce for his slaves, and at-Taiyyibat (all kinds of (lawful things) of food?”<sup>140</sup>

iii- Istisháb al-Wasf: This is presumption of continuity of attributes. For instance, a clean water is presumed to remain so until the contrary is established to be the case. That is, purity being its attribute is presumed to remain with the water.<sup>141</sup>

### **2.2.9 Sadd al-Dhará’i (Blocking the means to evil)**

Sadd, literally, means blocking. Dhará’i is the plural of the word dhari’ah which signifies the means to obtaining a certain end.

Technically, Sadd al-dhará’i, implies blocking the means that will lead to evil or anything unlawful. Hence, the means to anything unlawful is unlawful, just the way the means to anything lawful is lawful. For instance, Zina is unlawful. Hence, looking at a woman that one is not legally married to is also unlawful.<sup>142</sup>

The scholars have quoted the following text of the Qur’an as an authority in support of Sadd al-dhará’i. Allah (the Most High) says: “and insult not those whom they (disbelievers) worship beside Allah, lest they insult Allah wrongfully without knowledge...”<sup>143</sup> In the above cited text, Allah (the Most High) forbids insulting idol

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<sup>138</sup>. Zaidan, A. op. cit. p. 214

<sup>139</sup>. Al-Qur’an ch. 2 v. 29.

<sup>140</sup>. Al-Qur’an ch. 7 v. 32

<sup>141</sup>. Kamali, M.H op. cit. 262

<sup>142</sup>. Az-Zuhaili, W. pp cit. p. 108

<sup>143</sup>. Al-Qur’an ch. 6 v. 108

worshippers, a conduct which might have been otherwise permissible and praiseworthy. In it, there is the blocking of the means to evil. This is because, if it is permitted, it would have been opening a means to a greater evil, which is insulting Allah (the Most High).<sup>144</sup>

The scholars have also quoted the following text of the Qur'an as an authority in support of Sadd-dhará'i. Allah (the Most High) says. "O you who believe! Say not (to the Messenger S.A.W) Rá'ina but address him respectfully and listen to him."<sup>145</sup>

The reason for this prohibition was that the word "rá'ina" being a homonym, had two meanings, one of which was please look at us or attend to us; while with a slight twist the same word would mean "Our Shepherd". The Jews used to insult the Prophet with that word, and in order to block the means to such abuse, the Muslims were forbidden from using that form of address to the Prophet despite their good intentions and the fact that the word under discussion was inherently abusive.<sup>146</sup>

### **2.2.9.1 Types of Dhara'i**

The scholars have divided dhara'i into four types considering the degree of probability or otherwise that a means is expected to lead to an evil end.

- i. A means which will definitely lead to evil such as digging a deep pit next to the entrance door to a public place which is dark at night, so that anyone

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<sup>144</sup>. Az-Zuhaili, W. op. cit. 109

<sup>145</sup>. Al-Qur'an 2. V. 104

<sup>146</sup>. Abu Zahrah, M. op. cit. p. 260

who enters the door is very likely to fall into it. The Muslim jurists are unanimous on the prohibition of this type of dhari'ah.<sup>147</sup>

- ii. A means which most likely (al-zann al-ghalib) will lead to evil and is rarely, if ever, expected to lead to a benefit. An example of this is would be selling weapons during warfare or selling grapes to a wine maker. This is prohibited because this will most likely lead to evil and it is a way of assisting others to do evil.<sup>148</sup>
- iii. A means which frequently leads to evil, but in which there is no certainty, nor a probability, that this will always be the case. An example of this would be a sale which is used as a means to procuring usury (riba). These types of sales, generally known as buyu al-ajál (differed sales), in which either the delivery of the object of sale, or the payment of its price, is deferred to a later date, would all tend to fall under this category of means. According to the Malikis and the Hambalis, these types of sales are prohibited because they lead to usury (riba).<sup>149</sup>
- iv. A means which is rarely expected to lead to evil and is most likely to lead to a benefit. An example of this is to dig a water well in a place which is not likely to cause injury or harm to anyone. In this, there is a possibility that an evil might be caused as a result. Generally, the scholars are in agreement on the permissibility of this type of means.<sup>150</sup>

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<sup>147</sup>.Ibid at pp.261-262

<sup>148</sup>.Az-Zuhaili, W. op. cit. p. 109

<sup>149</sup> Ibid

<sup>150</sup> Abu Zahrah, M. op. cit. 262



### 2.2.10 The Fatwa of a Companion

The Sunni jurists are in agreement that the consensus of the Companions of the Prophet (SAW) is a binding proof, and represents the most authoritative form of Ijma.<sup>151</sup> However, the jurists differ as to whether the saying or Fatwa of a single companion should also be recognized as a proof. A number of leading jurists from various schools have held the view that the Fatwa of a Companion is a proof (Hujjah) which must be followed. Their argument is that following the demise of the Prophet (SAW), the leadership of the Muslim community fell upon their shoulders and the learned Companions issued decision on a wide range of issues.<sup>152</sup>

The scholars defined a Companion to be anyone who met the Prophet (S.A.W), while believing in him and died as a Muslim. The Jurists agree that the ruling of one companion is not a binding proof over another. For the Companions were themselves allowed to disagree with one another in matters of Ijtihad. The Jurists have differed as to whether the ruling of a Companion constitutes a proof as regards the Successors (tabi'un) and the succeeding generations of Mujtahidun. There are three views on this as follows:

- i. That the fatwa of a companion is a proof absolutely and takes priority over qiyas regardless of whether it is in agreement with the qiyas in question or otherwise. This is the view of Imam Malik, one of the two vies of Imam

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<sup>151</sup> Az-Zuhaili, W. op. cit. p. 105

<sup>152</sup> Kamali, M.H. op. cit. p.211

Shafi'i, one of the two views of Imam Ahmad b. Hambal and some of Hanafi jurists.

- ii. That the Ijtihad of a Companion is not a proof and does not bind the succeeding generation of Mujtahidun or anyone else. This view is held by the Ash'aris, the Mu'tazilah, Imam Ahmad b. Hambal (according to one of his two views).
- iii. That the ruling of a Companion is a proof when it is in conflict with qiyas but not when it agrees with qiyas. This view is attributed to Abu Hanifah.<sup>153</sup>

### **2.2.11 Shar'u Man Qablana (Revealed Laws Preceding the Shari'ah of Islam)**

Revealed Laws Preceding the Shari'ah of Islam are those laws revealed by Allah (the Most High) for communities who lived in the past year through his Prophets like Ibrahim, Musa, Dawud, and Isa (may Allah be pleased with them).<sup>154</sup>

The issue for discussion under this topic is whether those laws are part of the laws in the Shari'ah and whether Muslims should abide by those laws or not?

#### **2.2.11.1 Types of Revealed Laws Preceding the Shari'ah of Islam**

- i- Laws that were not mentioned in the Shari'ah of Islam either in the Qur'an or Sunnah. All the scholars agree that this is not part of the laws in the Shari'ah of Islam.<sup>155</sup>
- ii- Laws that were mentioned in the Qur'an and Sunnah. This is further divided into three as follows.

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<sup>153</sup> . Ibid

<sup>154</sup> Az-Zuhaili, W. op. cit. p. 101

<sup>155</sup> ibid

- a. The abrogated (Mansukh) laws from the Shari'ah of Islam. All the scholars agree that this is not a law in the Shari'ah of Islam. For instance, Allah (the Most High) says:

“And unto those who are Jews, we forbade (animal) with undivided hoof, and we forbade them the fat of the ox and the sheep except what adheres to their backs or their entrails, or is mixed up with a bone. Thus we recompensed them for their rebellion (committing crimes like murdering the Prophet and eating of *riba* (usury). And verily, we are truthful.<sup>156</sup>

The prohibition of animals with individual hoof means any animal with a claw among the birds and hoof among animals such as camel.<sup>157</sup> This has been abrogated in the Shariah of Islam with the authority of the following text. Allah (the Most High) says:

“Say (O Muhammad SAW): “I find not in that which has been revealed to me anything forbidden to be eating by one who wishes to eat it, unless it be *maitah* (a dead animal) or blood poured forth (by slaughtering or the like), or the flesh of swine (pork); for that surely is impure or impious (unlawful) meant (of an animal) which is slaughtered as a sacrifice for others than Allah for idols...”<sup>158</sup>

Another example is the prohibition on the booty of war. This is permissible under the Shariah of Islam. The Prophet (S.A.W) said; “The booty of war has been made lawful for me; which was not made lawful for anyone before me.”<sup>159</sup>

- b. Laws that were further made part of the Shariah of Islam. These types of Laws are part of the Shariah of Islam. For instance, Allah (the Most High) says: “O you who believe! Observing the fasting is

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<sup>156</sup> Al-Qur'an ch. 6 v. 146

<sup>157</sup> Az-Zuhaili, N. op. cit. p. 101

<sup>158</sup> . Al-Qur'an ch.6 V. 145

<sup>159</sup> .Muslim, A.M. op. cit. Vol.1, at p.370.

prescribed for as it was prescribed for those before you, that you may become the pious.”<sup>160</sup>

- c. Laws that were mentioned in the Qur’an without explicit command to observe or not to observe. For instance, the text on Qisas in the Laws of the Jews. Allah (the Most High) says: “And we ordained therein for them: “Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal...”<sup>161</sup>

There is a divergent of opinion among the jurists on this type. According to the Hanafis, Malikis and some Shafi’is and a report from Imam Ahmad b. Hambal, what is authentic from the Laws preceding the Shariah of Islam will be a law in the Shariah of Islam. This is where such a law came through revelation to the Prophet of Islam (S.A.W) and not through their own books. In such circumstances, it becomes a Law to be abide by in the Shariah of Islam.<sup>162</sup>

However, the Shafi’is (in one other report), the Ash-Ariyyah, the Mu’tazilite and the Shi’ah are of the view that the Laws preceding the Shariah of Islam will not be part of the Shariah of Islam.<sup>163</sup> They relied on the following provision of the Qur’an “...to each among you, we have prescribed a law and a clear way...” They argued that the Shari’ah of Islam abrogated the preceding Laws before it except where it is mentioned in the sharia of Islam that such a

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<sup>160</sup>. Al-Qur’an ch. 6 V. 183

<sup>161</sup>. Al-Qur’an ch.5 v. 45

<sup>162</sup>.Az-Zuhaili, W. op. cit. p. 102

<sup>163</sup>.Ibid

law should be observed.<sup>164</sup> However the Sharia of Islam only abrogated such laws that negate it. Those laws that the Sharia is silent on are not abrogated.

From the above exposition, the opinion of the majority appears to be more cogent. This is because the laws preceding the Shariah of Islam were confirmed in the Qur'an with details of aspects that should be observed.

This is the discussion on the sources of Islamic Law. The next chapter discusses the nature of abrogation.

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<sup>164</sup> Al-Qur'an ch. 5 v. 48

## CHAPTER THREE

### MEANING OF HUKM AND THE NATURE OF ABROGATION IN ISLAM

#### 3.1 Introduction

Having discussed the sources of Islamic Law in the previous chapter, this chapter discusses the meaning of Hukm, methods of extracting Law in Islam, the nature of abrogation, the legal position of abrogation, the benefits of abrogation and the various categories of abrogation.

#### 3.2 Meaning of Hukm

Literally, Hukm means to block.<sup>1</sup> Technically, according to experts in the principles of Jurisprudence (Usuliyyun), hukm is defined as a communication from the Lawgiver (Allah) concerning the conduct of the mukallaf (person of full legal capacity) which consist of a demand, an option or an enactment.<sup>2</sup>

For instance Allah (the Most High) says; “O you who believe fulfill (your) obligation. Lawful to you (for food) are all beasts of cattle except that which will be announced to you (herein)...”<sup>3</sup>

This is a communication from the Lawgiver (Allah the Most High) concerning fulfilling one’s obligation which is a demand to be executed.

There is difference between the Experts in the principle of jurisprudence (Usuliyyun) and the Juists (Fuqaha) with regard to the identification of hukm. On the above quoted

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<sup>1</sup> Muslim, I. op. cit.

<sup>2</sup> Khallaf, A. op. cit. p. 109 referred to by Kamali, M.H p.410.

<sup>3</sup> Al-Qur’an ch.5 v.1

text, that is, Qur'an 5:1 concerning the fulfillment of contracts, according to the Usuliyyun, the text itself, that is, the demand which is conveyed in the text represents the Hukm. However, according to the Fuqaha, it is the effect of that demand, namely the obligation (Wujub) that it conveys which embodies the Hukm.<sup>4</sup>

### 3.3 Methods of extracting Law in Islam

Muslim jurists have laid down the methodologies to be followed in extracting laws in Islam. These methodologies include understanding the language styles (asálib) in interpreting the Qur'an and Sunnah and the classification of words and their usage in Arabic language with the aim of extracting legal rules. Words have been classified into two with respect to the meaning they convey and they are "clear" (wadih) and unclear (gayhr wadih) words.

Wadih (clear expressions): This has been further classified into four as follows: Zahir, Nass, Mufassir and Muhkam. The essence of this classification is based on the extent to which the word convey a particular meaning.<sup>5</sup>

#### 1. Zahir (Clear Expression / Word)

This is a word that conveys its own meaning by itself though the reference in the context in which it is used may not be the original meaning of the word in question.<sup>6</sup> For instance, Allah (the Most High) says: "Allah has made trading lawful and forbidden usury."<sup>7</sup> This verse is clear in the aspect of making trading lawful and making usury forbidden. This is because those are the

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<sup>4</sup>. Khallaf, A. op. cit. p. 109

<sup>5</sup>. As-Sarkhasi, A (n.d) Usul As-Sarkhasi, Darul kutubi Ilmiyyah Beirut vol. 1 p. 163

<sup>6</sup>. Ibid

<sup>7</sup>. Al-Qur'an ch. 2 v.275.

meanings the two words “lawful” and “forbidden” convey without suggesting otherwise. But that is not the original meaning from the context in which they are used. The original meaning is that it is a response to the comparison made by the Jews that “trading is only like usury”. The legal effect of Zahir is that it is obligatory to work with its meaning in as much as there is no any other word or expression that negates it.<sup>8</sup> Also, a word that is Zahir (clear) is open to ta`weel (i.e it can admit of more than a meaning). For instance, if the Zahir (clear) word is general (ám) in nature, it can be taken to be a particularization (Takhsees) and so on. Lastly, a word that is Zahir can also be an instance of abrogation. Though, this is only applicable during the lifetime of the prophet (S.A.W).<sup>9</sup>

## 2. An-Nass

This is an expression that conveys the original intended meaning of the expression in question from the context within which it is used and it is open to taweel (i.e it can admit of more than a meaning).<sup>10</sup>

An-Nass is clearer in its meaning than Zahir. For instance Allah (the Most High) says “...then marry (other) women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one or (the slave) that your right hands posses ...”<sup>11</sup> It is understood from the above cited verse that it is meant to convey the limit to the number of wives to

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<sup>8</sup>. Khallaf, A. op. cit. p.181.

<sup>9</sup>. Ibid

<sup>10</sup>. As-Sarkhasiy, op.cit vol. I p. 164

<sup>11</sup>. Al- Qur’an ch. 4 v. 3



four and no more. This is because that is the meaning to be derived from the context within which the words or expression were used.<sup>12</sup>

The legal effect Nass is that it is obligatory to work with its meaning in as much as there's no any other evidence that will warrant reference to another interpretation which might better reflect the intention of the Lawgiver.<sup>13</sup>

### 3. Mufassar

This is an expression that provides further explanation to an expression that is conveyed by way of Nass.<sup>14</sup> Mufassar admits of not more than a meaning. For instance, Allah (the Most High) says: "...fight against the mushrikun collectively..."<sup>15</sup> The word Mushrikun (polytheists) is a name that is clear and general which can admit an exception. But when the word "collectively" came after it, it does away with the possibility of admitting an exception. Thus the word "collectively" further explained the meaning of Mushrikun (polytheists).<sup>16</sup>

The legal effect of a word or an expression that is Mufassar is that it is obligatory to work with its meaning.

### 4. Muhkam

This is a word or an expression that clearly conveys a meaning in itself such that the meaning is greater than that conveyed by a word that is Mufassar and it admits of no other meaning and abrogation.<sup>17</sup> Muhkam conveys a ruling that is

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<sup>12</sup>. Khallaf A. op. cit. p. 181

<sup>13</sup>. Ibid

<sup>14</sup>. As-Sarkhasiy, op. cit. vol. IP.164

<sup>15</sup>. Al-Qur'an ch. 9 v. 36

<sup>16</sup>. As-Sarkhasiy, op. cit. vol. 1 p. 165

<sup>17</sup> Ibid

not subject to change or abrogation. They are part of the fundamental rulings in Islam. For instance, the rulings relating to belief in Allah, His angels, His books, His messengers and the Last day. Also, Muhkam includes rulings that are perpetual in nature. For instance, Allah (the most High) says: "...and it is not (right) for you that you should annoy Allah's Messenger, nor that you should ever marry his wives after him (his death) ..."<sup>18</sup>

The legal effect of a word or expression that is Muhkam is that it is obligatory to work with its meaning.

**Ghayr Wadih (Unclear words):** This has been further classified into four as follows: Khafiyy, Mushkil, Mujmal and Mutashabih.

1. Khafiyy: This is an expression that conveys its basic meaning in a way that is clear. However, it is to some extent ambiguous with respect to some individual cases to which it is applied. The ambiguity in Khafi needs to be clarified by extraneous evidence which is often a matter of research and Ijtihad.<sup>19</sup> An example of Khafi is the word "Sariq" (thief) which has a basic meaning but which, when it is applied to cases such as that of a pick pocket or a person who steal the shrouds of the dead, does not make it immediately clear whether 'thief' include 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 of a person in wakefulness makes it somewhat

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<sup>18</sup> Al- Qur'an

<sup>19</sup>. Khallaf, A. op. cit. p. 188 refered by Kamali, A.H p. 97

different from theft. There is an Ijtihad opinion which authorizes the application of the hadd of theft to the pickpocket.<sup>20</sup>

2. Mushkil: This is a word or an expression that conveys several meanings but one of the meanings it conveys makes it a bit difficult and confusing as to which of the meaning does the word in question suggests.<sup>21</sup> For instance, the word “qur” which occurs in Qur’an 2:228 is Mushkil because it has two different meanings; menstruation (hayd) and the clean period between two menstruations (tuhr). If someone decides to take any of the two meanings, the ruling will differ depending on the one that is taken. Therefore, it is the duty of the Mujtahid to look at the words and what they suggest in order to discover the intended meaning from it.<sup>22</sup>

3. Mujmal: This is a word whose meaning is not ordinarily understood except by further explanation from the Lawgiver.<sup>23</sup> For instance, the word “Al-Qariah” (The Striking Hour) whose meaning is not ordinarily understood except by further explanation from the Lawgiver. Allah Says: “Al-Qariah (the striking Hour), what is the striking (Hour)? It is a day whereon mankind will be like moths scattered about.”<sup>24</sup>

The legal effect of Mujmal is that one is not to work with its meaning except where the Lawgiver gives further explanation as to its meaning.<sup>25</sup>

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<sup>20</sup>. Ibid

<sup>21</sup>. As-Sarkhasiy, A. op. cit P. 168

<sup>22</sup>. Ibid

<sup>23</sup>. Ibid

<sup>24</sup>. Al- Qur’an ch.101 v.1-4

<sup>25</sup>. As-Sarkhasiy A. op.cit. p.168

4. Mutashaabih: This is a word whose intended meaning is hidden and there is no way to understand the intended meaning because there is no extraneous evidence to make it understood. It is only the Lawgiver that knows the intended meaning. For instance, the alphabets at the beginning of some chapters in the Qur'an which are referred to as al-muqatta'at. E.g Alif – Lam – Min and so on.<sup>26</sup>

The proper understanding of the above expressions/words and their legal application will assist in deducting legal rulings in Islamic Law.

### 3.4 Meaning/Nature of Abrogation

Abrogation (Naskh) literally has many connotations such as “to copy”, “to abolish”.<sup>27</sup> It is said that “the wind abolishes (nasakhat) the remains of a nation”. That is, it abrogates and does away with it. Also “the laSun abolishes (nasakhat) the shadow”;<sup>28</sup> when it covers and does away with it. The literal sense of the word abrogation is used in the Qur'an. Allah (the Most High) says: “Never did We send a messenger or prophet before you, but; when he did recite the revelation or narrated or spoke, Shaitan (Satan) threw (some falsehood) in it. But Allah *abolishes* that which Shaitan (Satan) throws in. Then Allah establishes His revelations and Allah is All-knower, All-wise”.<sup>29</sup>

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<sup>26</sup> Ibid P. 169

<sup>27</sup> Mustapha, I. Az-Zayyaat, A. et al (n.d.) Al-Mu'jam Al-Wasit, DaarAl-Da'awah, Vol.2, p.917.

<sup>28</sup> Ar- Raazi, F. M. U. op. cit. p.420.

<sup>29</sup> Al-Qur'an ch.22 v.52.

Another literal meaning of abrogation is: “to copy” or “to record”.<sup>30</sup> That is, when the content of a book is copied from the book to another place. In this sense of the word, Allah (the Most High) says: “... We were *recording* (nastansikhu) what you used to do.”<sup>31</sup>

Technically; Abrogation has been define in various ways. Thus, according to Jurisprudents (Usúliyyún), abrogation is “the replacement of a legal ruling by the Lawgiver with another subsequent legal ruling.”<sup>32</sup>

Imam Ibn Hazm also defined abrogation as “an explanation bringing the life span of the first legal ruling to an end.”<sup>33</sup>

Al-Zarqanee defines abrogation as “the removal of a legal ruling by another legal ruling.”<sup>34</sup>

In abrogation, there are always two texts involved: the abrogating (Násikh) and the abrogated (Mansúkh) texts, which are revealed at different points in time. In fact, the abrogating text (Násikh) comes after the abrogated text (Mansúkh).<sup>35</sup>

From the above jurisprudential exposition, it is clear that in abrogation, there existed a time when a particular legal ruling was subsisting. But the same legal ruling is set aside and it is replaced by another. This is such that a legal ruling is being replaced and not necessarily the text and it can also be that it is the text that is completely erased.

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<sup>30</sup>. Al-Bukharee, A.A.M.op. cit. p.874.

<sup>31</sup>. Al-Qu’ran ch.45 V.29

<sup>32</sup>. HasabAllah, A. (1971) Usúlut Tashrí’ il Islámiy, Dárul Ma’aarif, Misr. P.336.

<sup>33</sup>. Ibn Hazm, A.A. (n.d.) Al-Ihkám Fí Usúliil Ahkám, Dárul Hadith, Cairo, vol. 4, p.438.

<sup>34</sup>. Az-Zarqanee, M.A. op.cit. p.460.

<sup>35</sup>. Abu Zahrah, M. op. cit. p.185.

Hence, for the purpose of this research, the definition given by the jurists (Usúliyún) is adopted. This is because, for there to be an abrogation, the two rulings in question must emanate from the Lawgiver. The definition given by Ibn Hazm clearly did not include the fact that the two rulings must emanate from the Lawgiver. Similarly, Az-Zarqanee's definition did not also mention the fact that the two rulings must emanate from the Lawgiver.

### 3.4.1 Difference between Abrogation (Naskh) and Particularisation (Takhsís)

The concept of Abrogation (Naskh) is quite different from Particularisation (Takhsís). Particularisation (Takhsís) is defined as “the particularisation of a general ruling (‘ám), such that what was seems to be a general ruling only applies in certain cases.”<sup>36</sup> For instance, Allah (the Most High) says: “Cut off (from the wrist joint) the (right) hand of the thief, male or female ...”<sup>37</sup> This has been specified by the Hadith where a Makhzoomi noblewoman (from the tribe of Makhzoom) stole at the time of the Prophet (S.A.W) and Usamah Ibn Zayd, may Allah be pleased with him, wanted to intercede for her. The Prophet (S.A.W) became angry and said:

“Do you intercede concerning one of the Hadd set by Allah? Those who came before you were destroyed because if a rich man among them stole, they would carry out the punishment on him. By Allah, if Fatimah Bint (daughter of ) Muhammad were to steal, I would cut off her hand.”<sup>38</sup>

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<sup>36</sup>. Qhadhi, A.Y. (1999) An Introduction to the Sciences of the Qur'aan, Al-Hidaayah Publishing and Distribution, Birmingham. P.249.

<sup>37</sup>. Al-Qur'an ch.5 v.38

<sup>38</sup>. Muslim, A.M.(n.d.) Sahih Muslim, DaarIhyaatTuraathilArabiyy, Beirut. Vol.3. p.1311.

Al-Nawawi said in his commentary on Sahih Muslim: Imam Malik, Shafi'i, Abu Hanifah and the Majority of scholars said: "The hand should be cut off from the wrist"<sup>39</sup>.

Scholars have identified the difference between abrogation and particularisation as follows:

1. Abrogation (Naskh)

can occur by a clear authority from the Qur'an and Sunnah, while Particularisation (Takhsís) can occur by a clear authority from the Qur'an, Sunnah and from the intellect (aql). For instance, Allah (the Most High) says: "Cut off (from the wrist joint) the (right) hand of the thief, male or female ..."<sup>40</sup> This has been specified by the Hadith of the Makhzoomi noblewoman earlier cited. The limitation of amputation to the wrists can only be by the text of Qur'an and Sunnah and not from the intellect (aql).

2. Abrogation (Naskh)

cannot occur except by an authority that comes after the abrogated ruling. But particularisation (Takhsís) can occur by an authority that was revealed before it, after it and alongside with the specified ruling.<sup>41</sup> For instance, Allah (the Most High) says: "Say, I find not in that which has been revealed to me anything forbidden to be eaten by one who wishes to eat it..."<sup>42</sup>

This is a general ruling which has been particularized by another ruling that was revealed alongside with the specified ruling where Allah (the Most High) says:

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<sup>39</sup>. Al-Nawawi, Y.S. (n.d) Al-Minhaj Fi Sharh Sahih Muslim, At-Matba'atul Misriyyah, Egypt. p.

<sup>40</sup>. Al-Qur'an ch.5 v.38

<sup>41</sup>. Az-Zarqaanee, M.A. op. cit. p.170-172.

<sup>42</sup>. Al-Qur'an ch.6 v.145

“...unless it be Maitah (a dead animal) or blood poured forth (by slaughtering or the like), or the flesh of swine; for that surely is impure or impious (unlawful) meat (of an animal) which is slaughtered as a sacrifice for others than Allah. But whosoever is forced by necessity without willful disobedience, nor transgressing due limits; (for him) certainly, your Lord is Oft-Forgiving, Most Merciful.”<sup>43</sup>

### 3.5 The Legal Position of Abrogation in Islamic Law

The Muslim jurists are unanimous on the legality of abrogation in Islamic Law.<sup>44</sup> In holding this view they rely on the following authorities. Allah (the Most High) says: “Whatever verse (revelation) We abrogate or cause to be forgotten, We bring a better one or one similar to it...”<sup>45</sup> According to Ad-Dahhaak (May Allah be pleased with him): this verse refers to the abrogating and the abrogated verses.<sup>46</sup>

Another authority on the legality of abrogation in Islamic Law is the provision of Qur'an chapter 16: 101 where Allah (the Most High) says: “And when We change a verse [of Qur'an, i.e cancel (abrogate) its order] in place of another, and Allah knows the best of what He sends down, they the disbelievers say, ‘You (O Muhammad) are but a forger, liar. ‘Nay, but most of them know not.’<sup>47</sup> This verse was revealed when the Jews envied the Muslims as regards the change in the direction faced in prayer from the Baitul Maqdis (Jerusalem) to the Ka'abah. With that, they challenged the religion of Islam for this new practice. They said, “Indeed Muhammad (S.A.W) used to command his companions to do something and later stop them from such a thing. This Qur'an is nothing but (a speech) emanating from him. This is why part of it (i.e

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<sup>43</sup>.Al-Qur'an ch.6 v.145

<sup>44</sup> .IbnulArabi, A.M. op. cit.p.3.

<sup>45</sup> .Al-Qur'an,ch.2 v.106.

<sup>46</sup> .Ibn –Katheer,A.op.cit.p.188.

<sup>47</sup> .Al-Quran ch.16. v.101.



the Qur'an ) negates the other.”<sup>48</sup> Allah (the Most High) then revealed the following verses: “And when We change a verse in place of another...” and “Whatever a verse We abrogate or cause to be forgotten, we bring a better one or one similar to it.”<sup>49</sup>

Another authority justifying the legality of abrogation in Islamic Law is the provision of Qur'an chapter 13:39 where Allah (the Most High): “Allah blots out what He wills and confirms (what He wills) and with Him is the mother of the Book Al-Lauh Al-Mahfuz.”<sup>50</sup>

In one of the reports, Ibn Abbas (may Allah be pleased with him) said, “It means He (Allah, the Most High) changes what He wills by abrogating it and confirms what He wills without changing it.”<sup>51</sup>

Imam al-Bukharee also reported from Ibn Abbas (may Allah be pleased with him) who said, “Umar (may Allah be pleased with him) said, ‘The best of us in (Qur’anic) recitation is Ubayy, but we do abandon his statements; and that is that, Ubayy (may Allah be pleased with him) used to say, ‘I will not abandon anything I heard from the Messenger of Allah (S.A.W) and indeed Allah (the Most High) has said: ‘Whatever verse We abrogate or cause to be forgotten, We bring a better one or one similar to it.’”<sup>52</sup>

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<sup>48</sup>.Al-Qurtubee,M.A.A.(1405AH) Tafseerul Qurtubee, Daar Ihyaa’it Turaathil Arabee, Beirut.Vol.2, p.61.

<sup>49</sup>.Al-Quran ch. 2. V.106

<sup>50</sup>. Al-Qur’an ch.13 v.39

<sup>51</sup>. IbnKatheer, A. op. cit. p.471

<sup>52</sup>.Bukharee, M.I.(1987) Saheeh Al-Bukharee, Daaru Ibn Katheer, Beirut.vol.4,p1628.

Abul Bukhturee reports that Aliyy<sup>53</sup> ( may Allah be pleased with him) entered the mosque on one occasion, he then saw a man admonishing people by way of warning them. He then asked, “What is going on here?” They all said: “It is a man who is admonishing people.” He then said, “He is not admonishing people! He is rather telling them that I am so and so a person, the son of so and so. You should know me.” He then sent for him and said to him, “Do you know the abrogating (verses) as against the abrogated?” The man said, “No!” Aliyy then said to him: “Get out of our mosque and do not admonish (people) in the mosque again”.

In another report, He (Aliyy) (may Allah be pleased with him) asked the man, “Do you know the Abrogating and the Abrogated (rulings)?” He said: No! He (Aliyy R.A) then said, “You are ruined and you have ruined (others).”<sup>54</sup>

It can be concluded from the above cited authorities that there is justification for the legality abrogation in Islamic Law which has to be reckoned with in all legal matters.

### **3.6 Justification/Benefits of Abrogation**

There are a lot of benefits in abrogation. An attempt will be made to highlight some of those benefits even as or although that a comprehensive knowledge about the benefits to be derived from abrogation remains with Allah (the Most High). The following are some benefits to be derived:

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<sup>53</sup> . He is Aliyy Bin Abee Taalib, Al-Qurashee, Al-Haashimee (R.A). He is an eminent companion of the Prophet (S.A.W) and the first person to accept Islam among the youth. He was the 4<sup>th</sup> Caliph of the Prophet (S.A.W). The Prophet (S.A.W) said to him: “you are part of me and I am part of you”.Umar (R.A) said: the Prophet (S.A.W) died and he is pleased with him. See. Bukharee, M.I .op.cit. p.1804.

<sup>54</sup> . Al-Qurtubee, M.A.A op. cit. p.61.

i. **To Convey the Legal Rulings of Islamic Law Gradually to Mankind.**

There was the need for the occurrence of abrogation in Islamic Law because, the Prophet (S.A.W) began to convey the message of Islam to a community that was not restricted in its practices and culture by any law or code.<sup>55</sup> Hence it was necessary to take such a community through the gradual process of learning and practicing the dictates of Islamic law. Otherwise, it would have been difficult for them to practice the law. At that point in time, the legal rules revealed were those that they (the Arabs) could practice. When they had become firmly established in faith, other legal rulings were revealed to them to replace the existing laws. For instance, in pre-Islamic Arabia, the Arabs took pride in drinking wine and gambling. The two were the distinguishing factors that elevate an individual in the society. It was either through wine drinking or gambling that an individual could be able to demonstrate his braveness and generosity.<sup>56</sup> This practice was not abolished at the inception of Islam. However, there was an indication to the fact that they were not good practices. Allah (the Most High) says concerning wine: “and from the fruits of date-palms and grapes, you derive strong drink and a goodly provision. Verily, therein is indeed a sign for people who have wisdom”.<sup>57</sup> A comparison between a strong drink [Sakaran] and a goodly provision [Rizqan Hasanah] indicates that a strong drink is not something good. This is because it is not “a goodly provision”.<sup>58</sup>

So, Allah (the Most High) subsequently, explained the harm in wine drinking and gambling in a more elaborate manner by stating: “They ask you (O Muhammad

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<sup>55</sup>. Abu Zahrah, M. op.cit. p.188.

<sup>56</sup>. Abu Zahrah, M. op. cit. p.189.

<sup>57</sup>. Al-Qur’an ch. 16 v.67

<sup>58</sup>. Abu Zahrah, M. op. cit. p. 189.

S.A.W) concerning alcoholic drinks and gambling, say: in them is a great sin, and (some) benefit for men, but the sin of them is greater than their benefit...”<sup>59</sup> This verse was to prepare them for the final stage of prohibition of wine drinking and gambling. This is because anything that has more harm than benefit is supposedly prohibited. After this, Allah (the Most High) then revealed a verse prohibiting coming to prayer in the state of intoxication where He says: “O you who believe! Approach not as-Salat (the prayer) when you are in a drunken state until you know (the meaning) of what you utter...”<sup>60</sup> After this verse was revealed, the believers used to avoid wine throughout the day and at some time in the night. Finally, the last verse was later revealed to bring about total prohibition of wine drinking. Allah (the Most High) says:

“O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, Al-Ansáb, and Al-Azlám (divination by arrows for seeking luck or decisions) are an abomination of Shaitan’s (Satan) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful”.<sup>61</sup>

From the above texts, it can be seen how the legal rulings in Islamic Law were conveyed to the Arabs in a gradual form. If it were, that the Arabs were told to stop wine drinking and gambling at once, it would have been difficult for them.

## ii. To Bring About Ease in Complying with Islamic Injunctions

The concept of abrogation is aimed at bringing about ease to humanity in complying with Islamic injunctions. This is why it has remained one of the areas of uniqueness of Islamic law.<sup>62</sup> For instance, fasting (in Ramadaan) was not made obligatory at the

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<sup>59</sup> . Al-Qur’an ch. 2 v.219

<sup>60</sup> . Al-Qur’an ch. 4 v.43

<sup>61</sup> . Al-Qur’an ch.5 v.90.

<sup>62</sup> . As-Suyutee, J. op. cit. p.54.

beginning of Islam.<sup>63</sup> The practice was that everyone had a choice to either fast or feed a poor. It was reported by Bukhari and Muslim on the authority of Salamah Bin Akwa' (may Allah be pleased with him) who said:

“When Allah revealed the verse: ‘And as for those who can fast with difficulty, they have to feed a poor person (Qur’an 2:184),’ there was a choice to either fast or feed a poor person. Until Allah (the Most High) revealed the verse that provides that ‘So whoever of you sights (the crescents on the first night of ) the month (the Ramadán), he must observe saum (fasts) that month...(Qur’an 2:185)’.”<sup>64</sup>

By the authority of this text, the rule in the previous text was abrogated. The above instance provides a better approach adopted by Allah (the Most High) in bringing about ease in complying with Islamic rulings and injunctions.

### **iii. To Bring About What Will Be of General Good to Mankind**

One of the reasons behind the concept of abrogation is to bring about what will be of general good to mankind.<sup>65</sup> There were some practices in the pre-Islamic Arabia that were bad and obnoxious. These include how women were considered not to have any right what so ever.<sup>66</sup> For instance, in the area of inheritance, a person was only entitled to inherit the deceased person if such a person was related to the deceased person through a male. Women were regarded as chattels that came down for inheritance.<sup>67</sup> But with the advent of Islam, women were recognized and included among the

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<sup>63</sup> . Ash-Shawkaanee, M.A.M. (1994) Nayl Al-Awtár Sharh Muntaqá Al-Akhhár, DaarulFikr, Beirut, Lebanon, Vol 4, p.102.

<sup>64</sup> . Bukharee, M.I. op. cit. vol.13. p.447..

<sup>65</sup> . Abu Zahrah, M.K. op. cit. p188.

<sup>66</sup> Ibid.

<sup>67</sup> . Ibid.

legitimate heirs of a deceased person. Allah (the Most High) says: “There is a share for men and a share for women from what is left by parents and those nearest related...”<sup>68</sup>

These are some of the benefits of abrogation. However, in recent times, some modernists do not view abrogation from the above perspective of its benefits. They rather view it to be a continuous process whereby it can be used as a basis for changing Islamic rulings in line with the changing needs and circumstances in recent times. This is, however, not necessary and uncalled for. This is because the provisions of the Shariah are adequate enough to address all emerging issues at all times.

In the same vein some groups such as the Jews have argued that there is no any benefit in abrogation since it has to do with a new idea that manifest to the Lawgiver (i.e Allah the Most High) at a later point in time. This is what they referred to as “Al-Badaa” (becoming apparent). They say, were it not that a new idea became manifest and apparent to Allah (the Most High) He would not have abrogated some legal rulings. This misconception has led the Jews to reject the concept of abrogation (naskh). They say, it is not befitting to say that a new idea became manifest to Allah, and so, He (the Most High) has to abrogate some legal rulings. Hence, this is their reason for rejecting the concept of abrogation.<sup>69</sup>

It will be inconceivable to attribute “Al-Bada” to Allah (the most high). This is because, a deep reflection about the world, in its entity, reveals that the Creator and Fashioner of the world possess, from the beginning and forever, the knowledge of

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<sup>68</sup>. Al-Qur’an ch.4 v.7

<sup>69</sup> Az-zarqaanee, M.A. op.cit. p.169.

what has happened, what is happening and what will come to happen.<sup>70</sup> The following authorities from the Qur'an further buttress this point. Allah (the Most High) says: "No calamity befalls on the earth or in yourselves but is inscribed in the book of decrees (Al-Lauhul Al-Mahfuz) before We bring it into existence. Verily, that is easy for Allah."<sup>71</sup> He (the Most High) also says:

"and with Him are the keys of the ghaib (all that is hidden), none knows them but He. And He knows whatever there is in (or no) the earth and in the sea; not a leaf falls, but he knows it. There is not a grain in the darkness of the earth or anything fresh or dry, but is writing in a clear record."<sup>72</sup>

He (the Most High) also says:

"Allah knows what every female bears, and by how much the womb falls short (of their time or number) or exceed everything with him is in (due) proportion. All-Knower of the un-seen and the seen, the Most Great, the Most High. It is the same (to Him) whether any of you conceal his speech or declare it openly, He be hidden by night or go forth freely by day."<sup>73</sup>

### **3.7 Categories of Abrogation**

The occurrence of Abrogation (Naskh) in Islamic law exists both in the Qur'an and Sunnah.<sup>74</sup> This includes the existence of the abrogating and the abrogated texts in the two primary sources of Islamic Law. Hence, the categories of abrogation in Islamic law are four.

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<sup>70</sup> Az-zarqaanee, M.A.op.cit.167

<sup>71</sup> Al-Qur'an ch.57 v.22

<sup>72</sup> Al-Qur-an ch.6 v.59

<sup>73</sup> Az-zarqaanee, M,A. op.cit. p.169.

<sup>74</sup> .Az-Zarqaanee, M.A. op. cit. p.216.

They are:

- The Qur'an abrogating the Qur'an
- The Qur'an abrogating the Sunnah
- The Sunnah abrogating the Qur'an
- The Sunnah abrogating the Sunnah

### **3.7.1 The Qur'an abrogating the Qur'an**

This type of abrogation is agreed upon by all those who considered the validity of abrogation.<sup>75</sup> Under this type of abrogation a text of the Qur'an abrogates another ruling in the Qur'an. For instance, the waiting period of a widow used to be one year. Allah (the Most High) says: "And those of you who die and leave behind their wives should bequeath for them a year's maintenance and residence, without turning them out..."<sup>76</sup> The ruling in this verse has been abrogated by the ruling in verse 2:234. Allah (the Most High) says: "And those of you who die and leave behind their wives should wait for four months and ten days..."<sup>77</sup>

### **3.7.2 The Qur'an abrogating the Sunnah**

The majority of jurists agree on this type of abrogation except Imam ash-Shafi'i.<sup>78</sup> In this type of abrogation there is always a ruling, deriving its authority from the Qur'an, abrogating an already existing rule which derives its authority from the Sunnah. The majority rely on the following authorities of the Qur'an abrogating the Sunnah to support their view.

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<sup>75</sup>. Al-Qattaan, M.K. op. cit. p.228.

<sup>76</sup>. Al-Qur'an ch.2 v.240

<sup>77</sup>. Al-Qur'an ch.2 v.234

<sup>78</sup>. HasabAllah, A. op. cit. p.357.



An example of this type of abrogation is the changing of the direction to face during prayers (Qiblah). Anas bin Malik reported that the Prophet (SAW) used to observe Salat while facing the direction of Baitul Maqdis (Jerusalem). Subsequently, the following verse was revealed:

“Verily! We have seen the turning of your (Muhammad’s S.A.W) face towards the heaven. Surely, we shall turn you to a Qiblah (prayer direction) that shall please you! So turn your face in the direction of Masjid al-Haraam, (at Makkah) (Qur’an ch.2v.144).

Thereafter, a man from Banu Salimah was passing by some people in Quba and he saw them in the position of Rukū during the Subhi Prayers while they have completed a unit (raka’ah) of Salat. He then called on them that the Qiblah (prayer direction) has been changed. Thereafter, the people all turned to the direction of Ka’abah.<sup>79</sup> The initial practice was by the authority of the Sunnah. However, it has been abrogated by the above cited verse.

Another example of the Qur’an abrogating the Sunnah is that, eating, drinking and sexual relations were unlawful during the night on the person who fasts in the month of Ramadaan. Al-Barraa’ (May Allah be pleased with him) said: when it is time for Iftar (Breaking Fasts) on the days the companions of Prophet Muhammad (S.A.W) observe fast, they do fall asleep before the arrival of the food and by that they do not eat or drink throughout the night and day until (another) evening. On one occasion, Qais bin Sirmah Al-Ansari observed fasting and it was time for Iftar (Breaking Fasts). He went to his wife and said to her, Do you have food for me? She said: No, but I will go to get it for you. He was tired and then fell asleep (without eating). The following

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<sup>79</sup>. Muslim, A.M. op. cit. Vol.3, p.120.

day the incidence was reported to the Prophet (S.A.W). Allah (the Most High) then revealed the following:<sup>80</sup>

“So now have sexual relations with them and seek that which Allah has ordained for you (offspring), and eat and drink until the white thread (light) of dawn appears to you distinct from the black thread (darkness of night)...”<sup>81</sup>

Another example of the Qur’an abrogating the Sunnah is the treaty signed by the Prophet, (S.A.W) and the people of Makkah in Hudaibiyyah.<sup>82</sup> It was agreed, as a condition, that anyone among the Makkans who comes forward to accept Islam should be returned. The Prophet (S.A.W) abided by the condition contained in the treaty, in the sense that he returned people like Abu Jandal<sup>83</sup> who came to accept Islam and some other persons from Makkah. Later, another woman<sup>84</sup> also came to accept Islam and the Prophet (S.A.W) intended to return her to Makkah. Allah (the Most High) then revealed the following verse:

“O you who believe! When believing women came to you as emigrants, examine them, Allah knows best as to their faith, Then if you ascertain that they are true believers, send them not back to the disbelievers, they are not lawful (wives) for the disbelievers nor are the disbelievers lawful (husbands) for them...”<sup>85</sup>

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<sup>80</sup>. Bukharee, M.I. op. cit. vol. 6. P.490.

<sup>81</sup>. Al.Quran ch.2 v.187

<sup>82</sup>. Az-Zarqaanee, M.A. op. cit p.224.

<sup>83</sup>. Abu Jandal- Ibn Suhail bin Amru. He is an eminent companion of the Prophet (S.A.W) who had accepted Islam and was chained down by his father for that reason. On the day of the Treaty of Hudaibiyyah, he escaped with chains on his leg and came to the Prophet (.S.A.W). Unfortunately, he met his father and was returned home. See- Adh-Dhahabiy, S. (1985) Siyaru A’alaamin Nubalaa, Muassasatur Risaalah, Beirut. Vol.1, P.192.

<sup>84</sup>. The woman is “Ummu Kulthum Bint Uqbah bin Abee Muait”. The verse was revealed in her case. See Ibnu Katheer, I.U.(1994) Tafseer Al-Qur’anil Adheem, DaarulFikr, Beirut. Vol.4. p.420.

<sup>85</sup>. Al-Qur-an ch. 60 v.10

Imam ash-Shafi'i, on the other hand, did not accept the idea of the Qur'an abrogating the Sunnah.<sup>86</sup> He supported his argument with the provision of the Qur'an where Allah (the Most High) says: "And We have also sent down unto you (O Muhammad S.A.W) the reminder and advice (the Quran), that you may explain clearly to men what is sent down to them..."<sup>87</sup> He said that the above verse, indicates that the Prophet's speech is an explanation to the Qur'an. He further argued that, were it that the Qur'an abrogates the Sunnah, the Qur'an would have been an explanation to the Sunnah. But in this verse the reverse is the case.<sup>88</sup>

A close look at the above arguments reveals that the fact the Qur'an was sent down to the Prophet (S.A.W) so that he may explain to men what was revealed unto them does not exclude the concept of abrogation to be an explanation from the Prophet (S.A.W) to the Qur'an. This does not also mean that the acts of the Prophet (S.A.W) cannot be abrogated by the Qur'an.

### **3.7.3 The Sunnah Abrogating the Qur'an**

This category may be further subdivided into two:

#### **(a) A Sunnah Mutawátirah Abrogating the Qur'an**

This was accepted by Imam Malik, Abu Haneefah and Ahmad in one of his opinions.<sup>89</sup> This is because a Sunnah Mutawátirah and the Qur'an are all revelations. Allah (the Most High) says: "nor does he speak of (his own) desire. It is only an

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<sup>86</sup>. Shafi'i, M.I. (n.d) Ar-Risaalah, Darul Kutubil Ilmiyyah, Cairo. p.54

<sup>87</sup> Al-Qur'an ch.16 v.44

<sup>88</sup> Ar-Raazi, F.M.U op.cit.p.513

<sup>89</sup>. Al-Qattaan, M.K. op.cit. p.229.

inspiration that is inspired.”<sup>90</sup> Allah (the Most High) also says: “And we have also sent down unto you (O Muhammad) the Reminder (the Qur’an), that you may explain clearly to men what is sent down to them...”<sup>91</sup> An example of the Sunnah Mutawátirah abrogating the Qur’an is the verse relating to bequest. Allah (the Most High) says: “It is prescribed for you, when death approaches any of you if he leaves wealth, that he make a bequest to parents and next of kin, in a reasonable manner...”<sup>92</sup>

This was abrogated by a Sunnah Mutawátirah, where the Prophet (S.A.W) said: “There is no bequest to a legal heir.”<sup>93</sup>

On the other hand, Imam ash-Shafi’i, the Zahiri jurists and Imam Ahmad in some other reports did not allow this category of abrogation.<sup>94</sup> They rely on the provision of the Qur’an where Allah (the Most High) says: “Whatever verse (revelation) We abrogate or cause to be forgotten, We bring a better one or that similar to it...”<sup>95</sup> They argue that the Sunnah is not better than the Qur’an and it is not similar to it.<sup>96</sup>

They also rely on the provision of the Qur’an where Allah (the Most High) says: “And when our clear verses are recited unto them, those who hope not for their meeting with us, say: bring us a Qur’an other than this, or change it.” Say (O Muhammad):it is not for me to change it on my own accord...”<sup>97</sup> They argued that the above verse indicates

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<sup>90</sup> .Al-Qur’an ch.53 v.3-4.

<sup>91</sup> .Al-Qur’an ch.16 v. 44.

<sup>92</sup> .Al-Qur’an ch.2 v.180

<sup>93</sup> .Bukharee, M.I. op. cit. vol.9. p.279.

<sup>94</sup> .Shafi’i, M.I. (n.d) Ar-Risaalah, Darul Kutubil Ilmiyyah, Cairo. p.54.

<sup>95</sup> .Al-Qur’an ch.2v.106

<sup>96</sup> .Al-Qattaan, M.K. op.cit. p.229.

<sup>97</sup> .Al-Qur’an ch.10 v.15

that the Sunnah does not abrogate the Qur'an. This is because the Sunnah is from the Prophet (S.A.W).<sup>98</sup>

From the foregoing, it can be seen that the Sunnah Mutawátirah abrogates the Qur'an. This is more so that the Prophet (S.A.W) does not speak out of his desire but he receives revelations guiding his sayings and actions. In the same vein, looking at the Sunnah Mutawátirah, it is such a report that contains a high number of reporters such that the possibility of those reporters coming together to relate what is false is minimal.

#### **(b) A Sunnah Áhád abrogating the Qur'an**

The majority of jurists did not allow this category of abrogation.<sup>99</sup> They argued that the Qur'an provides definitive knowledge (Qat'iy) while Áhád report gives room for doubt. They added that it will not be right to replace what is known with what gives room for doubt.

On the other hand, the Zahiris are of the view that Áhád report can abrogate the Qur'an. They rely on the following instances in support of their argument. That Allah (the Most High) says:

“Say, I find not in that which has been revealed to me anything forbidden to be eaten by one who wishes to eat it, unless it be Maitah (a dead animal) or blood poured forth (by slaughtering or the like), or the flesh of swine; for that surely is impure or impious (unlawful) meat (of an animal) which is slaughtered as a sacrifice for others than Allah. But whosoever is forced by necessity without willful

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<sup>98</sup>. Shafi'i, M.I. op.cit. p.54.

<sup>99</sup>. Al-Qattaan, M.K op.cit. p.229.

disobedience, nor transgressing due limits; (for him) certainly, your Lord is Oft-Forgiving, Most Merciful.”<sup>100</sup>

The Zahiris argued that the above Qur’anic text has been abrogated by the following Áhád report from Abu Tha’labah that “the Prohet (S.A.W) forbids the eating of animals that feeds on flesh.”<sup>101</sup>

They also rely on the fact that the people of Quba accepted the change in Qiblah (prayer direction) by way of an Áhád report and the Prophet (S.A.W) did not object to that.<sup>102</sup>

The first authority relied upon by the Zahiris is not an instance of abrogation but an instance of Particularisation (Takhsees). The text itself provided for what has been particularized alongside with it. Hence, it cannot be said to have been abrogated.<sup>103</sup>

On the other hand, the instance of the change in Qibla by way of an Áhád report is cogent enough to support the view that an Áhád report can actually abrogate the Qur’an. This is based on the fact that Áhád report is also from Sunnah and by that, it would only mean that the Sunnah abrogates the Qur’an. More so, that the Sunnah is also a revelation from Allah (the Most High) to His Prophet (S.A.W).

### **3.7.4 The Sunnah Abrogating the Sunnah**

This type of abrogation is recognized by the majority of jurists.<sup>104</sup> This category of abrogation may be subdivided into four:<sup>105</sup>

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<sup>100</sup>.Al-Qur’an ch.6 v.145

<sup>101</sup>. Muslim, A.M. op. cit. vol.10 p.68.

<sup>102</sup>. Muslim, A.M. op. cit. Vol.3, p.120.

<sup>103</sup>.Ar-Raazi, F.M.U op.cit. p.500.

<sup>104</sup>. HasabAllah, A. op. cit. p.357.

1. A Sunnah Mutawátirah abrogating another Sunnah Mutawátirah. There is no disagreement among the jurists on this type of abrogation.<sup>106</sup> However, there are no examples of a Sunnah Mutawátirah abrogating another Sunnah Mutawátirah.<sup>107</sup>

2. A Sunnah Áhád abrogating another Sunnah Áhád.

The jurists are agreed on the fact that a Sunnah Áhád abrogating another Sunnah Áhád.<sup>108</sup> They rely on the following authority from Anas bin Malik that the Messenger of Allah (S.A.W) said: “I used to forbid you from visiting the graves. Now you can go ahead to visit it. This is because it reminds you of the hereafter.”<sup>109</sup>

3. A Sunnah Mutawátirah abrogating a Sunnah Áhád.

This type of abrogation is also agreed upon by the jurists.<sup>110</sup> This is because a Sunnah Mutawátirah is stronger in authority than a Sunnah Áhád.

4. A Sunnah Áhád abrogating a Sunnah Mutawátirah.

The majority do not agree to the occurrence of the fourth category while the Zahiri School allows it.<sup>111</sup> The majority rely on the following two reasons to justify their position.

Firstly; A Sunnah Mutawátirah provides a definitive knowledge (Qat’iyuth thuboot), while Áhád report is speculative in nature (Zaniyy), and a definitive report (Qat’iy) cannot be replaced with a speculative report (Zaniyy) because it is more reliable.<sup>112</sup>

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<sup>105</sup>. Al-Qattaan, M.K. op. cit. p.229.

<sup>106</sup>. Al-Qattaan, M.K. op.cit. p.230.

<sup>107</sup>. Ibn Najjaar, M.A.A (1993) Al-Kawkabul Muneer, Wizaratul Awqaf, Saudi Arabia. P.182

<sup>108</sup>. Al-Qattaan, M.K. op.cit. p.230.

<sup>109</sup>. Al-Haakim An- Naysaaburee, M.A. op. cit. Vol. 3. P.415

<sup>110</sup>. Al-Qattaan, M.K. op.cit. p.230.

<sup>111</sup>. Az- Zarqaanee, M.A. op. cit. p.225.

<sup>112</sup>. Ibid, at p.226.

Secondly; they argued that Umar (may Allah be pleased with him) rejected the solitary report from Fatima Bint Qais on the issue that the Prophet (S.A.W) did not approve for her accommodation when her husband had to divorce her. Many of the companions, may Allah be pleased with them, affirmed Umar's decision on rejecting her report. This is because her report is a solitary report which is speculative in nature.<sup>113</sup> It cannot replace what is more reliable that is, the Qur'anic verse that provides: "Lodge them (i.e. the divorced women) where you dwell, according to your means..."<sup>114</sup>

On the other hand, the Zahiri jurists rely on the following authorities in holding their view: that the people of Qubaa<sup>115</sup> were performing Saláh while facing Baitul Maqdis when someone came to them with the news that the Qiblah had been changed from Baitul Maqdis. And they, there and then, turned to the direction of the Ka'abah. When the news reached the Prophet (S.A.W) he confirmed what they have done. The Zahiri Jurists argued that this is a proof that a solitary hadith can abrogate a Sunnah Mutawátirah.<sup>116</sup>

In response to the above argument, it is pertinent to note that the solitary hadith in the above example is associated with some inferences that elevate it to the position of Qat'iy (Definitive report).<sup>117</sup> The inferences are: Firstly, that the hadith has to do with an important event which is a congregational prayer during which many Muslims

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<sup>113</sup>. Az-Zarqaanee, M.A. op.cit. p. 226.

<sup>114</sup>. Al- Qur'an ch.65 v.6.

<sup>115</sup>. Qubaa is the name of a known well in the vicinity of the abodes belonging to Banu Amru Bin Auf amongst the Ansaar (Muslims in Madeenah). It is a hamlet situated two miles away from Madeenah. There are a lot of narrations on the virtues of the mosque located in the hamlet. It is said that the mosque is the one referred to in the saying of Allaah (the Most High) : "verily, the mosque whose foundation was laid from the first day on piety is more worthy that you stand there in (to pray). See: Al- Qur'an ch.9 v.108. See Al-Hamwiy, Y.(n.d) Mu'jam Al-Buldaan, DaarulFikr, Beirut. Vol.4. p.301-302.

<sup>116</sup>. Ar- Raazi, F.M.U. op.cit p.504.

<sup>117</sup>. Az- Zarqaanee, M.A. op.cit p.227.



gathered. Secondly, the reporter of the hadith is an eminent Companion of the Prophet (S.A.W) who had no intermediary between him and the Prophet (S.A.W). More so, the Companion knew that if he had lied, an instant revelation would be sent down to expose him. Thirdly, it has been an age long aspiration of the Arabs and the Prophet (S.A.W) that the prayer direction (Qiblah) be changed to Ka'abah. This is such that the Prophet (S.A.W) used to raise his face in the sky in anticipation of a revelation to that effect. It is in respect of this that Allah (the Most High) says:

“Verily! We have seen the turning of your (Muhammad's) face towards the heaven. Surely, We shall turn thee to a Qiblah (prayer direction) that shall please you, so turn your face in the direction of Al-Masjid al-Haram (at Makkah), and where so ever you people are, turn your faces (in Prayer) in that direction. (Qur'an Ch.2 V.144)<sup>118</sup>

From the above analysis, it can be conclude that a report having a high number of reporters such that the possibility of their coming together on falsehood is minimal will remain unshaken and makes it more difficult for such a report to be set aside by a solitary report. Hence, the view of the majority of jurists in this regard appears to be more cogent.

This is the analysis of the meaning and the categories of abrogation. The next chapter will discuss the classification and conditions for the application of abrogation in Islamic Law.

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<sup>118</sup>. Al- Qur'an ch.2 v.144.

## CHAPTER FOUR

### CONDITIONS AND CLASSIFICATION OF ABROGATION

#### 4.1 Introduction

This chapter discusses the conditions for the application of abrogation in Islamic Law. These conditions have been carefully identified by scholars in order to distinguish between the instances of abrogation in Islamic Law and other similar concepts.

It further discusses and analyses the types and classification of abrogation. These include instances of abrogation of a ruling and the text, the abrogation of the ruling without the text and the abrogation of the text and not the ruling.

#### 4.2 The Conditions of Abrogation

There are some conditions for the application abrogation in Islamic Law. These conditions are many but the most important are as follows:

##### 4.2.1 The two Rulings must Contradict each Other

The two rulings in question must contradict each other such that both of them cannot be applied at the same time.<sup>1</sup>If the two rulings are applicable at the same time, then there can be no abrogation. This is possible in two ways:

First; one of the rulings must deal with what the other ruling deals with in a general form and the other ruling must deal with what the first ruling deals with in a specific form. However, the fact that one ruling deals with the issue in a specific form does not

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<sup>1</sup>. IbnulJawzee, A.A. (1405) A.H. Nawásikhul Qur'aan, Daarul Al Kutubil Ilmiyyah, Beirut. P.23.

make it an instance of abrogation but it is an explanation that it is not included in the general rule.<sup>2</sup>

Secondly; each of the two rulings must be established in a way that is different from the other. For instance, the prohibition of marrying a woman who has been divorced three times. Such a woman is prohibited to the man who divorced her in a way. However, if such a divorced woman gets married to another man who later divorces her after consummation, then the prohibition to marry her by the first husband ceases to exist. In this case, the law allows the first husband to remarry her. The second instance of remarriage cannot be considered to be abrogating the first instance of marriage. This is because the situation that gave rise to the prohibition of marriage between them and the subsequent permission to remarry differs.<sup>3</sup>

#### **4.2.2 The Abrogated Ruling must have been Revealed before the Abrogating Ruling**

The abrogated ruling must have been revealed before the abrogating ruling.<sup>4</sup> This may occur in two ways:

First; It may occur from the kind of expression used. For instance, where Allah (the Most High) says: “Now Allah has lightened your (task), for He knows that there is weakness in you...”<sup>5</sup> This verse was revealed after the revelation of chapter 8 verse 65 of the Qur’an where Allah (the Most High) says: “O Prophet (Muhammad)! Urge the believers to fight. If there are twenty steadfast persons amongst you, they will overcome two hundred, and if there be a hundred steadfast persons they will overcome

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<sup>2</sup>. Ibid, p.23.

<sup>3</sup>. Ibid, p.23.

<sup>4</sup>. Al-Qattaan, M.K. op. cit. p.224.

<sup>5</sup>. Al- Qur’an ch 8.v.66

a thousand of those who disbelieve, because they (the disbelievers) are people who do not understand.”<sup>6</sup>

Al-Imam al-Bukharee reported on the authority of Ibn Abbas (may Allah be pleased with him) who said:

“When this verse (i.e. ch.8 v.65) was revealed it was difficult for Muslims, it was difficult for twenty (persons) to fight two hundred (persons), and for a hundred to fight a thousand. Allah then lightened it for them and abrogated this ruling with another verse”.<sup>7</sup>  
Thus: “Now Allah has lightened your (task) for He knows that there is weakness in you”.<sup>8</sup>

Secondly; It may occur by historical facts. This is through a report that indicates that the first ruling was revealed before the second ruling. In such a case, it should be that one of the two rulings cannot be applicable except by doing away with the other.<sup>9</sup>

#### **4.2.3 The abrogating and the abrogated rulings must originate from the Qur’an or Sunnah**

The abrogating and the abrogated rulings must originate from the Qur’an or Sunnah and not Ijma or Qiyas.<sup>10</sup> This is simply because, it is only Allah (the Most High) who has the authority to abrogate any ruling emanating from Him, either in the Qur’an or through the tongue of His Prophet (S.A.W).

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<sup>6</sup>. Al- Qur’an ch 8 v 65

<sup>7</sup>. IbnKatheer I.U op.cit. P. 395.

<sup>8</sup>. Al-Qur’an ch.8 v.66.

<sup>9</sup>. IbnulJawzee,A.A. op. cit. p.23.

<sup>10</sup>. Ibid. at p. 23.

It is important to note that both the abrogating and the abrogated rulings cannot originate from Ijmá' (Consensus of jurists).<sup>11</sup> This is simply because, Ijmá' (consensus of jurists) became a source of legislation after the death of the Prophet (S.A.W). According to Ibn Al-Arabee: “No speech or action is to be considered to be abrogating (another) after the (demise of the) Prophet (S.A.W) even if it is an Ijmá' (Consensus of jurists).”<sup>12</sup> This is the opinion of the majority of jurisprudents (Usúliyyún).<sup>13</sup> They argue that the abrogating ruling cannot originate from Ijmá' because the abrogated ruling may do away with a text and Ijmá' cannot do away with a text. They further argue that the abrogated ruling cannot originate from Ijmá' because there can be no Ijmá' without a text or Qiyas (analogical deduction) that is relied upon. This is because an Ijmá' without (a text or analogical deduction) to be relied upon would mean making a statement about Allah (the Most High) without knowledge.<sup>14</sup>

On the other hand, some scholars among the Mu'tazilah and others are of the view that the abrogating and the abrogated rulings can originate from Ijma'.<sup>15</sup> They argue that the allocation of Zakat to be given to those whose hearts tilt towards Islam is confirmed by the provision of Qur'an 8:60. Also, they argue that there is a decision from Umar (may Allah be pleased with him) and a group of others that that category of people is not to be given Zakat after the demise of the Prophet (S.A.W).<sup>16</sup> This, according to the Mu'tazilah, is an abrogation originating from Ijmá'.

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<sup>11</sup>. Ar- Raazi, F.M.U. op. cit. p. 531.

<sup>12</sup>. Ibn Al-Arabee, A. M. op. cit.p.4.

<sup>13</sup>. Az-Zarqaanee, M.A op. cit. p.230.

<sup>14</sup>. Ibid.

<sup>15</sup>. Ibid at p.231.

<sup>16</sup>. Ibn Katheer, I.U. op. cit. p. 443.

This can be responded to in a way that the above instance is not an example that can abrogate the text in question. This is because the allocation of Zakat to those people is an issue that has been decided by the Qur'anic text.

From the above analysis, it will be understood that Ijmá as a source of legislation can only be resorted to in the absence of texts of the Qur'an and Sunnah. Hence, it is submitted that in determining an instance of abrogation in Islamic Law, it is important that attention be given to instances emanating from the Qur'an and Sunnah.

#### **4.2.4 The Abrogating Ruling must be Equal or Stronger in Authority than the Abrogated one**

The abrogating ruling must be equal or stronger in authority than the abrogated one.<sup>17</sup>

This is supported by the provision of the Qur'an where Allah (the Most High) says: "Whatever verse (revelation) We abrogate or cause to be forgotten, We bring a better one or one similar to it..."<sup>18</sup> According to Ibn Abbas (may Allah be pleased with him) this verse means that a better and more beneficial ruling replaces the existing one.<sup>19</sup>

This is always after much consideration has been given to what will be of great benefit to mankind. According to Sudaiy, it suggests that a better ruling than the abrogated or similar to it will be revealed.<sup>20</sup> A better ruling can only be in the form of what is from the Qur'an.

To reconcile the above condition with the possibility of Sunnah abrogating the Qur'an, it is important to note that both the Qur'an and the Sunnah are equal in authority as they are both primary sources of Islamic Law. The following authorities are in support

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<sup>17</sup>. Ibnul Jawzee, A.A. op.cit. p.23.

<sup>18</sup>. Al-Qur'an ch.2 v.106.

<sup>19</sup>. Ibn Katheer, A. op. cit. p.189.

<sup>20</sup>. Ibid. p.189.

of that where Allah (the Most High) says: “Nor does he speak of (his own) desire. It is only revealed.”<sup>21</sup> Allah (the Most High) also says: “...And whatsoever the Messenger (Muhammad S.A.W) gives you, take it and whatever he forbids you abstain (from it)...”<sup>22</sup> With these authorities, it is clear that the Sunnah is equal in authority with the Qur’an and by that the above condition is applicable.

This condition has been stipulated by the majority of jurists. This is more so that it is in line with the general spirit of Islamic Law which is that a ruling be replaced with another one so as to make life easier for human beings.

#### **4.3.1 Criticisms against Abrogation and Responses/ Refutations**

Some Muslims and non-Muslims have criticized the existence of abrogation in Islamic Law. Some of those criticisms are as follows:

#### **4.3.2 Abu Muslim Al-Asfahaanee and the Concept of Abrogation**

Abu Muslim<sup>23</sup> in one of the reports is said to have raised objections concerning abrogation, particularly, in the Qur’an.<sup>24</sup> Some of those instances are discussed below:

1. With regards to the provision of Qur’an chapter 41: 42 where Allah (the Most High) says: “Falsehood cannot come to it from before it or behind it (it is) sent down by the All-Wise, worthy of all praise (Allah)”.<sup>25</sup> He interprets this verse to mean that

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<sup>21</sup>. Al-Qur’an ch. 53 v. 3-4.

<sup>22</sup>. Al-Qur’an ch. 59 v.7

<sup>23</sup>. He is Muhammad Bin Bahr, popularly known as Abu Muslim Al-Asfahaanee. He was born in the year 254AH. He is a mu’tazilite and great commentator of the Qur’an(Mufassir).Some of his works includes:“Jaamiut Ta’weel,Fit Tafseer”, An-NāsikhWalMansúkh, KitaabunNahw etc..He died in the year 322AH. See: Az-Zarkalee, A.M.(n.d.) Al-A’laam, DaarulIlm Lil Malayeen. Vol.6. p.50.

<sup>24</sup>. Al-Qattaan,M.K.op.cit .p228.

<sup>25</sup>. Al-Qur’an ch.41 v.42.

the legal rulings in the Qur'an can never be set aside or abandoned, and that in abrogation there is the setting aside or abandonment of a previous legal ruling. Hence, he considers the verses of abrogation as part of Specification (Takhsís).<sup>26</sup>

In response to the above, Az-Zarqaanee stated that: had it been the expression “falsehood” in the text relied upon by Abu Muslim means setting aside or abandoning a legal ruling while the text is preserved, it would have been a good authority for advocates of abrogation.<sup>27</sup>

This is because the verse would have suggested a particular type of abrogation which is the abrogation of the ruling without the text.

Secondly, the expression “falsehood” in the text means “anything that negates the truth”, and abrogation is indeed true. Hence, the text means that the Qur’anic beliefs are in line with good reasoning. The legal rulings in it are in conformity with wisdom. Its historical narrations are in line with realities and the expressions (in the Qur’an) are preserved against corruption.<sup>28</sup> Hence, it is not possible that mistakes and errors be found in the Qur’an. Allah (the Most High) says: “Verily We: it is We who send the Dhikr (i.e the Qur’an) and surely, We will guard it (from corruption).<sup>29</sup>

Allah (the Most High) also says: “And with Truth We have sent it down (i.e the Qur’an), and with Truth it has descended...”<sup>30</sup> The explanation of the text relied upon

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<sup>26</sup> . Al-Qattaan,M.K.op.cit.p228.

<sup>27</sup> . Az- Zarqaanee, M.A. op.cit. p.191

<sup>28</sup> . Ibid

<sup>29</sup> . Al-Qur’an ch.15 v.9.

<sup>30</sup> . Al-Qur’an ch. 17. v.105.



by Abu Muslim with this meaning reveals that the text is actually an authority in favour of abrogation.<sup>31</sup>

2. Abu Muslim also considers abrogation as Particularisation (Takhsís). For instance, the waiting period of a widow used to be one year. Allah (the Most High) says: “And those of you who die and leave behind wives should bequeath for their wives a year’s maintenance and residence without turning them out.”<sup>32</sup> This text was abrogated by the saying of Allah (the Most High): “And those of you die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days...”<sup>33</sup>

According to Abu Muslim, the one year waiting period is still in a general form (Kulliyy). This is because if she is pregnant, and the period of her pregnancy is one year, her waiting period would have been one complete year. Therefore, if this ruling exists in instances like this, it is to be considered as Particularisation and not Abrogation.<sup>34</sup>

In response to this, it is to be understood that the waiting period of a pregnant widow terminates when she delivers the baby. Be it within a year, less than a year, or more than that.<sup>35</sup>

3. On the provision of Qur’an 2:234 where Allah (the Most High) says: “Whatever verse (revelation) We abrogate or cause to be forgotten, We bring a better one or one

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<sup>31</sup> . Az- Zarqaanee, M.A. op.cit. p.191.

<sup>32</sup> . Al-Qur’an ch. 2 v.240.

<sup>33</sup> . Al-Qur’an ch. 2 v.234.

<sup>34</sup> . Ar-Raazi, F.M.U. op.cit. p.461

<sup>35</sup> . Ibid.p.462.

similar to it. Know you not that Allah is able to do all things?”<sup>36</sup> According to Abu Muslim, abrogation in this text means “taking away” (al-Izálah). Hence, it means the taking away of the Qur’an from LauhulMahfuz.<sup>37</sup>

In response to the above, Imam Ar-Raazi said that the taking away of the Qur’an from Lauhul Mahfuz cannot be limited to a part of the Qur’an without the other, and the text under consideration refers to a part of the Qur’an.<sup>38</sup>

It is evident from the foregoing that Abu Muslim considers Abrogation as part of Particularisation (Takhsís). However, there is a difference between Abrogation (Naskh) and Specification (Takhsís) which has been discussed in chapter two of this research work.

### **4.3.3 The Jews and the Concept Abrogation**

The Jews misconceived the concept of abrogation to be the same as Al- Badá.<sup>39</sup> They argue that if Al-Badá means that a new idea becomes apparent and manifest to Allah (the Most High), it will not be befitting to attribute such to Allah (the Most High). Hence, this is their reason for rejecting the concept of Abrogation.<sup>40</sup> They added that it is said that it was for a wisdom not known to Allah (the Most High) or for no wisdom at all, that necessitates that Allah (the Most High) abrogates an existing legal ruling.<sup>41</sup>

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<sup>36</sup> . Al-Qur’an ch.2. V.234.

<sup>37</sup> . Ar-Raazi, F.M.U. op. cit. p.464.

<sup>38</sup> . Ibid. p.464.

<sup>39</sup> . As-suyutee, J. op.cit. p. 54

<sup>40</sup> . Al- Qataan, M. K. op.cit P. 226.

<sup>41</sup> . Az-zarqaanee, M. A . op.cit P. 182

This implies two things: First, it attributes ignorance to Allah (the Most High). Secondly, it suggests attributing what is absurd to Allah (the Most High).

In response to the above misconception, it should be understood that in an attempt to respond to a particular opinion held by someone, it will be reasonable that one should not go to the extreme in doing that. This appears to be the position taken by the Jews. It is agreed that ignorance is not to be attributed to Allah (the Most High). This, in fact, is supported by a plethora of texts from the Qur'an. Allah (the Most High) says:

“And with Him are the keys of Ghaib (all that is hidden), none knows them but He. And He knows whatever there is in (or on) the earth and in the sea; not leaf falls, but He knows it. There is not a grain in the darkness of the earth or anything fresh or dry, but it is written in a clear record.”<sup>42</sup>

Allah (the Most High) also says: “No calamity befalls on earth or in your selves but it is inscribed in the Book of Decrees (Lauhul Mahfuz) before we bring it into existence. Verily, that is easy for Allah”<sup>43</sup> Allah (the Most High) also says:

“Allah knows what every female bears, and by how much the wombs fall short (of their time or number) or exceed everything with Him is in (due) proportion. All-knower of the unseen and the seen, the Most Great, the Most High. It is the same (to Him) whether any of you conceal his speech or declare it openly, whether he be hidden by night or go forth freely by day.”<sup>44</sup>

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<sup>42</sup>. Al- Qur'an ch.6 V. 59

<sup>43</sup>. Al- Qur'an ch. 57 V. 22.

<sup>44</sup>. Al-Qur'an ch. 13 V. 8-10

With the above authorities, it is clear that whatever Allah (the Most High) wants to abrogate from His legal rulings is based on the wisdom that is known to Him (the Most High). It was not hidden to Him (the Most High), it is not hidden to Him and it will never be hidden to Him (the Most High). What should be noted is that the situation of men changes from time to time. This is based on the individual differences and circumstances that are inherent in all human beings. Hence, when Allah (the Most High) decides to change any existing legal ruling, it is based on the good and betterment of men.<sup>45</sup>

The Jews also acknowledged the fact that the Laws of Prophet Musa (A.S) abrogated the Laws before the Torah.<sup>46</sup> Abrogation is also recorded in the texts of the Torah. For instance, the subsequent prohibition regarding eating the meat of animals after it was earlier made lawful. Allah (the Most High) says: “All food was lawful to the Children of Israel, except what Israel made unlawful for himself before the Taurat (Torah) was revealed. Say (O Muhammad): “Bring here the Taurat (Torah) and recite it, if you are truthful.”<sup>47</sup> He (the Most High) also says: “And unto those who are Jews, We forbade every (animal) with undivided hoof...”<sup>48</sup>

It is also reported in the Torah that Prophet Adam (A.S) used to join a brother and sister (of the same parents) in marriage. This practice was prohibited to Prophet Musa

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<sup>45</sup>. Az-Zarqaanee, M. A op.cit. Pp. 128-183

<sup>46</sup>. Al-Qattaan, M. K. op.cit P.227.

<sup>47</sup>. Al-Qur’an ch. 3 v. 93.

<sup>48</sup>. Al-Qur’an ch. 6 v. 146.

(A.S).<sup>49</sup> The Jews also rejected abrogation because they know that it will justify the Qur'an replacing their own revelation.

From the above, it is evident that abrogation is a concept well established in the divine revelation sent to the Jews and they abided by it. It will be out of place at a later time for them to reject such a concept.

In the same vein, in an attempt to deal with an issue, it is but reasonable that care be taken in order not to misplace or do away with the issue completely. This appears to be the role played by the Jews in relation to the concept of Abrogation.

#### **4.3.4 The Shi'ites and the Concept of Abrogation**

The Shi'ites uphold the concept of abrogation. However, they went to extremes in affirming and upholding abrogation. In doing this, they attributed Al- Badá to Allah (the Most High).<sup>50</sup> They are on the opposite end of the position taken by the Jews. They rely on the provision of the Qur'an where Allah (the Most High) says: "Allah blots out what He wills and confirms (what He wills). And with Him is the mother of the Book. (Al-Lauh Al- Mahfuz)." <sup>51</sup> To them, the above verse means that it becomes apparent to Allah (the Most High) at a later time to either blot out a legal ruling or to affirm a legal ruling.<sup>52</sup>

This interpretation is not the correct interpretation of the text and it is indeed misleading. According to Imam Az-Zamakhsharee, Allah (the Most High) does abrogate what is proper and pertinent in His rulings and replaces it with what He (the

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<sup>49</sup>. Ar- Raazi, F. M. U. op. cit. p. 442.

<sup>50</sup>. Al-Qattaan, M.K op.cit. p. 229.

<sup>51</sup>. Al-Qur'an, ch.13. v39.

<sup>52</sup>. Al-Qattaan, M. K op.cit . p. 227.

Most High) sees to be the best or He (the Most High) leaves it without abrogating it.<sup>53</sup>

This can be in all situations. It is for Allah (the Most High) to determine what to do away with and what to preserve. For instance, the wiping away of evil deeds with good deeds. Allah (the Most High) says: “Verily, the good deeds remove the evil deeds...”<sup>54</sup>

Another example is the wiping away of the disbelief of the repentant with their repentance and the affirmation of their belief and the obedience to Allah (the Most High). Allah (the Most High) says: “Except those who repent and believe (in Islamic Monotheism), and do righteous deeds, for those, Allah will change their sins into good deeds, and Allah is Oft-forgiving, Most Merciful.”<sup>55</sup>

From the above authorities, Allah (the Most High) affirms that He (the Most High) wipes away evil deeds and replaces them with good deeds or wipes away disbelief and replaces them with belief (in the oneness of Allah the Most High). All these do not suggest anything becoming apparent to Allah (the Most High). In fact, He does all these with His knowledge of that thing in particular even before it came into existence.<sup>56</sup>

The position taken by the Shi'ites in upholding abrogation while attributing Al-Badá to Allah (the Most High) is indeed an extreme position that is based on a wrong understanding of texts of the Qur'an.

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<sup>53</sup>. Az-Zamakhsharee, M.U. (n.d) Al-Kasháf An Haqá'iqit Tanzíl Wa Uyúnil Aqáwíl Fí Wujúhit Ta'awíl, DaarIhyaatit Turaathil Arabee, Beirut.vol.2 p.502.

<sup>54</sup>. Al-Qur'an, ch.11 v.114

<sup>55</sup>. Al-Qur'an ch.25 v.70.

<sup>56</sup>. Al-Qattaaan, M.K. op.cit. p.227.

It is indeed wrong to assume that there exists a time when Allah (the Most High) lacks the knowledge of what will happen in the Universe. This is because Allah (the Most High) is the All-Knowing. He (the Most High) says: “Allah knows what every female bears, and by how much the wombs fall short (of their time or number) or exceed everything with Him is in (due) proportion. All- knower of the unseen and the seen, the Most Great, the Most High. “It is the same (to Him) whether any of you conceal his speech or declare it openly, whether He be hidden by night or go forth freely by day.”<sup>57</sup>

#### **4.3.5 The Modernists and the Concept Naskh**

The position taken by some modern scholars is contrary to the proper understanding of Naskh. Thus, some of them have rejected the meaning of Naskh. For instance, Rashid Rida categorically rejected the meaning of abrogation. While referring to the verse: “whatever a verse (revelation) do we abrogate or cause to be forgotten, we bring a better one or similar to it. Know you not that Allah is able to do all things?”<sup>58</sup> He stated that an ayah can be in the form of religious obligation (ayat taklifiyyah) or cosmic phenomena (ayat takwiniyyah). Thus abrogation in the verse under consideration has to do with cosmic phenomena (ayat takwiniyyah) and that there are no commandments abrogated by the verse. He further stated that takwiniyyah are the those occurrences contrary to natural laws (i.e miracles) with which Prophets were assisted. Hence, it is such phenomena that change with the passage of time.<sup>59</sup> He added that the words in the in the verse under consideration (i.e Qur’an 2: 106) refer to

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<sup>57</sup>. Al-Qur’an ch.13. v.8-10.

<sup>58</sup>. Al-Qur’an ch. 2 v. 106

<sup>59</sup>. Rida, M.R. (n.d.) Tafsir Qur’anil Hakim. (Tafsir Al-Manar) Hai’at Misriyya Al- Aammah lil Kitaab, Egypt, Vol.1, p.611.

the Divine Omnipotence and not to the laws of (human) responsibility. For if it were the latter, the verse would have read for example: “Do you not know that Allah is all-knowing, the legislator”<sup>60</sup>

The position held by Rashid Rida is contrary to the proper understanding of the text in question (i.e Qur’an 2: 106). This is because there is nothing in the above cited text suggesting that the verse in that context refers to cosmic phenomena (ayat takwiniyyah) or anything relating to the miracles with which the prophets were assisted with. If it were miracles that are referred to in the texts, we would have seen more examples of that with prophet Muhammad (S.A.W) and some other prophets of Allah (the Most High). More so, Ibn Abbas (may Allah be pleased with him) reports that Umar (may Allah be pleased with him) said: “the best of Us in (Qur’anic) recitation is Ubayy, but we do abandon his statements; and that is that, Ubayy (may Allah be pleased with him) used to say, I will not abandon anything that I heard from the Messenger of Allah (S.A.W) and indeed Allah (the Most High) has said: “whatever verse we abrogate or cause to be forgotten, we bring a better one or one similar to it.”<sup>61</sup>

According to Al Dahhaak (May Allah be pleased with him): this verse refers to the abrogating and the abrogated verses.<sup>62</sup>

Muhammad Al- Ghazali reiterated the same view of rejecting abrogating even more clearly. He stated that this tale of abrogation of the notion of embalming of some verses, in that such verses are present but are in operative, is a baseless one. He added

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<sup>60</sup>.Ibid

<sup>61</sup> . Bukharee, M.I op.cit. vol. 4 p. 1628

<sup>62</sup> . Ibn Katheer, A. op. cit. p. 188



that there is no verse in the Qur'an which may be said to be not applicable and therefore invalid; this is nonsense. Each verse is potentially valid, but it is He the Lawgiver who knows the conditions in which the verses may be applied, and it is in this manner that the verses are to be applied.<sup>63</sup>

This view held by Al-Ghazali is contrary to the proper understanding of abrogation as understood by classical jurists. It is necessary to mention here that abrogation is not limited to seemingly verses that contradict each other only in the Qur'an. Abrogation also includes an instance where a verse ceases to exist in the Qur'an but the ruling is continuously applicable. For instance the ruling on stoning to death of persons who commit adultery used to be in the Qur'an but was later abrogated. How then can Al-Ghazali justify the ruling on stoning to death of persons who commit adultery?

Some other modernists have also under the guise of abrogation called and advocated for reinterpretation of the Qur'an. For instance, Abdullahi Sa'eed posited that in view of the current problems many Muslims are facing in their effort to implement the Shari'ah, he believes "that Naskh (abrogation) provides a strong basis for the reinterpretation of some texts of the needs of Muslims today."<sup>64</sup> He argued that the Qur'anic revelation occurred over 22 years during which a number of rulings given in the earlier period of Islamic were changed once, twice or even three times. He cited the example of the rulings relating to the consumption of wine which went through a number of changes before the final declaration that believers should keep away from wine completely. With these, he says the lawgiver appears to be providing the

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<sup>63</sup>. Al-Ghazali, M.() *Kaifa Nata'amal Ma'al Qur'an*, Nahdatu Misr, Egypt, p.84.

<sup>64</sup>.Saeed, A. (2006) *Interpreting the Qur'an; towards a contemporary approach*, Routledge Taylor & Francis Group. London, p. 77.

community with an important tool with which to change rulings in line with changing needs and circumstances.

Also, he added that while in Mecca, the Muslim Community was a very small minority lacking in political and economic power. But with their migration to Medina, the situation of Muslims changed significantly. Thus, Medina became a home for the Muslims with Political, economic and military strength.

The focus of Qur'anic guidance & in Mecca was on the spiritual and moral development on the individual. But in Medina the language as well as the tone of the Qur'an changed in line with the changes in the community. This change, to a certain extent, is embodied in the Ibn Hazm and Suyuti who discussed Naskh, did not take it to its logical conclusion that, when society changes there is sufficient warrant in the Qur'an and the Sunnah to change certain rulings or at least aspects of their application through reinterpretation.<sup>65</sup> He further argued that in reinterpreting the Qur'an, the Qur'anic ruling should be looked at first in order to ascertain its underlying objective. This is by taking into account, temporal, cultural and circumstantial differences. Then one should see to how that objective can be achieved. For instance, he added that, in the early Islamic Community, amputation was used to punish and prevent theft. So, without changing the under changing the underlying objective, one could argue that, a Muslim community could today find a means of prevention that is more in line with its own circumstance.<sup>66</sup>

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<sup>65</sup> . Saeed, A. op. cit. p. 85

<sup>66</sup> . Saeed, A. op. cit. p. 85

In response to the above, effort at reinterpreting the Qur'an, it is to be noted that the different changes that occur during the legislative period was as a result of the stage the Muslim community was at that point in time. For if it were for the first time declared to the Arabs to stay away from wine drinking, it would have been difficult for them. Hence the need to take them through the gradual process of practicing the Shariah.

On the issue that the issue underlying objective of a ruling should be identified so as to see to how that objective can be achieved; this has always been the case with all the legal rulings in the Shari'ah. There is always an objective a ruling seeks to achieve. However, that will not be a sufficient license to warrant reinterpretation of the text of the Qur'an. For instance, the ruling on the amputation as identified by Abdullah Saeed has the prevention of theft as the objective to be achieved. Hence, there would be no basis for suggesting reinterpretation in this regard This is because, such rulings really meets the demands of the society in that regard and it is the best for the society as stipulated by lawgiver. Any attempt to suggest otherwise through reinterpretation and the so called understanding of Naskh" will be an attempt to render those provisions of Islamic Law obsolete and or impotent.

#### **4.4 Types of Abrogation**

There are two types of abrogation as follows:

1. An-Naskh Al-Sarih (Abrogation)

Abrogation is said to be explicit where the Lawgiver explicitly states the abandonment of a previous legal ruling<sup>67</sup>. For instance, Ibn Buraidah reported from his father who said: The Messenger of Allah (S.A.W) said: “I had forbidden you from visiting the graves. Nay, visit them, for they remind you of the hereafter.”<sup>68</sup>

In the above cited examples, the text leaves no doubt as to the nature of the two rulings and that all the other issue of abrogation.

Another example of explicit abrogation in the Qur’an is the provision relating to the change in the direction of the Qiblah from Jerusalem to Ka’abah in Qur’an 2:142 – 144. The texts of the Qur’an in that regard is clear and leaves no doubt with regards to the fact of abrogation in the circumstance.

## 2. An-Naskh Ad-Dimni (Implicit Abrogation)

For implicit abrogation, the Lawgiver will not make the abrogation explicit. Instead, it is a situation where the Lawgiver introduces a ruling which is in conflict with a previous ruling. The subsequent ruling will then be considered as abrogating the previous ruling implicitly.<sup>69</sup>

An example of implicit abrogation is the ruling in chapter 2:180 of the Qur’an which permitted bequest to one’s parents and relatives. This was abrogated subsequently by the authority of chapter 4:11 of the Qur’an which entitled the legal heirs to specific shares in inheritance.<sup>70</sup>

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<sup>67</sup> Az-Zuhaili, W. op. cit. p. 240

<sup>68</sup> Muslim, A.M op. cit. p. 240

<sup>69</sup> .Az-zuhayli, W. op. cit. p. 240

<sup>70</sup> .Ibid

Implicit abrogation is subdivided into complete abrogation (naskh kulli) and partial abrogation (naskh juzi). In the case of complete a previous ruling is abandoned completely with respect to all legal persons. For instance, the prohibition on bequest to a legal heir. The prophet (S.A.W), “There is bequest to legal heirs”.<sup>71</sup>

This Hadith completely abrogates bequest to a legal heir which was hitherto permitted. Another example of a complete abrogation is the Qur’anic texts concerning the waiting period (Iddah) of widows, which was initially prescribed to be one year but subsequently changed to four months and ten days. Allah (the most high) says: “And those of you who die and leave behind wives should bequeath for their wives a year’s maintenance and residence without turning them out, but if they (wives) leave, there is no sin on you for that which they do of themselves, provided it is honourable”.<sup>72</sup>

The ruling in the above text has been abrogated completely by the authority of Qur’an 2:234. Allah (the most high) says: “And those of you who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days, then when they have fulfilled their term there is no sin on you if they (the wives) disposes of themselves in a just and honourable manner.”<sup>73</sup>

Partial Abrogation (Naskh Juz’i) is a form of abrogation in which a text is partially abrogated by another, while the remaining part continuous to be

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<sup>71</sup>.Ibn Majah, M.Y. (n.d) Sunan Ibn Majah, Darul Fikr, Beirut, Vol. II, p. 906

<sup>72</sup>. Al-Qur’an ch. 2 V. 240

<sup>73</sup>. Al-Qur’an ch. 2 v. 234

operative.<sup>74</sup> An example of this is the text relating to qadhf (false accusation) which has been partially abrogated by the text on Li'an Allah (the Most High) Says: "And those who accuse chaste woman, and produce not four witnesses, flog them with eighty stripes and reject their testimony forever."<sup>75</sup>

Allah (the Most High) also says: "And for those who accuse their wives, but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e testifies four times) by Allah that he is one of those who speak the truth".<sup>76</sup>

The first text provide the general rule that anyone, be it a spouse or otherwise, who accuses chaste women of Zina must produce four witnesses for proof. The second text provides that if the accuser happens to be a spouse who cannot provide four witness and yet insist on making a case, he may take four solemn oaths to take the place of four witnesses. This should be followed by the fifth if he tells a lie. The ruling in the first text has thus been abrogated by the second text in so far as it relates to married couple.<sup>77</sup>

#### **4.5 Classification of Abrogation**

The classification of abrogation is as follows:

##### **4.5.1 The Abrogation of the Ruling and the Text**

###### **(NASKH AL-HUKM WA AT-TILAAWAH)**

Under this particular classification, both the ruling and the text have been abrogated.

This type of abrogation is agreed upon by all those who consider the validity of

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<sup>74</sup>. Abu Zahrah, M. op. cit. p.177

<sup>75</sup>. Al-Qur'an ch. 24 v. 4

<sup>76</sup>. Al-Qur'an ch. 24 v. 6

<sup>77</sup>. Abu Zahrah, M. op. cit. p.177

abrogation.<sup>78</sup> They cited, as an example a Hadith reported by Imam Muslim and others on the authority of Aisha (may Allah be pleased with her) in which she was reported to have said:

“It had been revealed in the Qur’an that ten clear suckles (of a baby from a woman) made marriage unlawful. (i.e, that the baby would be considered her foster child). This was later abrogated by five suckles, and the Prophet (S.A.W) died and it was before that time (found) in the Qur’an.”<sup>79</sup>

Al-Qattaan quoted Al-Qaadi Abubakar who mentioned a group that rejected this particular classification of abrogation. They argued that the report used as an example is an Áhád report (solitary report), and it is not proper to rely on Áhád reports in cases of Qur’anic revelation and abrogation. This is because Áhád reports are speculative in nature.<sup>80</sup>

This can be responded to in the sense that the authenticity of abrogation is one issue and the authenticity of Qur’anic revelation is another issue, entirely.

A speculative report, such as Áhád report, can be relied upon to authenticate an instance of abrogation, while it is a condition precedent that a definitive report (Dalíl Qat’iy), such as a Mutawaatir report, be relied upon in cases of Qur’anic revelation. The issue under consideration is the authenticity of instances of abrogation and not Qur’anic revelation. Hence, the Áhád report (solitary report) can be relied upon.<sup>81</sup>

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<sup>78</sup>. Az-Zarqaanee, M.A. op.cit.p.197.

<sup>79</sup>. Muslim, A.M. op.cit. p.1075.

<sup>80</sup>. Al-Qattan, M.K. op.cit.p.230.

<sup>81</sup>. Al-Qattaan, M.K. op.cit. p.230.

#### 4.5.2 The Abrogation of the Ruling and not the Text

##### **(Naskh Al-Hukum Dúna At-Tiláwah)**

Under this classification, the text is still present in the Qur'an and it is still being recited, but the ruling is no longer applicable. An example of this is the text prescribing one year as the waiting period for a widow. Allah (the Most High) says: "And those of you who die and leave wives behind should bequeath for their wives a year's maintenance and residence without turning them out..."<sup>82</sup>

The ruling in the above text has been abrogated by 2:234 which provides that: "And those of you who die and leave wives behind them, they (the wives) shall wait (as regards their marriage) for four months and ten days..."<sup>83</sup> However, the text of the abrogated verse has been in the Qur'an and it is being recited.

Another example of the abrogation of a ruling and not the text is the verse concerning spending something in charity before private consultation with the Prophet (S.A.W). Allah (the Most High) says: "O you who believe! When you (want to) consult with the Messenger (Muhammad S.A.W) in private spend something in charity before your private consultation..."<sup>84</sup>

This verse is still in the Qur'an and it is being recited. However, it has been abrogated<sup>85</sup> by the provision of chapter 58:12 which reads: "Are you afraid of spending in charity before your private consultation (with him)? If then you do it not,

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<sup>82</sup>. Al-Qur'an ch.2 v. 240

<sup>83</sup>. Al-Qur'an ch.2 v. 234

<sup>84</sup>. Al-Qur'an ch.58 v.12

<sup>85</sup>.Az-Zarqanee, M.A. op. cit. p.197.



and Allah has forgiven you then (at least) perform As-Salaat and give Zakat and obey Allah...<sup>86</sup>

Another example of abrogation of a ruling and not the text is the provision of chapter 2:184 which reads: “And as for those who can fast with difficulty, they have (a choice either to fast or) to feed a Miskin (poor person)...<sup>87</sup>

This verse is still in the Qur’an and it is being recited. However, it has been abrogated<sup>88</sup> by the provision of chapter 2:185 which reads: “So whoever of you sights (the crescent on the first night of) the month (of Ramadan), he must observe saum (fast) that month...<sup>89</sup>

There is a lot of wisdom in the abrogation of the ruling in a text without necessarily doing away with the text. Some of these wisdoms include the following:

1. Just as the Qur’an is to be recited in order to know the rules in it and to act in accordance with those rules, it is also required that the Qur’an is to be read because it is the speech of Allah (the Most High) through which rewards are to be earned. Hence, some texts whose rulings have been abrogated were left by Allah (the Most High) so that they are to be read and reward be earned through them.<sup>90</sup>
2. The occurrence of most instances of abrogation in Islamic Law brought out much ease in the practice of the provisions of the law. Hence, the abrogated

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<sup>86</sup>. Al-Qur’an ch. 58 v.13.

<sup>87</sup>. Al-Qur’an ch.2 v.184.

<sup>88</sup>. Az-Zarqaanee, M.A. op, cit. p.197.

<sup>89</sup>. Al-Qur’an ch.2 v.185.

<sup>90</sup>. Al-Qattaaan, M.K.op.cit p.231.

texts were not erased completely. Such texts are to serve as reminder to mankind of the much favour done to them.<sup>91</sup>

There are some instances where the rules in some texts have been abrogated even before its application. For instance, the abrogation of spending something in charity before private consultation with the Prophet (S.A.W.) This is meant to provide for a means of earning reward for the belief in it and the intention to obey Allah's commandment.<sup>92</sup>

#### **4.5.3 The Abrogation of the Text and not the Ruling**

##### **(Naskh At-Tilawah Duna Al-Hukm)**

Under this classification, the text containing a particular ruling ceases to remain. However, the ruling is continuously applicable. The majority of jurists accept that a text can be abrogated but the ruling in it may be sustained.<sup>93</sup> An example of this is the text of the Qur'an concerning the stoning to death of persons who commit adultery. Imam al-Bukharee reports on the authority of Umar bin al-Khattaab (May Allah be pleased with him) who said, while giving a sermon in the Prophet's (S.A.W.) mosque;

“Verily, Allah (the Most High) sent Muhammad (S.A.W) with the truth, and He sent the Book down upon him. The verse of stoning was revealed with it, we recited it, memorized it, and understood it. The Prophet (S.A.W) awarded the punishment of stoning to death, and after him, we also did the same. I fear that with the lapse of time, people may (forget it and) say; we do not find the punishment of stoning in the Book of Allah, and go astray by abandoning this duty prescribed by Allah. Stoning is a duty laid down in Allah's book for married

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<sup>91</sup>. As-Suyuutee, J.op.cit.p.61.

<sup>92</sup>. Al-Qattaa, M.K.op.cit.p.231.

<sup>93</sup>. Al-Bazdawe, A.M.op.cit. p.909.

men and women who commit adultery, when proof is established.”<sup>94</sup>

The wordings of the abrogated text on stoning have been recorded in other authentic narrations. Imam Al-Haakim reported on the authority of Ubbayy bin Ka’ab, may Allah be pleased with him, who said: Suratul Ahzaab (i.e. Qur’an ch. 33.) used to be as lengthy as Suratul Baqarah (i.e Qur’an ch. 2) and in it (is the following): *Ash Shaikhu Wash Shaikhatu idhaa zanayaa farjumoohumaa al-battah nakaalan minAllah wAllahu Azeezun Hakeem*.<sup>95</sup> This means, “the married man and woman, if they commit adultery, then stone them. That is an exemplary punishment from Allah, and Allah is all-Powerful, all-Wise”

Another example of the abrogation of the text and not the ruling is the verse relating to the story of the people of Ma’uunah-Well (Bi’r Ma’uunah). Imam al-Bukharee reports on the authority of Anas bin Malik (may Allah be pleased with him) who said:

“The Prophet (S.A.W) prayed against those who killed the people of Ma’uunah-Well for thirty days... And (a text of) the Qur’an was revealed concerning those that were killed at the well of Ma’uunah and we read it but it was later abrogated. (The text reads thus): ‘That you extend (this message) to our people that we met our Lord, He is pleased with us and we are pleased’.”<sup>96</sup>

On the other hand, some groups among the Mu’tazilah do not agree with this classification.<sup>97</sup> They argue that what is intended in a particular text is the rule in it, which ultimately is the message the text conveys. The intended message in a rule is

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<sup>94</sup>.Bukharee, M.I.(1987) Saheeh Al-Bukharee, Daarul Ibn Katheer, Beirut. Vol. 6. p.2503.

<sup>95</sup>. Al-Haakim An Naysaabuuree, M.A. (1411) A.H Al Mustadrak Alaas Saheehayn, Daarul Kutubil Ilmiyyah, Beirut. Vol.2. p.415.

<sup>96</sup>. Bukharee, M.I. op.cit p.1342.

<sup>97</sup>. Al-Bukharee, A.A.M. op.cit. p.909.

derived through the text. Hence, there will be no need for abrogating the text and preserving the ruling.<sup>98</sup>

They further argue that abrogation of the text while maintaining the rule is frivolous and does not befit the Lawgiver. This is because it is an act which is devoid of any wisdom.<sup>99</sup>

The above arguments can be refuted to in two ways:

First, the abrogation of the text and not the ruling is not devoid of wisdom for it to be considered frivolous. In fact, there is wisdom in that, which is, the reduction of the Qur'an to a particular volume which will make it easy for people to memorise and to learn it by heart.

Secondly, the fact that they do not know the wisdom behind the abrogation of the text and not the ruling should not be a ground for them to say that it is devoid of any wisdom. This is because; having no knowledge about something is no justification that it does not exist. More so, anything emanating from the All-knowing (i.e Allah, the Most High) always contains wisdom which we have to believe in even if we cannot specifically identify it.<sup>100</sup>

From the foregoing, it is evident that the position held by the majority of jurists is justifiable. This is in view of the plethora of examples cited by the majority of jurists from both the Qur'an and the Sunnah.

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<sup>98</sup>. Ibid.

<sup>99</sup>. Az-Zarqanee, M.A. op.cit.p.200.

<sup>100</sup>. Ibid,p.200-201.

## CHAPTER FIVE

### CONCLUSION

This chapter summarizes the entire research work. It discusses its findings and finally proffers some recommendations/suggestions.

#### 5.1 Summary

This research work analyses of the concept of abrogation in Islamic Law. Accordingly, the nature and sources of Islamic Law were discussed in details.

The research also work discussed extensively the differences between the concept of abrogation and other similar concepts such as Takhsis (Particularization) with a view to showing whether or not abrogation can still be an on-going process.

The work also discussed the nature and legal position of abrogation in Islamic Law. The work also discussed the derivable benefits/justification of abrogation and the rules of Tarjih/Jam' were also discussed in details. Lastly, the work analyzed the effort of modernist to re-interpret some verses of the Qur'an so as to make them obsolete/important under the guise of abrogation.

#### 5.2 Findings

This research work reveals the following findings:

**i. Abrogation in Islamic Law cannot be an ongoing process.**

From the research work, it can be seen that some modernists have considered abrogation to be an ongoing process. They view abrogation as a

basis for changing some of the provisions of Islamic Law. The reasons and benefits in the application of abrogation are not to serve as basis for considering abrogation as an ongoing process.

**ii. The classification of abrogation is relevant in understanding the wisdom in abrogating some rulings despite the presence of the text in the Qur'an.**

The research work shows that the classification of abrogation is relevant to the extent of understanding the abrogated ruling despite the presence of the texts in the Qur'an. This is can be seen in the abrogation of one year waiting period by a widow to four months ten days. This will serve as a reminder to mankind of the much favour done to them by Lawmaker through the process of abrogating some laws and replacing them with better and similar ones.

**iii The application of Abrogation brings about ease and general good to mankind.**

The research work reveals that some of the derivable benefits in the application of abrogation are that they bring about ease to humanity in complying with the dictates of Islamic Law and they also bring about what will be of general good to mankind. This can be seen in how wine drinking was partly abrogated at some hours of day by way of first prohibiting wine drinking at the time of approaching Salat before later it was abrogated completely in order to bring about general good to mankind.

- iv. **The concepts of Abrogation (Naskh) and Particularisation (Takhsis) are only similar but they are not the same.**

The research work reveals that concepts of Abrogation (Naskh) and Particularisation (Takhsis) are only similar but they are not the same. The close similarities between the the concepts of abrogation (Naskh) and Particularisation (Takhsis) serve as the basis why some scholars such as Abu Muslim Al-Asfahaanee considers the two concepts to be the same. However, the two concepts have distinct features.

### **5.3 Recommendations/Suggestions**

Having made the above findings, the following recommendations are given:

- i. Abrogation should not be viewed as an ongoing process because it cannot be a basis for reinterpreting some texts of the Qur'an.
- ii. In the application of abrogation, reference should always be made to the classification of abrogation in order to understand that though some rulings exists in the Qur'an but they are no longer applicable.
- iii. There is the need for further study and research in this aspect of Islamic Law with a view to discovering more derivable benefits in the application of abrogation in Islamic Law.
- iv. The concepts of Abrogation (Naskh) and Particularization (Takhsis) should be viewed to be closely related but with distinctive features.

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