CONFLICT OF LAW AND THE METHODOLOGY OF TARJĪH: A STUDY IN ISLAMIC LEGAL THEORY

MOHD DAUD BAKAR

A Thesis Submitted for the Degree of PhD at the University of St Andrews

1993

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CONFLICT OF LAW
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MOHD DAUD BAKAR

THESIS PRESENTED TO THE UNIVERSITY OF ST. ANDREWS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
NOVEMBER 1993
ABSTRACT

Islamic law never achieved unity but expressed itself in, at least, four surviving schools. More interestingly, contemporary Muslim communities are still divided among themselves on a number of issues related to their laws. This work describes how problem of legal conflicts have been tackled by Muslim jurists. It is an attempt to examine closely the phenomenon of conflict in Islamic law from the standpoint of usul al-fiqh or Islamic legal theory. In fact, much is heard nowadays of the contradiction in the body of Islamic law. Whilst in contrast, little is presented in terms of the methodology of removing this conflict. The present work therefore, attempts to redress this balance. The emphasis of the work will be concerned primarily with tarjīḥ methodology; how to give preference to one piece of evidence or argument over the other when they conflict. Nevertheless, considerable concern is given to investigating the background to the conflict of law in the Sharīʿah.

This study of a neglected area in Islamic legal scholarship will be an important source of reference to students, both practising and theoretical jurists or to anyone who merely wishes to increase his knowledge of legal themes, particularly legal conflict. The very aim of the work is to argue that conflict is a natural and unavoidable consequence of legal study because legal conflict is only conflicting principles and arguments adduced by both the classical and modern jurists to reach what is actually intended by God in the target case. Therefore, conflicts are inevitable in most of the cases in fiqh owing to the variety of principles set out to deal with one piece of legal evidence, let alone with all the pieces of legal evidence in question.
*Tarjih* is therefore, an important and workable instrument in the re-examination of these conflicts and in arriving at the most accurate principle for establishing the law for as long as this is possible. It is hoped that the discovery of new facts and the increase of knowledge which results from the broadening and deepening of the research will positively contribute to the process of unification of Islamic law.
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DECLARATIONS

I Mohd. Daud Bakar, hereby certify that this thesis, which is approximately 120,000 words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

Date 4/11/1993 Signature of Candidate

I was admitted as a research student under Ordinance No. 12 in October 1990 and as a candidate for the degree of Ph.D. in October 1991; the higher study for which this is a record was carried out in the University of St. Andrews between 1990-1993.

Date 4/11/1993 Signature of Candidate

I hereby certify that the candidate has fulfilled the conditions of the Resolution and Regulations appropriate for the degree of Ph.D. in the University of St. Andrews and that the candidate is qualified to submit this thesis in application for that degree.

Date 4/11/1993 Signature of Supervisor
DEDICATION

to my parents

to my wife

to my children
ACKNOWLEDGEMENTS

It is a privilege to express my gratitude to those whose valuable advice, support, and help made this study possible. Initially I am particularly indebted to Professor John Burton under whose supervision and guidance this work has been prepared. His interest and encouragement as well as his unfailing patience and his friendly attitude have been invaluable. I also grateful to Dr. R.A. Kimber, Dr. D.E.P. Jackson and Mrs. Kerr for their support and helpfulness during my stay. I record also my sincere gratitude to all the University librarians, staff of the Language Centre and all my colleagues for their help in many ways. I am also thankful to St. Leonard's College for granting me funds to enable me to undertake a one month study-visit to Egypt.

I must also thank both the Public Service Department, Malaysia, for granting the scholarship for this study and all the academic and administrative staff of the International Islamic University, Malaysia, for their helping hand and for giving me the necessary leave of absence.

The principal debt which must here be acknowledged is to the members of my immediate family (Faizah, Sharafie, Izzatie and Atiqie) whose tolerance and understanding have always inspired me and made my work enjoyable.
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SYSTEM OF TRANSLITERATION OF ARABIC CHARACTERS

- medial:
- final:
- initial: not expressed

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\[ \text{a} \quad \text{ah (eg. sunnah)} \]
\[ \text{at} \quad \text{(in contract form e.g. sunnat al-Rasul)} \]

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NOTE ON THE TRANSLATION OF THE Qurān

I have used Mohammed Marmaduke Pickthall's translation of the Qurān (The Koran, London, 1989). However, other translations are occasionally referred to for comparative purposes and for the sake of elucidation and precision of meaning.
Many Muslims understand that Islamic tradition places great emphasis upon the centrality and the uniformity of the Shari‘ah, the revealed law of Islam. At the same time, they also comprehend that Shari‘ah was not given to man ready-made. Hence, Shari‘ah is regarded as subject to human involvement. This human involvement might take the form of interpreting and applying the revealed institutions or of deducing new rules from the revealed component of the Shari‘ah. All interpretative efforts aim to arrive at what is actually intended by the Law giver. Disagreement and conflict are therefore but a phenomenon common to the students of fiqh. “Conflict of law and the methodology of tarjih: a study in Islamic legal theory”, is therefore the most appropriate topic for examining the above.

Needless to say, the present study is aimed at re-examining the issue i.e. conflict of law, critically, studying diversity of opinions among the jurists and evaluating their arguments for two purposes, namely for determining the most acceptable opinion in a particular case of disagreement and for - the major purpose - establishing methodologies of tarjih in consideration of their conformity to principles, sources and broad objectives of the Shari‘ah. This topic is important as well as interesting for it poses a number of significant and challenging tasks for the student to address. Thus, it is not surprising, that many primary discussions of usul al-fiqh will be carried out to the extent that the work will cover almost all the contents of usul al-fiqh. To make the discussion easy to follow, well-structured and balanced chapters have been adopted. Before going into the general outlines of each chapter, mention should be made that the present work is divided conceptually into three aspects. The first part
(contained in three chapters) deals primarily with the theoretical foundation of the topic which covers the introductory remarks on Islamic legal theory as well as on conflict and preference. The second part of the thesis (comprising of four chapters) is exclusively confined to the methodological aspect of *tarjīh*. The third part is the summary and concluding remarks of the study.

In the first chapter, I discuss briefly some preliminary considerations of *usūl al-fiqh* and of the topic of the thesis i.e. *taʿārud* and *tarjīh*. I considered some brief accounts of *usūl al-fiqh* as worthy of inclusion since *taʿārud* and *tarjīh* is nothing other than an integral part of *usūl al-fiqh*. In the second part of the chapter, purpose, need and sources, as well as the methodology of the work, are briefly outlined.

In chapter two, considerable discussion is devoted to understanding the meaning as well as the *hukm* of *taʿārud*. This is followed by a lengthy elaboration of the causes of legal conflict that can be categorised into two kinds; those which inevitably exist and those that are relatively "man-made". The purpose of this chapter is to show that legal conflict is not actually intended by the Law giver. The following chapter is concerned with *tarjīh* and related discussions. The meaning, *hukm*, condition of *tarjīh* is fully elaborated in the first part of the chapter. An attempt to distinguish between *tarjīh* and some terms similar to it is made in the second part of this chapter and finally the chapter is closed with a close examination of the position and the significance of the principle of *tarjīh* in *usūl al-fiqh* particularly in the course of legal conflict. These three chapters represent theoretical foundations of the topic.
The second part of the thesis, as previously mentioned, is directed towards dealing with methodological aspects of *tarjīh*. Four chapters (starting from chapter four to seven) are devoted to undertaking this task. As a logical requirement, all areas of legal evidence should be put into detailed examination for legal conflicts are, as a matter of fact, the product of *ugṣul al-fiqh*; evidence of *fiqh*. Chapter four describes the methodology of *tarjīh* in *matn* conflict. In this regard, only the *Qur'an* and the *Sunnah* are deliberately examined for they are texts. Almost all kinds of wording and their conflict are brought forward which cover four distinct areas of the nature of legal text in the eyes of the jurists.

Chapter five undertakes to study the conflict of *isnād*. Many types of *isnād* from many different standpoints are discussed in this chapter. The following chapter i.e. chapter six, is divided into two parts. Part one discusses how *tarjīh* operates in conflict as to *ijma'*. Discussion of conflict followed by the methodology of *tarjīh* in *qiyyās* conflict is carried out in the second part of this chapter. The final chapter in the second part of the thesis i.e. chapter seven, is entitled "*tarjīh* based on external factors". It discusses various methods which did not fit under other previous headings and chapters. Since it is not possible to devote a whole chapter to each of these various methods, they are combined within this chapter to ensure that all relevant methods of *tarjīh* are adequately treated in the study. In the last chapter, I will try to provide a summary or a conclusion to the work and some suggestions that deserve to be taken into account seriously so as to relate the findings with practical purposes.

In conclusion, it is re-affirmed that conflict is a natural phenomenon in legal study. It occurs from the inability of the jurists to determine precisely the intended interpretation of the texts and their
applicability to cases arising in Muslim life. It is hoped that this work can offer considerable tentative, if not practical and comprehensive, methods of preference for reviewing legal conflicts in Islamic law.
ABBREVIATIONS

Abū Yusuf, al-Radd
Abū Yusuf, Kitab al-Radd 'ala Siyar al-Awza‘ī.

Abū Zahrah, Uṣūl
Abū Zahrah, Uṣūl al-Fiqh al-Islāmī.

Tarikh
Tarikh al-Madhāhib al-Islāmiyyah fī al-Siyāsah wa al-'Aqā'id wa Tarikh al-Madhāhib al-Fiqhiyyah.

Abū Hanīfah
Abū Hanīfah, Hayatuhu wa 'Arsruhu - Ārā'uḥu wa Fiqhuhu.

Malik
Malik, Hayatuhu wa 'Arsruhu - Ārā'uḥu wa Fiqhuhu.

al-Shaftī
al-Shaftī, Hayatuhu wa 'Arsruhu - Ārā'uḥu wa Fiqhuhu.

Aghnides, Theories
Aghnides, Mohammadan Theories of Finance with an Introduction to Mohammadan Law and Bibliography.

A. H.
after Hijrah

Ahkām
al-Jassās, Ahkām al-Qurān.

Ahmad Hasan, The Early
Ahmad Hasan, The Early Development of Islamic Jurisprudence.

Ijma'

Ahmad Yusuf, al-Shaftī

AJCL
American Journal of Comparative Law.

AJISS
American Journal of Islamic Social Sciences.

al-Āmīdī, al-Iḥkām

Amīnī, Ḥijāḥ
Amīnī, Fundamentals of Ḥijāḥ.

al-Ānbarī, al-Luma‘


Burton, The Sources, Burton, The Sources of Islamic Law, Islamic Theories of Abrogation.


cf.

Coulson, A History, Coulson, A History of Islamic Law.

--------, Conflicts, Conflicts and Tensions in Islamic Jurisprudence.

CSLR, Cleveland State Law Review.

d.

d. date of death


al-Dhahabī, al-Tafsīr, al-Dhahabī, al-Tafsīr wa al-Mufassirūn.

DI, Der Islam.


ed.

ed. edited by

e.g.

e.g. for example

EI 2 Encyclopedia of Islam, Second edition, 1960 - the following page or paragraph

ff. the following pages or paragraphs


fol(s) folio(s)

Ghayat al-Usl, al-Ansari, Ghayat al-Usl Sharh Lubb al-Usl.

GUOST, Glasgow University Oriental Society Transactions.

Guraya, Origins, Guraya, Origins of Islamic Jurisprudence (With Special Reference to Muwatta' Imam Malik)


-------------, Tarjih, al-Ta'aruf wa al-Tarjih wa Atharuhuma fi al-Fiqh al-Islami.

-------------, Dirasat, Dirasat Usluiyyah fi al-Sunnah al-Nabawiyyah.

-------------, Athar, Athar al-Jimal wa al-Bayan fi al-Fiqh al-Islami.

-------------, Adillah, Adillat al-Tashri' al-Mukhtalaf fiha.


HI, Hamdard Islamicus.


------, al-Ijtihad. al-Ijtihad wa Tabaqat Mujtahidi al-Shafi'iyyah.

Hujjat Allah. al-Dahlawi, Hujjat Allah al-Balighah.


Ibn ‘Abd al-Barr, Jami’. Ibn ‘Abd al-Barr, Jami’ Bayan al-Ilm wa Fadlihi wa ma yanbaghi fi Riwayatihhi wa Hamlihi.


Ibn Taymiyyah, *Naqd*, Naqd 'Maratib al-Ijma'.


IC, *Islamic Culture.*

ICLQ, *Islamic and Comparative Law Quarterly.*

i.e. that is


IJIAS, *International Journal of Islamic and Arabic Studies.*


IQ, *Islamic Quarterly.*

Irshād, al-Shawkānī, Irshād al-Fuhūl ilā Tahqīq al-Haqq min 'Ilm al-Uṣūl.*


IS, *Islamic Studies.*


'Iwad, Dirāsat, 'Iwad, Dirāsat fī al-Ta‘arud wa al-Tarjīh


------, al-Naskh, al-Naskh, Haqīqatuhu wa Ahkāmuhu.


----------, al-Fu‘ūl, al-Fu‘ūl fī al-Uṣūl (Abwāb fī al-Ijtihād wa al-Giyās).

JICL, Journal of Islamic and Comparative Law.


JIS, Journal of Islamic Studies.

JPHS, Journal of the Pakistan Historical Society.

JSAI, Jerusalem Studies in Arabic and Islam.

JSS, Journal of Semitic Studies.

Juynboll, Muslim Tradition, Junyboll, Muslim Tradition, Studies in Chronology, Provenance and Authorship of Early Hadīth.


Kamālī, Islamic Jurisprudence, Kamālī, Principles of Islamic Jurisprudence.

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<td>Lane, An Arabic-English Lexicon.</td>
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CHAPTER ONE
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PART A

A PRELIMINARY CONSIDERATION OF USūL AL-FIQH

A Brief Survey of the Historical Development of Usūl al-fiqh

In the treatment of this question, it is useful to identify two major elements in order to draw a proper view of the development of usūl al-fiqh. These two elements are the emergence and the developmental aspects of this science. Only through this historical approach is it possible to gain an understanding of a long-established legal system, that is the Shari‘ah, the revealed law of Islam, and to appreciate the issues with which the present work will be concerned later.

A. The Emergence of ‘Ilm Usūl al-fiqh

‘Ilm usūl al-fiqh or simply ‘ilm al-usūl or usūl al-fiqh or just usūl 1, like other sciences and fields of scientific study developed gradually. Although modern scholars have made extensive and valuable contributions to the history of Islamic law in most of its aspects, there remains room for further inquiry and investigation about the early history of usūl al-fiqh and its development (particularly of the chronological developments of concepts and doctrines within usūl al-fiqh).

1 The main terms preferred by Muslim bio-bibliographers and historians are the first three terms. Al-usūl, unlike the others, reveals the difficulty of deciding whether it is meant to refer to usūl al-fiqh or to kalam (theology principles) since the same word i.e. al-usūl, was also used to describe usūl al-dīn (the principles of religion). The present work however, has used all these terms to indicate usūl al-fiqh. For the principles of religion, the phrase usūl al-dīn will be adopted.
As far as the emergence is concerned, al-Shafi‘ī (d. 204 A.H.) has been credited with having been the first scholar to write systematically on the subject of usūl al-fiqh. Muslim and Western scholars are alike in assigning to al-Shafi‘ī the role of father of Muslim jurisprudence. However, Abū al-Wafā’ al-Afghānī in his introduction to Usul al-Sarakhsi has credited Abū Ḥanīfah (d. 150 A.H.), the founder of Ḥanafi school of law, as the first who spoke about this discipline in his book entitled Kitāb al-Ra‘y. On the other hand, however, al-Khaṭīb al-Baghdādī believed that Abū Yusuf (d. 182 A.H.) was the first to complete a book on usūl al-fiqh. The same primacy was credited to Imām al-Ba‘qir (d. 114 A.H.) by the Shi‘is.

Having established that the starting point of Muslim jurisprudence lies in the practice of the late Umayyad period, some Western scholars led by Professor Schacht have suggested that usūl al-fiqh as a discrete discipline did not exist during the life time of the Prophet or for the greater part of the first century of Hijrah. To this effect, it is said that the Qur‘ān contains comparatively little legal matter and that which it

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Abū Zahrāh clarified that it was possible that early jurists before al-Shafi‘ī might have had systematic thought on usūl al-fiqh but al-Shafi‘ī’s contribution i.e al-Risalah, was eminently superior in terms of systematic composition. (Usul, pp. 14-16)
6 Origins, pp. 1, 5, 190, 191, 230 (note no. 1); idem, Introduction, p. 19; EI 2, vol. 2, pp. 887-888. See also Hurgronje, Selected Works, pp. 269, 278.
does contain is entirely unsystematic and haphazard. Also, significantly, it has been argued that the Prophet himself made no attempt to devise any comprehensive legal system. Yet Schacht's point of view proposing that *usul al-fiqh* was known to the Muslims only after al-Sha‘bī’s time is highly disputable. In what follows, an attempt is made to argue the contrary.

The traditional Muslim point of view maintained that the content of *usul al-fiqh*, like other religious disciplines, was based on the *Qur’an* and the Sunnah from the very beginning. As regards the *Qur’an*, it seems that Schacht has ignored its significant role in providing materials for *usul al-fiqh*. In his book "*The Origins of Muhammadan Jurisprudence*", Schacht devoted no more than four pages to discussing "The Kuranic element in early Muhammadan law". The *Qur’an* in terms of Islamic legal theory, however, constitutes the most reliable source of reference in terms of legal rulings for many cases as well as methodologies of interpretation.

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8 Anderson, "Recent development in Shari‘a law ", in *MW*, vol. 40, 1950, p. 245 (cited after as "Recent Development") ; Schacht, "Problems on modern Islamic legislation", *SI*, vol. 12, 1960, p. 106 (cited after as "Legislation")

This contention is acceptable when this is viewed from the Western conception of legal activities. The Muslims, however, view the problem differently. For details, see Ansārī, "Some reflections on the Qur’anic legal verses", in *HI*, vol. 4, no. 2, passim, particularly p. 19 ; idem, "The contribution of the *Qur’an* and the Prophet to the development of Islamic *fiqh*", in *JIS*, vol. 3 (2), 1992, pp. 156-171. (cited after as "The Contribution")

9 Mas‘ūd, *Islamic Legal Philosophy*, p. 11 ; Dīl, "Islamic law: Western tyranny by terms", *The Search*, vol. 3, 1982, pp. 69, 71. (cited after as "Islamic Law")


Regarding the Prophet's role, it is commonly acknowledged that he was often approached by the Companions for his decision in a particular legal case or problem. The Prophet answered these questions either personally or by direct revelation, namely the Qur'an. No question of methodology yet arose as it was not necessary for the Companions to know the reason of regulations, since the law was what the Prophet proclaimed.

Nevertheless, the possibility of the Companions encountering unprecedented problems was not ignored by the Prophet. This was indicated in his posing of the question to Mu'ādh b. Jabal on the occasion of the latter's departure to Yemen as a judge and a teacher. The Prophet is reported to have asked Mu'ādh:

"What will you do if a matter is referred to you for judgement?" Mu'ādh said: "I will judge according to the Book of Allah". The Prophet asked: "What will you do if you find no solution in the Book of Allah?". Mu'ādh said: "Then I will judge by the Sunnah of the Prophet". The Prophet asked: "And what if you do not find it in the Sunnah of the Prophet?". Mu'ādh said: "Then I shall come to a decision according to my opinion (ijtihād) without any hesitation". The Prophet patted Mu'ādh's chest and said: "Praise be to Allah who has guided the Messenger of His Prophet to what which pleases Him and His Prophet".12

This way of deciding cases was pursued by the Companions and by the jurists in later generations.13 Moreover, we find the Prophet himself

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In addition, much valuable information about the Prophet's own judgement can be derived from al-Qurtubi, Aqāliyah Rasul Allah, passim.

13 Hujjat Allah, vol. 1, p. 149.
sending judges to different towns and localities. The judges who were appointed were instructed to base their judgements on the law revealed by Allah and the Sunnah of the Prophet.\(^{14}\)

Now I propose to show that the emergence of any science, including usul al-fiqh, cannot be determined or judged on the use of the specific terms such as usul al-fiqh regarding Islamic legal theory. Even al-Shafīʽī himself did not use the term usul al-fiqh, either in the title of his work or anywhere in the body of the text. He simply called his book al-Kitāb or Kitābī or Kitābuna.\(^{15}\) The title al-Risālah, meaning epistle or letter, is later attributed to his work owing to the fact that the work is a letter sent to Ibn Mahdī (d. 198 A.H.).\(^{16}\) This fact is also observed in all of the sciences known to the people because it is the practice which occurs first, then the theory.\(^{17}\) Therefore, the question of defining a discipline or even a particular principle generally comes after it had been fully developed and applied.

Hence, the denial of the existence of usul al-fiqh long before the two-word term for it was established is unfounded. That is to say, the absence of certain terminologies does not necessarily signify the non-

\(^{14}\) For details on the judicial activities of the Prophet, see M. Hamīd Allah, al-Watha'iq al-Siyasiyyah, Beirut, 1968.

\(^{15}\) Al-Risālah, paras. 96, 573, 625, 709, etc.

\(^{16}\) Khaddūrī, Islamic Jurisprudence, pp. 20-22; al-Shalābī, al-Madkhal, p. 198.

\(^{17}\) Ahmad Yusuf, al-Shafīʽī, p. 34; Makdisi, "The Juridical theology of Shafīʽī: origins and significance", in SI, vol. 29, 1984, p. 9 (cited after as "Juridical Theology").
existence of the concept intended by these terms. Al-Shafi`i’s stand in relation to usul al-fiqh, indeed, is similar to the position of Aristotle with respect to logic and of al-Khalil ibn Ahmad with respect to prosody in that both the logic and the prosody, like usul al-fiqh, had been in use for a considerable time before they were later arranged by these two scholars.\(^\text{18}\)

Moreover, there were several books written before al-Shafi`i which dealt with one or other of the fundamental discussions which later came to be recognized as the science of usul al-fiqh. In this context, the well-known bibliographer, Ibn al-Nadim (d. 435 A.H.) cited the works of Abū Yusuf in the following terms: "Abū Yusuf has the following works on usul\(^\text{19}\) and amālī (dictations)\(^\text{20}\): the book on ritual prayer, the book on alms tax......".\(^\text{21}\) Ibn al-Nadīm continues as follows: ".... and among those who reported on the authority of Abū Yusuf is Mu`alla; he transmitted his legal thought, his legal principles and his books".\(^\text{22}\) Furthermore, Abū

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\(^{18}\) Ahmad Yusuf, al-Shafi`i, pp. 34-35; Abū Zahrah, al-Shafi`i, p. 159.

\(^{19}\) Nabil Shehaby writes that "Usul in this regard is used to denote a limited number of cases and judicial judgements, those found in the Qur’an and the traditions as well as cases decided upon by a few authorities. This may be the sense in which Ibn al-Nadīm used the word when he mentions Abū Yusuf’s writing on usul al-fiqh. It is presumably evident when Ibn al-Nadīm lists works having such titles as Wills, Trusteeship and Alms tax". See Nabil Shehaby, "Illa and qiyas in early Islamic legal theory", in JAOS, vol. 102, 1982, p. 28 (cited after as "Illa and Qiyas"). See also Ahmad Yusuf, al-Shafi`i, p. 37 note no. 2.

\(^{20}\) Amali, the plural of imla`, implies what is expressed by a particular teacher directly from his heart or mind where the pupil will in turn record this saying. See al-Zuhayli, al-Figh, vol. 1, p. 49; al-Shalabi, al-Madkhal, p. 183, note no. 3.

\(^{21}\) Ibn al-Nadīm, al-Fīhrîst, p. 286.

\(^{22}\) Ibid., p. 286.
Yusuf in his book, *al-Radd 'ala Sīyar al-Awza‘ī*, has criticised the scholars of Syria for their ignorance of *usūl al-fiqh*.

In addition to this, the list of al-Shaybānī's works as mentioned by Ibn al-Nadīm may demonstrate the existence of some principles of *usūl al-fiqh* at that time. Among his books are *Kitāb al-Istihsān* and *Kitāb al-Radd 'ala Ahī al-Madīnah*. Having traced the so-called *istiḥsān* application in the early history of Islamic law, Goldziher considered Abū Hanīfah as the founder of the principle of *istiḥsān*. What concerns us here is the statement of Schacht which challenged Goldziher's point of view. Schacht noted that the principle of *istiḥsān* already existed even before the time of Abū Hanīfah as a part of Iraqi legal reasoning, even though, as Schacht said, the technical term for *istiḥsān* appeared later for the first time in Abū Yusuf's work.

These instances which occurred before the appearance of al-Shāfi‘ī's *Risālah* show that the early jurists in general had some sort of principles of law but they left behind no systematic works as did al-Shāfi‘ī. It is interesting to cite here the argument adduced by Khaddūrī in his introduction to his translation work of al-Shāfi‘ī's *Risālah*. He says, "finally, we may raise the question of the sources from which al-Shāfi‘ī drew inspiration and information. This is not an easy question to answer precisely, since al-Shāfi‘ī makes no reference in the *Risālah* to books which he may have consulted. In his other works, *Kitāb al-Umm* in particular, he devotes whole sections to discussions with other jurists such as Abū ❧

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26 Ibid.
Hanīfah, al-Awza‘ī, Malik, Abū Yusuf and al-Shaybānī which clearly indicate that he had studied the works of these eminent jurists with care.  

Furthermore, he argues that "the vocabulary of the Risālah itself raises questions not only of legal nomenclature but also of literary and philosophical terminology. What is obvious is that al-Shafi‘ī rarely defines his terms, assuming that both his followers and readers will be familiar with the general and technical words from the content of his writings or from the common usage of the time".

In any case, the science of usūl al-fiqh, as we know it from the book of al-Shafi‘ī, existed long before the two-word term for it was established. As concluded by one scholar, "by the time al-Shafi‘ī appeared, much had already been derived. On the basis of the rules he now drew up he found in the techniques and methods of his contemporaries and their predecessors much to criticise". Al-Shafi‘ī’s Risālah is basically a work on methodology. Therefore another scholar has said that "on the whole and notwithstanding the evidence of its development, traces of the influence of earlier doctrines and occasional inconsistencies, al-Shafi‘ī legal theory is a magnificently consistent system and eminently superior to the doctrines of the ancient schools".

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28 Ibid., p. 28.
29 Burton, *The Sources*, p. 15.
B. The Development of Usul al-fiqh

As previously mentioned, usul al-fiqh developed gradually throughout the generations of the early period of Islam. Al-Shafi'i's Risalah marked the beginning of the systematic work on usul al-fiqh. The birth of usul al-fiqh as the science of jurisprudence in Islam appears to have occurred sometime prior to the death of 'Abd al-Rahman ibn Mahdi in 198 of the Hijrah. Ibn Mahdi is said to have written to al-Shafi'i asking him to compose a work explaining the legal significance of the Qur'an and the Sunnah. What is clear is that no definite knowledge is available as to the precise date and place in which al-Shafi'i composed al-Risalah.

In short, al-Risalah is a well written document which reflects not only the legal thought and theories of sources of those jurists current in the time of al-Shafi'i but also of the past. The question of the precise date of the emergence of usul al-fiqh remains undecided, a factor which, however, does not harm or affect this interesting field of study in Islam. The reason for this problem, I believe is that the development of a specific branch of knowledge in Islam cannot be easily separated from other related subjects. Not only are they closely related but sometimes overlapping and interchangeably used. With this in mind, I suspect a researcher would face great difficulty in confirming the precise date of the emergence of any specific discipline as far as Islamic knowledge is concerned.

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31 Al-Baghdadi, Tarikh Baghdad, vol. 2, pp. 64-65; idem, al-Shafi'i, p. 82; Khadduri, Islamic Jurisprudence, p. 19.
32 Ahmad Yusuf, al-Shafi'i, p. 38.
Schacht states that al-Shafi'i's personal achievements in legal theory consist (1) of the development of a new theory of interpretation applied to the two principal sources of the revealed law: the Qur'an and the Prophetic traditions; (2) of the almost complete identification of Sunnah with traditions (hadiths) and (3) of the hierarchy of the four sources of law including consensus and qiyas. 34

After Risalah's appearance, there is no definite knowledge of the development of this science for two or three centuries after al-Shafi'i. Biographical and bibliographical works persistently reflect a gap in the literature of usul between al-Shafi'i and Abu Bakr al-Sayrafi's (d. 330/336 A.H) treatise on this subject. 35 Al-Sayrafi, indeed, also a Shafi'i, was the first jurist who wrote after al-Shafi'i. His work however, was no more than a commentary on the Risalah. 36 Yet, al-Subki, also a Shafi'i, has given the list of works on usul after al-Shafi'i. The list begins with al-Shafi'i's Risalah, followed by the commentaries but none of them are extant. According to this list, the first independent and comprehensive works on usul are by authors who died at the dawn of the fifth century of Hijrah, two centuries after al-Shafi'i's death. 37

From this brief explanation of these two aspects of the historical development of usul al-fiqh, it is certain, in my opinion, that the science developed gradually from unwritten work, or unsystematic written work, to

34 Origins, pp. 56, 77, 134.
35 Hallaq, "A tenth-eleventh century treatise on judicial dialectic", in MW, vol. 72, 1987, p. 197, note no. 5. (cited after as "Judicial Dialectic")
36 Ibid.
37 The full list of al-Subki can be found in Makdisi's "Juridical Theology", pp. 30-31. See also al-'Alwan i, Usul, pp. 45-54.
systematic written work. From the fifth century onwards this discipline was the exclusive concern of the contemporary jurists. However, following these developments, particularly after the seventh century of Hijrah, the scholars seem reluctant to explore new dimensions in this subject. Perhaps, they believe the previous achievements to be sufficient. That is to say, they may perceive all essential questions of law and its usūl as having been thoroughly discussed and thus further deliberation was deemed unnecessary. Hence, their contributions are limited to the explanation of only some words and phrases found in the earlier books.

This phenomenon is not, however, a positive indication that no 'original' books on usūl al-fiqh were written in this period. Al-Shāfiʿī (d. 780 A.H.) and al-Shawkānī (d. 1225 A.H.), for example, composed their well-known books "al-Muwāfaqāt fī Usūl al-Fiqh" and "Irshād al-Fuhūl ila Tahqīq al-Haqq min Tīm Usūl al-Fiqh" which are considered among the most profound books written in the later period.

THE DEFINITION OF USūL AL-FīQH.

Obviously, one cannot find a strict definition or even the term of usūl al-fiqh in the early literature as previously shown. Even al-Shāfiʿī simply called his work al-Kitāb although the actual subject matter seemed to be well established. This may have been for a particular reason. In this regard, a satisfactory explanation has been provided by one scholar who noted a marked lag between the conceptual and terminological aspects of the development of fiqh. A number of concepts remained in use for a long

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39 Al-Darīnī, al-Manāhīj, p. 20, note no. 4; Badrān, Usūl, p. 20.
period of time before they could acquire a standard, precise legal technical phraseology for their expression.\textsuperscript{40}

It seems that the term \textit{usul al-fiqh} became established among the scholars only in the fifth century of Hijrah. The first independent and comprehensive work on \textit{usul al-fiqh}, after al-Shaf'i's \textit{Risalat}, which has come down to us and is now in print is the \textit{Mu'tamad} of Abu al-Husayn al-Basri al-Mu'tazili (d. 436 A.H.). He used the term \textit{usul al-fiqh} in his work to refer specifically to this science. Furthermore, he gives a detailed explanation of the term.\textsuperscript{41}

Initially, it is necessary to note that the term \textit{usul al-fiqh} has two words combined together to indicate a specific meaning. Therefore, it is important to define these two words independently before attempting to define them as a combination. The reason for that as indicated by Makdisi, is "to distinguish between the science of \textit{fiqh} and that of \textit{usul al-fiqh} and thus put an end to the equivocal use of the latter term in the sense of elements or rudiments of \textit{fiqh}, reserving the two-word term to designate the methodology of the revealed law".\textsuperscript{42}

It is common among scholars who wrote on \textit{usul al-fiqh} to clarify its meaning in three stages. They begin by explaining the word \textit{usul} then

\textsuperscript{40} Angari, "Islamic juristic terminology before Shafi'i: a semantic analysis with special reference to Kufa", in Arabica, vol. 19, 1972, p. 255. (cited after as "Islamic Juristic") See also Farukhi, "al-Shafi'i disagreements with the Malikis and the Hanafi schools", in IS, vol. 10, 1971, p. 131. (cited after as "Disagreements")
\textsuperscript{41} Al-Mu'tamad, vol. 1, pp. 8-11.
\textsuperscript{42} Makdisi, "Juridical Theology", p. 9.
the word *fiqh* and finally *usūl al-fiqh*.\(^{43}\) *Usūl* which is the plural form of *asl*, literally means root.\(^{44}\) The jurists describe *usūl* in its literal sense as something built upon.\(^{45}\) In technical terms, *asl* has a variety of meanings:\(^{46}\)

(a) It is used to mean evidence or *dalīl* particularly the *Qurʾān* and the *Sunnah*. At the later stage, *ījmaʿ* and *qiṣas* are called *usūl* also. The common phrase "*al-asl fī hadhā al-ḥukm Kitāb Allāh*", means the evidence for this rule is the *Qurʾān*.

(b) It is also used to mean "root" or "origin". For example, "*al-āb asl al-ibn*", meaning "the father is the origin of his son" and "*al-khamr asl al-nabīdḥ*" meaning the ruling on *al-nabīdḥ* is derived from or originated in the ruling on wine drinking.

(c) Another meaning for *asl* is the original or more preferred one as in "*al-asl fī al-kalām al-ḥaqīqah*", meaning the original and the preferred meaning of the speech is the *ḥaqīqah* as contrary to *majāz*.

(d) Continuance or presumption is another meaning for *asl*. In strictly technical terminology, it is well known as *al-istiṣḥāb*. Therefore, it is said, "*al-asl fī al-ashyaʿ al-ibāhah*" which translates as the original status for everything is permissibility.

(e) Lastly, it is used for principle or *qāʿidah*.

Broadly speaking, *usūl al-fiqh* is commonly understood as evidence of *fiqh*\(^{47}\) where the *fiqh* is what is built upon them.


\(^{44}\) Lane, *Lexicon*, part 1, pp. 64-66.

\(^{45}\) *Al-Muʿtamad*, vol. 1, p. 9; *al-Talwil*, vol. 1, p. 13; *Irshad*, p. 3; *al-Jurjānī*, *al-Taʿrifat*, p. 16; Badrān, *Usūl*, p. 22.


\(^{47}\) *Al-Lūmaʾ*, p. 4; *al-Hakīm*, *al-Usūl*, pp. 40-41.
As regards fiqh, it means literally "understand"48 or "to understand what is intended by the speaker".49 Therefore, it is said "faqahtu kalamaka" meaning, "I understand what do you mean by such and such".50 Moreover, the word fiqh or its derivatives in the Qur'an carry the same meaning as above i.e. being used to denote understanding of any matter.51 Obviously, such a meaning is not intended in the technical sense of fiqh as will be shown later. But what is clear from the previous illustration is that the fiqh based on its original meaning was not applied in the legal sense alone, but carried a wider meaning covering all aspects of Islam, namely theological, political, economic and legal questions.52

A book known as al-Fiqh al-Akbar attributed to Abū Hanīfah was the best example of this. This book deals with the principles of Islam such as faith, unity of Allāh, His Attributes, Prophethood, the Life Hereafter and so on.53 It appears that fiqh until the second century of Hijrah embraced theological problems as well as legal issues. Owing to its comprehensive and generic status, Abū Hanīfah is reported to have defined fiqh as


See the following Qur'anic verses: 4: 78; 6: 25, 65, 98; 7: 178; 8: 65; 9: 81, 87.
53 Ibid. p. 3; Schacht, Theology and Law, p. 4; Ibn al-Nadīm, al-Fihrist, p. 285.

For details, see Wensinck, The Muslim Creed, pp. 104, 110-112.
"ma’rifat al-nafs mā lahā wa mā ‘alayhā (a soul’s knowledge of its rights and obligations). Alongside the term fiqh, several other terms were also common among the early Muslim scholars such as ‘ilm, shari‘ah, ra’y, etc., which are not sharply defined. Accordingly, these terms were used interchangeably as they had not yet acquired distinct technical meanings.

Consequently, it is difficult to draw a sharp distinction between them. However, from the beginning of the second half of the second century of Hijrah, the term fiqh was gradually narrowed down and ultimately came to be applied only to the legal problems. The works of Abu Yusuf and especially those of al-Shaybānī were the first systematic attempts to write exclusively on fiqh. Henceforth, books began to be written independently on that particular field of study.

Fiqh, as a technical term, has been confined to a specific religious science called furū‘ (branches) as opposed to usul (roots). Accordingly, the word fiqh in the mind of the jurists means a compendium of legal rulings. Or rather, fiqh is a science that determines the legal rulings, assigning them to one of the five categories of ahkām such as obligatory, recommended, prohibited, disapproved and permissible. It concerns itself only with whether an individual deed is lawful or not.

54 Since Abu Hanīfah’s al-Fiqh al-Akbar is not available to me, my knowledge of this definition is taken from al-Tawājib, vol. 1, pp.16-18.
55 Ahmad Hasan, The Early, pp. 3-8.
56 Ibid., p. 8.
57 Ibid., p. 9.
As previously mentioned, usūl al-fiqh generally means the principles of fiqh. Thus, it is an area of knowledge that can be roughly translated as "legal theory". Accordingly, it deals with legal theories, principles in the interpretation of legal texts, methods of reasoning and of deduction of rules and other such matters. In brief, usūl al-fiqh, in the words of Gibb, is "a science of interpretation or roots of jurisprudence". Obviously, usūl al-fiqh unlike fiqh, is not concerned with individual cases of law on their own but only with principles and proofs on which the rules of the individual cases are formulated. It is, certainly, an Islamic legal theory devised to identify and to interpret the sources in order to establish the law i.e. it provides methodological principles from which legal rules might be legitimately derived.

THE SUBJECT MATTER OF USūL AL-FIQH

Usūl al-fiqh generally concerns itself not only with the law proper but also with questions of linguistics, logic, methodology, epistemology and theology. Al-Āmidī, however, has restricted the subject matter of usūl al-fiqh to the sources of evidence itself and related discussion. By this, he

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61 Gibb, Muhammedanism, p. 93.
For classical definitions of usūl al-fiqh, according to many different viewpoints, see Jalāl al-Dīn, al-Usūl, pp. 32-48.
62 Al-Mankanṭūl, p. 4; Muntaha, p. 4; Nabil Shehaby, "Ilā and Qiyās", p. 27; Hallaq, "Usul al-fiqh: Beyond tradition", in JIS, vol. 3 (2), 1992, pp. 179-181 (cited after as "Usul al-fiqh"); al-'Alwānī, Usūl, pp. 3-4
means that *usūl al-fiqh* discusses only those principles which are immediately necessary for reaching the *fiqh*. In other words, it does not concern itself with those less immediate subjects such as language and syntax or dogmatics (*kālaṃ*) although they are necessary. Nevertheless, al-Āmidī on another occasion, did concede that the other kind of sciences which have an intimate relationship with jurisprudence are also essential for deriving legal rulings. Hence, he says, "the knowledge of the meaning of the verbal directives in the Qur'ān, the Sunnah and the statements of authoritative scholars (*ahl al-hall wa al-'aqd*) depends on a knowledge of what has been established in language studies with respect to them".64

It seems to me that al-Āmidī attempted to distinguish between two types of *usūl* subject matter. No doubt *usūl al-fiqh*, as inspired by the title itself, is confined exclusively to the bases of *fiqh* and how they are manipulated to arrive at *fiqh*. However, in a practical sense, one is unable to identify the law intended by the Lawgiver through legal texts by merely basing oneself solely on the knowledge of legal evidence. As sources of evidence vary from one to another and are open to many possible interpretations, a jurist has little choice but to commit himself to and seek assistance from other related knowledge that would help in arriving at the proper legal conclusion. Subjects such as linguistics, logic, epistemology, etc., though not evidence, are very crucial in governing the accurate understanding of legal texts. Therefore, it seems that the disagreement between al-Āmidī and the other jurists is insignificant since they all agreed upon the necessity of language study in deriving the law. But, the attempt of al-Āmidī to divide *usūl* subject matter into two groups on the

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64 Ibid., pp. 6-7.
basis of their immediate significance to the raison d'etre of usul study appears to be more appropriate.

Familiarity with the Arabic language (philology) is a prerequisite to understanding the foremost sources of law, namely the Qur'ān and the Sunnah, since both have come to Muslims in the language, grammar and morphology of the Arab. This led al-Shafi'i to introduce significantly in the Risālah several chapters concerned with the linguistic aspects. Among these is the discussion of general (‘āmm) and particular (khāss).

65 Al-Risālah, paras. 179-235.
To see how al-Shafi'i emphasises the importance of Arabic language in legal interpretation, see ibid., paras. 143-178.


The later jurists such as al-Jassās and al-Ghazālī have added some extensive discussions of language as with haqīqah, majāz, sāriḥ, kināyah, amr, nahy, etc.

On the other hand, from the very beginning, usul al-fīqh also had close ties with rhetoric. Subsequently, knowledge of the rhetorical principles was deemed to play a principal role in legal reasoning. In the chapters of usul al-fīqh which explained the rules for reasoning used when dealing with the Qur'ān and traditions, rhetorical considerations constituted the major part of the discussion.

Theological problems and legal philosophy are also treated in most of the books on usul al-fīqh although not mentioned by al-Shafi'i in the Risālah. The determination of good and evil, the relationship between reason and revelation, the qualifications of acts before the advent of revelation, the imposition of responsibility or obligation beyond one's
capacity are among the theological problems which have been frequently discussed by the jurists.  

All these are tools to be used by the jurists in understanding legal provisions especially in the Qur’ān and the Sunnah. Therefore, linguistics, theology and rhetoric are used in usūl al-fiqh works in order that every argument has a proper basis. However, the major concern of usūl al-fiqh is in relation to the sources or the bases of law such as the Qur’ān, the Sunnah, āwāmī and qiyaṣ. The jurists also discuss the authority of other principles which are not fully approved by the jurists such as masa’ilīh mursalah, istiḥsān, istiṣḥāb, ’amāl, sād al-dhānī, ’urf, etc.

THE FUNCTIONS OF USŪL AL-FIQH

Ideally, "the goal of Muslim jurisprudence was to reach an understanding (fiqh ) of the Shari‘ah. Its primary task, therefore, was to formulate the principles or sources (usūl) from which such an understanding might be achieved". That is to say, the main objective of usūl al-fiqh was to lay down a coherent system of principles through which a qualified jurist could extract case decisions. From the third century onwards this was universally recognized by the jurists to be the sacred purpose of usūl al-fiqh. This is ordinarily stated at the beginning of usūl works.

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68 Hurgronje, Selected Works, p. 287 ; Makdisi, "Juridical Theology", p. 16.
69 Coulson, Conflicts, p. 3. See also F. Rahman, Islam, p. 115.
According to one scholar, discovering the law of God through a highly systematic and logically sophisticated methodology was therefore considered by Muslims the primary if not the only function of legal theory. Theorists have repeatedly declared that in effect this function is the *raison d'etre* of *usul al-fiqh*\(^\text{71}\), whilst continuing to assert that assigning this role to *usul al-fiqh* was indeed justified by the very fact that events are endless and new problems that require solutions may arise at any moment.\(^\text{72}\)

Professor Badran, in another perspective, has outlined the functions of *usul al-fiqh* as follows:\(^\text{73}\)

1. to use its principles and its general rules which are based on textual proofs in order that the individual cases have proper *Shari'ah* values.
2. to realise the bases upon which legal values are formulated and to realise the objectives of their implication.
3. to be able to derive correctly legal rulings through *qiyas* or other methods of *ijtihad* for cases whose rules are not textually available.
4. to understand the methods of deriving legal rulings employed by earlier scholars and to compare their opinions on the case at issue and hence, to give preference to the opinion showing stronger proof.

In short, *usul al-fiqh* principally aims at discussing legal evidence that forms the basis of *fiqh*, in so far as they may be used as evidence for the establishment of legal rulings for legal cases. It does not discuss, however, what the legal rulings are in particular cases, that being the

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71 Hallaq, "Considerations on the function and character of sunni legal theory ", in JAOS, vol. 104, 1984, p. 681. (cited after as "Considerations")
72 Ibid.
function of *fiqh*. If it does, it is merely an explanatory note of how legal rulings are constructed from legal evidence.

**THE CONTENTS AND STRUCTURE OF USUL AL-FIQH.**

Having established now that many early scholars had already dealt with one or another subject of *usul al-fiqh*, it must be noted that the contents as well as the organization of these early works were not so highly detailed and organized as in the later works. This is indeed a natural phenomenon of every new and fresh effort in terms of literature74 (as well as in other fields of life).

Al-Shafi'i's Risalah, the first systematic book on *usul al-fiqh*, marked the beginning of a particular structure of *usul al-fiqh*. Al-Shafi'i in his initial chapter, introduces some general terms which call for clarification such as 'ilm (knowledge), bayan (elucidation) and 'adala. He then proceeds to elaborate in terms of the perspectives of the meanings of these terms. The second part of his Risalah concerns the discussion of the Qur'an as a major source for Islamic law together with the technical meanings of exegetical terms such as general, particular, explicit, implicit, abrogation and so on. The following part deals with the authority of the Sunnah followed by the discussion of the other 'sources'

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such as *ijmā*, *qiyyās*, *iṭḥād* and *istiḥsān*. It is readily acknowledged that no theological problems are discussed in the *Risālah*.

However, the later achievement in *usūl al-fiqh* bears testimony to a considerable difference between it and that of the early scholars in terms of content and structure. It is obvious that the latter works are often loaded with too much *fiqh* or *kalam*, or logic or grammar, depending on the special interest of the individual author. A detailed analysis of the contents of *usūl al-fiqh* discussions throughout the centuries reveals that the contents of *usūl al-fiqh* were developing. Al-Jassās's (d. 370 A.H.) treatise for instance, entitled *Usūl al-Jassās*, is the first known to us that provides a new stage in the rationalistic explanation of *usūl al-fiqh*. Moreover, his book is full of linguistic considerations which make it quite different from earlier works.

On the whole, the contents and structure of *usūl al-fiqh* were not fixed rigidly but were constantly developing. Though the *Risālah* covers several main subjects, its contents are not so well organised in comparison with those of the later works particularly of al-Jassās. Similarly well organised contents were followed by other leading jurists like al-Shirāzī (d.

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76 Mention should be made that *al-Risālah* did not mention any theological problem except in the discussion of analogy (paras. 1327ff. particularly para. 1332) where al-Shafi‘ī raised a question common to the theologians that is whether a jurist is required to arrive at actual (*baṭī‘an*) or only at an apparent truth (*zāhiran*) as far as the result of legal reasoning is concerned.
78 Bernand, "*Hanafī usūl al-fiqh* through a manuscript of al-Jassās ", in *JAOS*, vol. 105, 1985, pp. 623, 634 (cited after as " *Hanafī usūl al-fiqh*")
Following these developments, the celebrated Shafi'i jurist, al-Ghazalī (d. 505 A.H.) then, organised the contents of *usūl al-fiqh* in a more satisfactory manner and consequently his structure has been generally adopted by most modern scholars in their writings. It is interesting to recall what he said about his book, *al-Mustasfa*, particularly of its distinct structure. ".... I composed my book in such a manner as to allow all those reading it for the first time to understand (from the very beginning) the whole contents of the book because when someone cannot understand it from the very beginning, he certainly will not continue reading".

It should be noted also that most of the works of Western authorship on this subject are, broadly speaking, primarily concerned with the history of jurisprudence whereas the judicial subject-matter of *usūl al-fiqh* does not receive the same level of attention as is given to its historical development. Muslim writers tend, however, to treat the historical development of *usūl al-fiqh* separately from *usūl al-fiqh* itself in a discipline known as *Tarīkh al-Tashri*'.

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79 ‘Atiyyah, *Tanzīr al-Fiqhi*, p. 44.
81 *Al-Mustasfa*, vol. 1, p. 4.
83 Ibid. For an account of such a tendency, see the following:
To be brief, I shall outline the dominant structure adopted in usūl literature with special reference to the contemporary works on this subject particularly by Muslims. The contents of usūl are divided into four main sections or chapters. The first chapter usually deals with the concept of the ḥukm and related discussions such as al-ḥākim, al-mahkūm ʿalayhi and al-mahkūm fīhi. The second chapter concentrates on the sources of law irrespective of whether they are fully accepted or not. Whilst the third chapter concerns the methods of interpretation of rules from the sources discussed in the previous chapter. This chapter, therefore, provides a set of methods to be followed in interpreting the rules systematically. The issues of ijtihād, taqlīd, naskh, tarjīh, etc., are usually discussed in the last chapter of books on usūl al-fiqh.

METHODOLOGICAL APPROACHES TO DOCUMENTING USŪL AL-FIQH.

In his Muqaddimah, Ibn Khaldūn (d. 808 A.H.) differentiates between two kinds of writings on usūl al-fiqh. The first includes works written by theologians and then identified as the method of the theologians or mutakallimūn. Works written by the jurists, on the other hand, are known as the method of the jurists (fuqahāʾ).

This classification has been eventually accepted by most of the modern scholars. George Makdisi, however, considers this classification as incorrect for two reasons. One error consists in characterizing such

84 See for example Abu Zahrah, Usūl; Khallāf, Usul; Zuhayr, Usul.
86 See for example, Hitu, Introduction to al-Mankhul, pp. 6-12.
works as belonging to one of two categories; the usūl of the Shafi‘is or the
usūl of the Hanafis and the other problem (the major error) lies with the
listing of al-Shafi‘ī and his Risālah at the head of a category entitled 'the
method of the mutakallīmūn'. This is because usūl al-fiqh, as originally
conceived by al-Shafi‘ī, is a juridical theology, a study of God’s law, as
distinguished from kalam, the study of God Himself; it is a study of God’s
commands and prohibitions, not of whether God is or what He is.

In response to what has been said by Makdisi, we may say that
although al-Shafi‘ī disagreed with the ‘ilm kalam, his method of writing
was an abstract and rational method as adopted by the theologians after
him. On this basis, one may see that the classification made by Ibn
Khaldūn and modern writers was basically confined to the written
approach and not to the theological consideration. For this reason, the
first mode of writing is also well known, apart from the method of the
Shafi‘is, as the method of the mutakallīmūn for both of them adopt the
same mode of writing which is abstract and rational.

87 Makdisi, "Juridical Theology", p. 42.
88 Ibid., pp. 43-44.
89 See Abu Zahrah, al-Shafi‘ī, p. 48.
90 Khalīfah, Manahij, p. 11.
A. The Method of the Mutakallimūn

This method is identified as a purely theoretical method and thus not influenced by any derivative (fuṣūr') rules. According to this method, the principles of fiqh i.e. usul al-fiqh must be based on logical and rational argument and supported by sound evidence. Whether these principles are against pre-determined branch rules or not, does not affect the establishment of a particular principle or asl (singular of usūl). Therefore, it is not surprising that a particular principle, established by one jurist, perhaps even a leading one, has been openly argued by another jurist who equally based his writing on his personal rational argument rather than by adhering to what has been established in the books of fiqh. Al-Shafī‘ī for instance, opines that neither the Qur‘ān abrogates the Sunnah nor the Sunnah the Qur‘ān but al-Ghazālī, who is also one of the Shafī‘is, on the contrary, argues that abrogation between them is not only valid but has also actually taken place.

Al-Shafī‘ī adopted this method in the writing of his Risālah. It is obvious that many scholars, whatever their school of law, have followed the same method in their writings. Thus, this is the method followed by the majority of jurists, simply called the jumhūr. Many works have been carried out in accordance with this method but as remarked by Ibn

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91 Al-Muqaddimah, vol. 3, p. 28; Badrān, Usūl, p. 15; al-Alwānī, Usūl, pp. 54-55; al-Hākim, al-Usul, p. 84; Abu Zahrah, Usūl, pp. 18-19.
94 For the list, see al-Muqaddimah, vol. 3, pp. 28-29; Badrān, Usūl, pp. 15-16; Hitū, Introduction to al-Mankhūl, pp. 6-11.
Khaldūn, there are four treatises, in the kalam-oriented usūl al-fiqh which became the cornerstone of later writings or the most influential works as follows:

1. Al-'Umd / al-'Ahd of al-Qādī 'Abd al-Jabbar (d. 415 A.H.)
3. Al-Burhān of Imām al-Ḥaramayn al-Juwaynī (d. 478 A.H.) and
4. Al-Mustasfa of al-Ghazālī (d. 505 A.H.)

These four books became the starting point for later scholars of usūl al-fiqh, and many commentaries and abridgements have been composed based on these works.

B. The Method of the Jurists.

This method, as opposed to the method of the mutakallimūn, is chiefly based on observing and extracting cases of fiqh as proof for the reliability of a particular principle (asl). This deductive approach is mainly attributed to the Hanafis therefore, known as the method of the Hanafis. One might ask why the Hanafis committed themselves to this method and not to another. This is mainly due to the nature of the Hanafī school of law. We know that leading Hanafī jurists, including Abū Hanīfah himself, left no systematic book on the theory of sources or usūl al-fiqh as did al-Shāfi‘ī. Instead, they left a number of books that are full of cases of fiqh containing the opinion of Hanafī leading jurists such as

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96 Al-Muqaddimah, vol. 3, p. 28; Hitu, introduction to al-Mankhul, p. 7; al-Manṣūr, Usul, p. 44.
Abū Ḥanīfah, Abū Yusuf, al-Shaybānī, Zufar, etc. Hence, the later Hanāfi jurists have little choice but to establish principles and theories of sources by observing cases pre-determined by their imāms. In consequence, principles of fiqh in Hanāfi school of law are formulated in the light of its applicability to relevant cases where cases are the proof of the rationality of a particular principle. This attitude is most evident in their long-standing argument on the validity of a particular principle by saying, "This is indicated by a number of rules pre-determined by our imāms". Naturally, cases of law are often discussed in order to justify the soundness of a particular principle. Consequently, many of the principles are no longer valid when these principles are not supported by what has been determined in fiqh.

Professor Badran points out an excellent example of this. In principle, the Hanafis had opined that a word, though it is a mushtarak, has no authority to carry both literal and metaphorical meanings. It must refer to just one of them. In their fiqh they found however, two contrary fatwās. First, one is not permitted to marry those women with whom one's father had sex by relying on Qur'ān (4:22), "And marry not those whom your fathers married (mā nakaha ābā'ukum)". On this occasion, the word nikah refers to sexual intercourse. Another fatwa is found in their indicating that a marriage is also invalid with those women with whom one's father had made a contract ('aqd) even without having any sex.

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98 Khalīfah, Manāhil, p. 15; Badrān, Usūl, p. 17
100 Badrān, Usūl, p. 17.

Al-Hakīm observes that this method is more directed towards a historical study rather than rational discussion. (al-USUL, p. 83)
Here, nikāh according to the Hanafis, means marriage metaphorically. Thus, the word nikāh comes to denote both sexual intercourse and a legal contract. Accordingly, the earlier principle must be altered to the following: "A word may refer to both meanings i.e. haqiqah and majaz when it is mushtarak provided that this word is found in a negative statement (siyāq al-nafi)," as is the case in the Qur'anic verse cited above.

Some of the well known jurists who adopted this method are the following:

(2) Al-Jassās (d. 370 A.H.) who wrote a book known as Usūl al-Jassās.
(3) Al-Sarakhsi (d. 490 A.H.) who wrote a book called Usūl al-Sarakhsī.

It should be noted that there are scholars from other schools of law who have followed this method. They included Imam al-Qarāfī al-Malikī (d. 684 A.H.) in his “Tanqīh al-Fusūl fi ‘Ilm al-Usūl” and Imam al-Islāmī al-Shāfi’ī (d. 777 A.H.) in his “al-Tamhid fi Takhrīj al-Furū’ aṣā al-Usūl”.

C. The Combination Method

Apart from these two methods, another approach is adopted by the jurists in their writings on usūl al-fiqh. Some jurists have attempted to combine these two afore-mentioned methods, namely the theologian’s and the jurist’s methods into an integrated method. This has influenced the works of both the Shafi’is and the Hanafis as well as the jurists of the later period.

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101 Ibid. (note no. 1)
102 Ibid.
103 Ibid. , p. 18.
104 Ibid., p. 18.
Badi' al-Nizām al-Jami' bayn Usūl al-Bazdawī wa al-Ihkām by Imam Mużaffar al-Dīn al-Sa‘ātī (d. 694 A.H.), al-Tanqīh and commentary al-Tawqīh, written by the same person, i.e. Sadr al-Sharī‘ah (d. 747 A.H.) and Jam' al-Jawāmi‘ by al-Subkī (d. 771 A.H.) are among the works based on this method. This sort of writing has, to a certain extent, dominated the modern writings on usūl al-fiqh as evident in the currently available works on this subject.

THE TREATMENT OF TA‘ARUD AND TARJĪH IN USŪL LITERATURE.

In general, we have no definite knowledge of how and when ta‘arud and tarjīh were treated for the first time as a technical term in usūl al-fiqh. Even al-Shafi‘ī’s Risālah, as the first systematic book on usūl, did not include a chapter called “al-ta‘arud wa al-tarjīh” or any other title similar to this. Like the Risālah, the Mu‘tamad which is the first independent and comprehensive work available on usūl al-fiqh after the Risālah, has no special chapter entitled “al-ta‘arud wa al-tarjīh”. However, to the best of my knowledge, the earliest reference to tarjīh with a considerable section of discussion is in the Burhān of al-Juwaynī (d. 478 A.H.), one of the leading Shafi‘ī jurists. This conclusion may be taken as valid until some evidence to the contrary comes to hand for many usūl manuscripts remain unpublished.

105 Ibid., p. 19.
106 Al-San‘ānī for example, has used the term tashīh as equal to tarjīh. (Ijabah, p. 417)
The above illustration does indeed raise at least two points to be closely considered. Firstly, we have seen that the terminological aspect was adopted as the determining point to judge whether a particular idea is established at a particular time or not. In other words, the absence of the "term" was used to argue that the concept which is later attributed to that "term" was also absent or was not in use.

Nevertheless, as is readily acknowledged, the existence of any science including tarjīh which is part of usūl al-fiqh, cannot be determined or judged on the basis of the use of the specific term, since it does not apply to the early period of literature.108 To this effect, as shown before, the scholars, though they knew that the Risālah does not carry the specific term usūl al-fiqh, still held that al-Shāfi‘ī was the father of usūl al-fiqh and acknowledged his book as the first systematic work on usūl al-fiqh. This was mainly motivated by the fact that the subject matter of usūl al-fiqh seemed to be well established in the Risālah to the effect that no one cannot fail to notice the nature of the discussion embodied in the Risālah.

Accordingly, one should try to trace the treatment of taʿāruḍ and tarjīh in the early usūl literature by considering, instead of the terminological aspect, the conceptual meaning of taʿāruḍ and tarjīh which is the preference of one piece of evidence over the other when they conflict. By doing so, one can clearly see, as will become evident later, that taʿāruḍ as well as tarjīh already occupied a significant place in the discussion in usūl literature, even before the appearance of the Risālah.109

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109 See for example, Abu Yusuf, al-Radd, passim.
By the time al-Shafi'i appeared, much work had already been done on ta'arud and tarjih. Apart from his long discussion on Islamic legal theory, ranging from linguistic consideration to personal reasoning in the Risalah, his encyclopaedic work i.e. Kitab al-Umm, preserves a number of treatises such as Ikhtilaf al-Hadith, Ikhtilaf Malik wa al-Shafi'i, etc., that are full of instances of ta'arud and tarjih. Not only that, he also provides reasons for the superiority of a particular piece of argument. For example, in the case where more than one tradition is reported concerning tashahhud, al-Shafi'i declares his preference for the one reported on the authority of Ibn 'Abbās, saying that it contains more words (i.e. al-mubarakat) than the other version thus implying that it is the most complete one.  

Hence, it is not surprising that Schacht outlined one of al-Shafi'i's personal achievements in legal theory as consisting of the hierarchical ordering of the four sources of law. This achievement is related partly, if not wholly, to the phenomenon of ta'arud and tarjih in one way or another.

As for al-Mu'tamad, though it did not contain a specific chapter on ta'arud and tarjih as later introduced in most of the subsequent literature, there are many instances where ta'arud and tarjih have been treated well in the light of usul al-fiqh. In the “Book of judicial qiyas,” al-Basra discussed preference in cases of qiyas contradiction and he

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111 Origins, p.134.
named his discussion "a chapter concerning the preponderance of causes and a section concerning the preponderance of qiyas".\textsuperscript{113} In addition, he has dealt with the subject in a chapter called "contradictory traditions" followed by another chapter immediately following called "bases on which one of two contradictory traditions prevails".\textsuperscript{114} These works show that ta'\textsuperscript{arud} and tar\textsuperscript{jih} have been dealt with in the Mu'tamad on occasions which naturally involved conflict and as a result, tar\textsuperscript{jih} is frequently employed to support one of two conflicting pieces of evidence. The treatment of ta'\textsuperscript{arud} and tar\textsuperscript{jih} in this way can also be traced in other us\textsuperscript{ul} works even before al-Juwayni's al-Burhan, such as in al-Shirazi's (d. 476 A.H.) al-Luma'\textsuperscript{f}i Us\textsuperscript{ul} al-Fiqh.\textsuperscript{115}

From the fore-going study, we can suggest that tar\textsuperscript{jih} was treated in two ways before it came to be finally entitled to a whole special chapter. In the earliest period of the literature particularly in the Ris\textsuperscript{alah}, tar\textsuperscript{jih} is merely found as a concept of preference, having no special chapter or at least, section which deals with tar\textsuperscript{jih}. The works of al-Basr\textsuperscript{i} and al-Shirazi\textsuperscript{I} also represented this sort of tar\textsuperscript{jih} treatment in us\textsuperscript{ul} literature. In the following period, tar\textsuperscript{jih} is discussed in a "book" (kit\textsuperscript{ab}) or at least in a section (fas\textsuperscript{l}) instead of being discussed under no special title, which suggests that the subject matter has developed and gained a special consideration amongst the jurists.

The second observation is that tar\textsuperscript{jih}, particularly from the sixth century of the Hijrah onwards, was never treated as a single phenomenon but always discussed together with the phenomenon of legal

\textsuperscript{113} Ibid. pp. 1040, 1047.
\textsuperscript{114} Ibid., pp. 672-688.
\textsuperscript{115} Al-Luma', pp. 49-50, 69-70.
conflict in the so-called "chapters on al-ta'arud wa al-tarjih". This form of treatment was adopted by most of the modern scholars who wrote on usul. This may be due to the intimacy of the relationship between ta'arud and tarjih to the extent that without the one, the other is incomplete if discussed.

Wahbah al-Zuhaylî, a contemporary Muslim jurist, has offered a valuable observation regarding the treatment of tarjih in usul literature. He observes that some of the jurists have placed tarjih discussion before the problem of ijtihad and taqlid but after the discussion of legal evidence. They do so because they might think that tarjih is more applicable to legal evidence since the evidence is overwhelmingly speculative. By contrast, the vast majority of writers on usul have treated the question of tarjih after the chapter on ijtihad which hints that only a mujtahid can undertake the task of removing any legal conflicts. Having supported the second treatment of tarjih, al-Zuhaylî asserts that this type of organisation is more consistent with the fact that conflict is merely apparent and not actually intended by the Law giver. In short, it shows that tarjih is nothing more than an attempt to remove an apparent conflict between two pieces of evidence by employing legal reasoning or ijtihad. Accordingly, as will be shown later, a murajjih has to be a mujtahid.

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118 Al-Zuhaylî, Usul, vol. 2, p. 1171. See also 'Iwad, Dirasati, p. 5.
Mention should be made that although *tarjīḥ* is frequently treated under a special heading or chapter, the relevant discussions and informations about it, together with examples, are available in detail only throughout the contents of *usūl* books and not exclusively presented in one particular chapter. Accordingly, one might easily notice many fundamental principles or methods of *tarjīḥ* in that particular chapter but they are lacking in terms of an adequate and satisfactory explanation and example. Methods like *haqīqah* prevailing over *majāz*, or a *sahīh* tradition being superior to *hasan* or *daʿīf* traditions, are briefly mentioned without detailed arguments and instances. As suggested above, the details of conflict and *tarjīḥ* in these two areas are obtainable only in chapters concerning *haqīqah-majāz* and *isnād* respectively. Thus, the more we familiarise ourselves with the whole discussion of *usūl al-fiqh*, the more we learn of the details regarding *tarjīḥ*. Relatively speaking, however, among classical books, I agree with the opinion that regards al-Āmīdī's *al-Ihkām*, as the most comprehensive and organised work adequately to discuss the so-called conflict and *tarjīḥ* in Islamic legal theory.

*Tarjīḥ*, on the other hand, has also been treated in another way and in another field of discipline e.g. in *ḥadīth* criticism. In this area of study, it is considered a major part of *ḥadīth* criticism which aims at distinguishing the reliable from the unreliable traditions by examining, among other things, the transmitter's qualification. For example, a *ḥadīth*

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119 Ibid.
120 Ibid.

As far as al-Āmīdī is concerned, he has listed more than 180 methods of *tarjīḥ* relevant to the entire discussion of conflict in *usūl al-fiqh*. (*al-Ihkām*, vol. 3, pp. 256-295)

121 Al-Qāsimī, *Qawa'id*, passim, particularly pp. 313-314.
whose transmitters are recognized as ‘adl is accepted while a hadīth with an opposite character of transmitters is rejected, especially in cases of contradiction.\textsuperscript{122} To this effect, the study of hadīth criticism seems to cover part of tarjīh methodology especially in Sunnah contradiction with special reference to isnād.\textsuperscript{123} Hence, one should take this into consideration in an attempt to trace when and how tarjīh is treated in usūl literature since the study of such is also applicable to our present study because it offers several methodologies of hadīth preference based on isnād.

In another perspective, tarjīh has not only been treated in pure usūl literature but also in the field of positive law (furū') designed as a comparative study of madhāhib. This study is known at the present time as fiqh muqāran.\textsuperscript{124} Obviously, each of the works has to indicate a bias for one particular legal view when there is more than one reported view on the subject. The preferred opinion often belongs to the author's school of law and very rarely to another contrary point of view outside his madhhab. As far as tarjīh between madhāhib is concerned in fiqh muqāran, the methodology of tarjīh appears to merit remarkable consideration throughout the study since one is unable to express a preference unless provided with the proper basis to do so. Ibn Khaldūn rightly remarks that "the disputation clarified the sources of the authorities as well as the motives of their differences".\textsuperscript{125} Apart from fiqh muqāran, tarjīh

\textsuperscript{122} Ibid.
\textsuperscript{123} Chapter five will be fully devoted to examining tarjīh methodology in isnād conflict.
\textsuperscript{124} For example, see al-Zuhaylī, al-Fiqh, passim.
\textsuperscript{125} Al-Muqaddimah, vol. 3, p. 31. See also Tanqīh, p. 419; M. Husam al-Dīn, "Fiqh al-Khilaf", pp. 500-501.
methodology can be easily found in two other fields of study namely *tafsīr āyat al-ahkām* and *sharh ahadīth al-ahkām*.

I believe that a brief account on the topic enables us to note that *tarjīh* was established, in written works, from the very beginning of Islamic literature not only in those works restricted to *usūl* study but also in other disciplines which deal with whatever contradiction was said to occur in the *Shari‘ah*. It was only at a later stage of Islamic literature that *tarjīh* together with *ta‘ārūd* was treated more systematically. The present study is a further attempt to re-examine the methodological aspect of *tarjīh* in Islamic legal theory by considering first with particular emphasis, the causes that make legal rulings contradictory before commencing the task of assigning superiority to one over the other.
CHAPTER ONE
PART B

PURPOSE AND SCOPE OF THE PRESENT STUDY

The only guidance for Muslims is the Shari'ah (literally the path to the watering place); the sacred revealed law of Islam. It is the command of Allah, revealed to the Prophet. This means that Allah is the actual legislator, who revealed the Shari'ah. This revelation determines the norms and basic concepts of Shari'ah. To be successful in this life and Hereafter, one is obliged to fulfill all the obligations, and in turn to refrain from all the prohibitions laid down by the Shari'ah. In a further step, to understand the Shari'ah, the knowledge of usul al-fiqh is a prerequisite. Thus, in order to identify God's will, His command and the precise formulation of His law, one must confine oneself to what is known as usul al-fiqh or Islamic legal theory. It is the latter that explains to Muslims whether an action is approved or not. Above all, its major function is to govern how legal rulings should be extracted from legal sources.

Every single Muslim believes that Allah, the Most Knowledgeable, is the only one who revealed the Shari'ah. No other 'elements' co-operated with Him in establishing and enjoining the Shari'ah on mankind. In other words, the Creator, the Almighty Allah shares his absolute power with no one. One who believes in another way is unanimously regarded to be against the fundamental principles of Islamic belief or iman. Since the actual Legislator

1 Coulson, A History, p. 20; Idem, Conflict, p. 1; Fitzgerald, "The alleged debt of Islamic to Roman law", in LQR, vol. 67, 1951, p. 82.
2 Burton, The Sources, p. 11.
3 El 1, vol. 4, p. 1055.
4 Coulson, Conflicts, p. 1; Weeramantry, Islamic Jurisprudence, p. 1.
is only Allah, conflict or contradiction in His law is unimaginable and unacceptable. In turn, fiqh should be one and there should be no discrepancy in it other than in minor details. In other words, it is impossible that one case would have more than one rule, since the law was extracted from one source namely the Shari‘ah. To this effect, Allah has said in Q. 4: 82; “Will they not then ponder on the Qur‘an? If it had been from other than Allah they would have found therein much incongruity”. 5

However, it remains surprising that the majority of cases in Islamic law have more than one legal rule and this is not only common in the present time but also in the early Islamic literature or even during the Companion period. 6 Nowadays, a Muslim, particularly a muqallid Muslim, can easily find himself in a deep problem when reading the first page of a book on fiqh. He certainly will encounter conflicting views on a single case in his own madhhab, as is the case when he attempts to read a book of fiqh which contains more than one madhhab’s legal view i.e. fiqh muqāran, for then the conflict is wider and greater. Hence, any student of fiqh is aware of the existence of these disagreements.

The above illustration may confuse some students of Islamic law. As we may know, conflict of law cannot be referred to fiqh itself because the fiqh is built upon certain principles called usul al-fiqh. The fiqh is only the product of the latter. Its conflict or even its unity is mainly due to the principles which

5 Ahmad Fahmi Abu Sinnah, "Min fiqh al-Kitab wa al-Sunnah", in MA, vol. 63, 1990, p. 29. Concerning this particular verse, al-Tabari has recorded the remark of Ibn Zayd who says that the contents of the Qur‘an do not contradict each other (for the conflict) is merely due to the ignorance and the lack of human ability. (Jami‘, vol. 5, p. 179f.)

6 See e.g. al-Tabari, Ikhtilaf, passim.
govern the methods of interpretation. In short, *usul al-fiqh* is the element responsible for making *fiqh* contradictory. Naturally and simultaneously, the present work is an attempt to tackle this problem based exclusively on the discipline of *usul al-fiqh* from which the conflicts come to exist.

The first task of the present study is to explain in great detail how legal disagreements occur in the body of Islamic law. Since all the causes of legal disagreement, as we shall see, can be summarised as the conflict of sources or elements of evidence, I shall place particular emphasis on that specific question throughout the work.

Not only that, I also wish to examine some of the methodology of *tarjīḥ* as one of the legal solutions adopted by the jurists to remove conflict of law. No doubt a discussion of the phenomenon of *taʿāruḍ*, followed by an examination of the methodology of *tarjīḥ* would be unwieldy in scope. There are many methodologies which are prominent but I wish to examine only some that are of primary importance. This limitation will be personal in consideration.

To do so, I will concentrate my discussion on the reliability of every single method or procedure used by each school of law or jurist in order to make its or his legal opinion "weightier" than the others i.e. preferable. This means every preference will be extensively examined in the light of purely rational argument which is not influenced by any derivative rules called *furūʿ*.

7 *Al-Mankhul*, p. 3.
8 See page 83.
By this, only that which is supported by sound evidence will be proposed as an applicable method of tarjīḥ to appropriate cases of conflict.

It is certain that in the course of conflict, the competition between Islamic schools of law and pressures to adhere to the legal rulings and legal sources of one of the established schools of law is obvious. Accordingly, most scholars adhere to the legal sources as well as to the legal rulings of the school they follow. In other words, it was an extremely common practice of the ancient schools that whenever two pieces of evidence contradicted each other, the one adopted by them was said to be "more reliable". However, it is very rare, I believe, that a jurist, when giving preference to a particular evidence or legal ruling over the other argues on the ground that it is the one that his school of law adheres to. He often argues and attempts to prove that his legal opinion and his madhhab's methodology is the most reliable and well-founded way of extracting the law. It is quite clear that each of the opposing groups would claim to be on the right side, which may however, turn out wrong and vice-versa. Nevertheless, arguments and counter arguments in this regard, would offer a considerable potential source for the study of the methodology of tarjīḥ.

The present study does not intend to consider preference on the basis of madhhab influence as genuine and solid. Only what is proved to be the

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11 Even, if we decide to regard a particular school of law as more reliable e.g. the Shafi'i school of law, the problem remains as legal opinion within one school is not always the same especially when it has adherents of different regions. The Shafi'is in Arabia and East Africa, for example, prefer the
most reliable method of preference is taken into account. In doing so, I have restricted myself to a discussion which carries a genuine conflict and a sound preference. On the whole, this study attempts to provide the methodology by which one can determine which, of two conflicting pieces of evidence, is most worthy of approval and which of the two interpretations is closer to that which is intended by the Lawgiver.

I have concluded, it seems to me, that legal disagreements arise mainly from the variety of interpretations and are not originally intended by the Shari'ah. Conflict is due to the varying abilities amongst those who interpreted the law. An attempt at tarjīth, in the present study, is similarly based upon my personal point of view. Thus, any preference proposed here is not a final or a clear cut conclusion to the extent that it excludes further argument or re-consideration. However, it must be kept in mind that every conclusion made here has been formulated from a great deal of detailed study such that it is the most likely or the most probable method of preference as far as I am concerned. Finally, I remain hopeful that this work can fill the gap left by other writers by presenting most, if not all, of legal conflicts together with "how to prefer" in one exclusive study. It is hoped that at the end of the thesis, some tentative, if not proper, methods can be formulated as far as tarjīth is concerned in all cases of conflict in Islamic legal theory.


12 Zaydan, al-Khilaf, pp. 277-280, 301.
NEED FOR THE WORK

Despite the great interest shown in usūl al-fiqh, whether by modern Arabic or Western scholars, no specific or systematic work dealing with this crucial aspect has been carried out. I know of many works that treat the phenomenon of conflict and the methodology of tarjīh, but not in an in-depth manner and not systematically. Hence one can find these works in usūl literature or fiqh and also in books of tafsīr or aḥadīth or in others which have some information on how the scholars removed the conflict in their respective studies. A few systematic books, however, have emphasised legal conflict but instead of tarjīh, other legal solutions are examined such as taʿwil and naskh. Moreover, their discussions are confined to only one particular area of conflict e.g. conflict of matn or in particular, conflict of isnāds. The present work however tends to examine not only these two areas of conflict but also other possible areas of conflict that are relevant to the selected theme of the work, namely conflict and tarjīh in Islamic legal theory.

Briefly, I have chosen to examine this topic for several reasons:

(1) Islamic law has been criticised for conflict and contradiction. The present study hopes, as the first stage, to ascertain some causes leading to legal conflict before suggesting some principles to remove that conflict.

(2) To continue what has been thus far-achieved by the ancient jurists in this particular question such as by al-Shāfiʿī in Ikhtilaf al-Hadīth, Ibn Qutaybah in Taʿwil Mukhtalaf al-Hadīth and Taʿwil Mushkil al-Qurʾān, al-Tahāwī in Sharh Maʿānī al-Āthār, Ibn Rushd in Bidāyat al-Mujtahid, etc.

13 For example, see Ibn Qutaybah, Taʿwil, passim and al-Iʿtibār, passim.
(3) To combine all the relevant informations concerning conflict and preference in one systematic work.

(4) To argue that there is no genuine conflict in the Shari‘ah. Rather, it is an attempt to show that the law which Allah has revealed in the shape of Islam could not be contradictory.

(5) To show that tarjīh is the most practical and profound way to remove legal conflict compared to other legal solutions such as naskh, istithsān, etc.

(6) To arrive at some tentative methods of tarjīh so as to contribute not only to usūl studies but also to the process of the codification of Islamic law throughout the Muslim world which demands only the selected legal point of view in every single case in Islamic law for the sake of unification and uniformity.¹⁴

SOURCES AND METHODOLOGY

I rely heavily upon primary sources in my work on conflict and preference. An attempt has been made to consult all the classical books of usūl and other related disciplines as they are available to me, which have special devotion to our purpose. Hence, our examination is not only restricted to those books of usūl, but rather to many other references such as fiqh particularly fiqh muqarar, tafsīr and hadith particularly tafsīr āyat al-ahkām and sharh aḥadīth al-ahkām as well as those disciplines which aim at reaching a conclusion upon the reliability of one of the many conflicting traditions such as ‘ilm al-ḥadīth and the like.

¹⁴ See the relevancy of this notion to the practical problem in the contemporary Muslim state in al-Zuhaylī, al-Fiqh, vol. 1, p. 27 and Hakim Mohammad Sa‘īd, "Enforcement of Islamic Laws in Pakistan", in HI, vol. 2, no. 2, 1979, pp. 66-67.
In respect to the methodology of the present work, I would like to introduce it by quoting what has been said by one scholar:\textsuperscript{15} "Scholars may advance the general stock of knowledge in a variety of ways; by the discovery and publication of hitherto unknown source materials; by placing their entire subject in a wholly novel perspective on the basis of extensive re-examination and analysis of available sources; or finally by applying the new perspectives to the elucidation of a single long-recognised problem". The present work is of the second type. It seeks to re-examine in one comprehensive work all the arguments used by the ancient jurists either to support and strengthen their legal views or to weaken and undermine the opposing legal views in cases of conflict.

Accordingly, I shall begin my study by identifying the causes of legal disagreement. To be certain of the meaning of \textit{tarjīḥ} and its legal background, an attempt shall be made to identify the key-word to the problem. For this, conflict as well as the methodologies of \textit{tarjīḥ} will be keenly studied and closely examined from the perspective of various subject matters. \textit{Matn} conflict will be discussed first followed by \textit{isnād} conflict. The third problem concerns conflict in \textit{ijmāʿ} and qiyaṣ application and the following question deals with conflict in those areas other than the prescribed scope of studies. In the last chapter, a conclusion and some suggestions are made in order to summarise the whole work, its results and findings.

\textsuperscript{15} Burton, \textit{The Collection of the Qur'ān}, pp. 4-5.
More precisely, in order to achieve what has been proposed, the study I am conducting is primarily based on a critical study in such a way that every argument must be extensively analysed and criticised first. When certain of its reliability and applicability to those relevant cases of conflict, it is accepted. In turn, if I do not have enough and clear evidence and argument, I will still proceed to suggest that a particular method of *tarjīh* be applied in a particular case but not in the strictest form because of the lack of adequate argument. As regards the method of presentation in this work and its relation to *usul* - oriented study, I have to say that both methodologies, as previously discussed, will be utilised. It is natural to do so because one cannot offer a proper evaluation of legal conflict unless one has at one's disposal certain legal and rational arguments as well as cases that are conflicting. A study of theoretical arguments and case study are both useful as far as *tarjīh* is concerned in the present work.16

16 See *al-Burhān*, vol. 1, pp. 84-85.
CHAPTER TWO
CHAPTER TWO

AL-TA’ARUD (CONFLICT OF EVIDENCE)

It is obvious that if there is no conflict then there is no question of devising a method to remove such conflict. As far as tarjih is concerned, the question of causes leading to disagreement must be examined. On the other hand, the knowledge of ikhtilaf is extremely important, for anyone who is not familiar with the science of ikhtilaf ought not to be permitted to pass judgement and to exercise qiyas. To make the discussion more organised, I intend to study the question of conflict in Islamic law by first trying to ascertain the meaning as well as the hukm of conflict and its related discussions before committing myself to causes leading to what is commonly known in usul al-fiqh as ta’arud.

The Meaning of al-Ta’arud.

Broadly speaking, ta’arud or conflict occurs when two pieces of evidence of equal strength require two contrary rulings to be applied to the same case at the same time. Put differently, conflict takes place whenever what is implied by one piece of evidence is opposed by another for one reason or another. In usul terminology, this phenomenon has been called by more than one title. Apart from ta’arud, it is sometimes called tanaqud, ta’adul, taqabul, etc. It is not difficult to find examples of

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4 See the following:
conflict as this is very common in *fiqh* as will become evident throughout the thesis. A reader of *fiqh* finds no difficulty at all in extracting many examples of such conflict even in the first few pages of a book on *fiqh*. More significantly, differences of opinion arose among the followers of Islam soon after the demise of the Prophet and on many occasions, *ikhtilaf* took place among the Companions even in the lifetime of the Prophet.5 Before we move to another sub-discussion however, it will be useful to point out some of the technical meanings attached to *ta'arud* together with relevant examples in order to crystalise what has already been said.

*Al-ta'arud* is the common title used to denote any contradiction of evidence in *usul al-fiqh*. Literally, conflict is said to take place when two elements contradict each other to the degree of rendering both elements inapplicable. Hence, the phrase *'ta'arud al-bayyinat'* i.e. conflict of pieces of evidence, means that one piece of the evidence opposes the other which makes both pieces inapplicable6 i.e. simultaneous application of both is impossible. *Jima*’ or *ittǐfaq* (agreement) is its exact antonym.7

Conventionally, *ta'arud* has various definitions but remains relevant to a common and central concept of conflict as indicated by the literal sense. The Hanafis have generally opined that *ta'arud* comes to exist when one of two *dalīl* or *hujjah* of equal strength contradicts what

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7 El 1, vol. 1, p. 1061.
is implied by the other in cases such as an opposition between permissibility and prohibition on the one hand and between positive (\(\ddot{\text{u}h\text{b}a\dot{\text{t}}}\)) and negative (\(\text{naf}\ddot{\text{f}}\)) on the other.\(^8\) Other jurists tend to confine \(\text{ta}'\text{arud}\) to the conflict that arises merely between two speculative pieces of evidence (\(\text{am}\ddot{\text{a}r}{\text{a}}t\)) instead of between two \(d\ddot{\text{a}l}\ddot{\text{i}}\)\(\ddot{\text{l}}\).\(^9\) That is, two \(d\ddot{\text{a}l}\ddot{\text{i}}\) or two \(\text{hujjah}\), according to the latter jurists, are held to be unable to contradict one other since both are definite (\(q\ddot{a}t\ddot{\text{f}}'\ddot{\text{i}}\)) for they accept no other possible interpretations.

This difference seems to be merely theoretical and verbal because neither the Hanafis nor the other jurists have at their disposal a clear cut and agreeable principle by which they may decide with certainty whether a particular piece of evidence is \(q\ddot{a}t\ddot{\text{f}}'\ddot{\text{i}}\) or otherwise. On many occasions, evidence is not sharply classified and sometimes inconsistently valued even within the same school of law.\(^10\) As we shall see, disputes in \(\text{fiqh}\) are always caused by these two classifications for they are neither constant nor certain. From this conclusion, the consideration of whether or not \(q\ddot{a}t\ddot{\text{f}}'\ddot{\text{i}}\) evidence can contradict another \(q\ddot{a}t\ddot{\text{f}}'\ddot{\text{i}}\) evidence becomes worthless since principles to distinguish between \(q\ddot{a}t\ddot{\text{f}}'\ddot{\text{i}}\) and \(\text{zann}\ddot{\text{f}}\) are widely variable. An

\(^8\) Al-Sarakhsi, \(\text{\textit{Usu}l}\), vol. 2, p. 12; \(\text{\textit{Kash}f}\), vol. 3, p. 77; \(\text{\textit{al-Taqr}ir}\), vol. 3, p. 2; \(\text{\textit{al-As'a}d}\), \(\text{\textit{Usu}l}\), p. 255.

\(^9\) \(\text{\textit{Nihayah}}\), vol. 3, p. 211; \(\text{\textit{al-Mustafa}}\), vol. 2, p. 393; \(\text{\textit{Irshad}}\), p. 273

Although the word \(d\ddot{\text{a}l}\ddot{\text{i}}\) applies to both definite and probable proofs, some jurists, however, apply the word \(d\ddot{\text{a}l}\ddot{\text{i}}\) to definite proofs and \(\text{am}\ddot{\text{a}r}{\text{a}}t\) (signs) to probable proofs. See Ahmad Hasan, "The sources of \(\text{fiqh}\): a general survey", in \(\text{IS}\), vol. 29, 1990, pp. 110-111 (cited after as "The Sources"); \(\text{\textit{Taqr}i\text{n}}\), pp. 19-20, 36.

\(^10\) See the following three notes.
explanation of this question will be elaborated upon further in chapter three under the heading of "the condition of tarjīḥ".

However, some brief examples might be useful at this stage. As we shall see in chapter six, īmāra enjoys a considerable position as legal evidence to the effect that it is not liable to any cancellation or alteration (as often occurs in legal texts). In other words, consensus, generally speaking, is qāṭī evidence. Nevertheless, the jurists are divided amongst themselves as far as the details are concerned. Al-Shafi‘ī considered only the consensus of the whole community as qāṭī, while other jurists, including leading jurists in the Shafi‘ī school of law extend this degree of strength to cover both the consensus of the community and of the legal specialists (mujtahidūn).11 Not only that, having contended that a principle which leads to certainty must be based on equally certain evidence (qāṭī), they disagreed on the details. In the case of consensus, its basis must be derived from revelation. Rational evidence, according to some of the jurists, cannot serve in religious matters12 whereas it is acceptable to the other jurists.13 Such matters would make the discussion of conflict between qāṭī and qāṭī or between qāṭī and zannī void of certainty. It is not an error, however, to accept the classification of legal evidence into two categories of strength, namely qāṭī and zannī, but it should not prevent a mujtahid from re-examining the accuracy of both since the principles by which legal evidence is classified are relatively variable and accordingly liable to cross-examination.

13 Al-Mustasfa, vol. 1, p. 196; Badran, Usul, p. 125.

For details, see Sha‘ban, Dirasat, pp. 98ff.
This discussion also shows that the jurists, notwithstanding the schools of law, have demanded certain strict conditions to ensure that only certain situations will be genuinely treated as actual cases of conflict, such as when both pieces of evidence are of equal strength.\(^{14}\) Both pieces of evidence must also confine themselves to the same subject matter at the same time.\(^{15}\) Otherwise, it may render conflict only apparent. It is precisely on this ground, that the prohibition of approaching (i.e. sexual intercourse with) one's wife in her period of menstruation, does not contradict the 'order' to do so when one's wife has purified herself. It is clearly evident from Q. 2:222, "They question thee (O Muhammad) concerning menstruation. Say: It is an illness, so let women alone at such time and go not in unto them till they are cleansed. And when they have purified themselves, then go in unto them as Allāh hath enjoined upon you...". The alleged conflict is not genuine for it is assigned to two different times or conditions.

The genuine example\(^{16}\) of conflict may be illustrated by the following three traditions. The first says that the Prophet performs an ablution and washes his feet.\(^{17}\) The second reports that the Prophet wipes over his feet\(^{18}\) and the third tells us that the Prophet sprinkles water


\(^{15}\) Ibid.

\(^{16}\) What is intended by the genuine case is merely the one which apparently fulfils all the conditions laid down by the jurists though it is not necessary to be actually genuine for many conflicts can be eventually removed by one means or another.

\(^{17}\) Al-Shāfī‘ī, Ikhtilaf al-Hadīth, p. 522.

\(^{18}\) Ibid.
over his feet.\textsuperscript{19} Surely, they adequately provide a considerable conflict in the eyes of the jurists whose task is to remove this conflict by any possible means.

Remark should also be made upon the fact that the present discussion is restricted only to conflict of law as it is discussed by the usulists in classical \textit{uşūl} literature. We have no interest in, and concern with, the so-called conflict of law dealt with by many contemporary jurists whose task is exclusively confined to the problems of conflict of law between Muslim and non-Muslim in Islamic territory. The aim of this contemporary study is to seek solutions from a jurisdictional point of view whenever dispute arises in an Islamic state between members of two different sects or religions, which is frequently concerned with personal status law or the so-called private international law.\textsuperscript{20}

\textsuperscript{19} Ibid.

Having preferred the first report, al-Shaftī rejected the other two reports for the \textit{isnād} of one of them is unreliable. Although the \textit{isnād} of the other \textit{ḥadīth} is reliable (ḥasan), since its content (sprinkling) is contrary to what is more established (\textit{akthar wa athbat minhu}), it should therefore also be rejected. (ibid)

\textsuperscript{20} See Cardahi, “Conflict of law”, in \textit{Law in the Middle East}, passim; David Pearl, \textit{A Textbook on Muslim Law}, pp. 174-195; Mahmās, \textit{Falsafah}, p. 11.
The *Hukm* \(^{21}\) of *al-Ta‘ārud*

As regards the *hukm* of conflict in the *Shari‘ah*, I would like to introduce what has been recorded between al-Shafi‘i and his interlocutor in *al-Risalah*. The interlocutor puts a question to al-Shafi‘i as follows, “I have found the scholars, in former and present times, in disagreement on certain (legal) matters. Is it permissible for them to do so?” Al-Shafi‘i replies that *ikhtilaf* has two aspects. From one point of view, *ikhtilaf* is forbidden but “I would not say the same regarding the other”. *Ikhtilaf* is forbidden in all spheres where God has provided a *hujjah* in his Book or on the tongue of his Prophet, textually and explicitly. But with regard to such texts as permit of interpretation (*ta‘wil*) or are to be understood by *qiyyas* in such a way that the interpreter or *qa‘is* accepts what is implied by a *khabar* or *qiyyas*, even if another differs from him in his interpretation, in such a case, “I do not hold that (disagreement) of this kind constitutes such strictness as that arising from textual (evidence)”.\(^{22}\) To conclude, we may say that *ikhtilaf* may be forbidden or permissible according to causes leading to *ikhtilaf*.

\(^{21}\) The arabic word *hukm* (singular of *ahkam*) is used with various slightly different meanings which no single English word will render exactly. At least, two words will be used to express the arabic *hukm*, the word value (as in this case) and the expression "legal result". (see Aghnides, *Theories*, p. 24)

In *fiqh* terminology, *hukm* is the rule that a *mujtahid* arrives at, based on the *Shari‘ah* sources and in accordance with their general principles. (See Hammad, “Ghazali’s juristic treatment of the *Shari‘ah* rules in *al-Mustasfa*”, in *AJISS*, vol. 4, 1987, p. 160

\(^{22}\) *Al-Risalah*, paras. 1671-1675. See also idem, *Ibfal al-Istihsan*, pp. 302-303.

This shows that al-Shafi'i is of the opinion that conflict may occur and sometimes must unavoidably exist in the Shari'ah. But this is restricted to the second classification of *ikhtilaf*. Al-Shafi'i presents an example of this, saying that two judges may judge one affair, one by accepting, one by rejecting. This is *ikhtilaf* but each one has acted as was incumbent upon him.\(^{23}\) Furthermore, there is a hadith confirming the validity of *ijtihad* which states that, "If a judge makes the right decision through *ijtihad*, he shall be doubly compensated; if he errs, he shall be compensated once".\(^ {24}\) Not only that, he offers another example which might add weight to his doctrine. He says, if two people differ in facing the *qiblah*, though they are both 'right' by *ijtihad*, yet while they differ in aiming for the same point, they cannot both be right with respect to the point, but they are right with respect to *ijtihad*.\(^ {25}\) In other words, paradoxically all are 'right'. To summarise al-Shafi'i's attitude towards disagreement, we can simply say that al-Shafi'i acknowledges disagreement as the necessary result of *ijtihad*. Referring to the tradition that prescribes one and two rewards, he denies the existence of a fundamental disagreement even when there are contradictory opinions because every *mujtahid* fulfils his duty by drawing the conclusions which he considers right. Thus, a variety of views is permissible and acceptable provided that they do not go beyond the second category of *ikhtilaf*. This point of view has been shared by the vast majority of jurists from different schools of law throughout the centuries and seems to be the proposal most acceptable to contemporary jurists and scholars.\(^ {26}\)

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23 Al-Risalah, paras. 1404-1407, particularly para. 1407.
24 Ibid., para. 1409.
25 Ibid., paras. 1425-1426; idem, Ibtal al-Istiqsan, p.302.
Some of the scholars are of the contrary opinion. They criticised the idea that there are any divergent opinions in the Shari‘ah. Al-Sha‘rāni, for instance, takes the extreme position denying that there is any controversy whatsoever and seeks to defend his position arguing that the whole of the Shari‘ah provisions may be reduced to two categories, commandments and prohibitions, each of which admits a double construction - one for the case of want of excuse (‘azimah) and the other for the case of excuse (rukhgah). The apparent contradiction and divergence of provisions and views in the Shari‘ah, is then only a consequence of the fact that while some of these provisions and views refer to cases of want of excuse, others refer to cases of excuse.

Similarly, al-Shāṭibī, in his work, al-Muwāfaqat, has strongly denied that genuine conflict can occur either in the principles (ugṣūl) of Shari‘ah or its branches (fiqh). To support his thesis, he argued that no one could find two pieces of evidence that contradict each other to the extent that both must be abandoned. He concludes that the conflict is due to the weakness of the mujtahid. In other words, whatever the conflict is, it is merely apparent and cannot actually take place in the body of the Shari‘ah. He then discussed some aspects of ikhtilāf which are not

The details of arguments put forward by those who support the existence of ikhtilāf in Islamic law can be found in al-Muwāfaqat, vol. 4, pp. 123-131.

supposed to be called *ikhtilāf* for certain reasons.\(^{30}\) On the whole, the standpoint of the second group is relatively identical to the first. In spite of their denial of existence of any conflict in the *Shari‘ah*, their disapproval is primarily directed, it appears to me, towards genuine contradiction called *tanāqud* i.e. mutual cancellation. As a matter of fact, even the first group of jurists have shared the same notion that *ikhtilāf* is permissible, as will be shown later, as long as one has possible means to remove that apparent contradiction (*ta‘ārūd*). Otherwise, it is called *tanāqud* which is unacceptable to all of the jurists.\(^{31}\)

Others, however, have attempted to differentiate between the so-called 'major and minor conflict'. Minor *ikhtilāf* is permissible while major *ikhtilāf* is condemned for it is a dangerous type of *ikhtilāf*.\(^{32}\) A conflict is regarded as minor when the disagreement exists in a dispute of whether a particular action is obligatory or recommended on the one hand and whether it is forbidden or disapproved on the other. This is permissible, although some prefer to do a particular thing instead of another. This demonstrates the flexibility offered to the people.\(^{33}\) Relatively speaking,

\(^{30}\) Al-*Muwaṣṣaqaṭ*, vol. 4, pp. 214-220.

For the summary, see *al-Mawsu‘ah al-*Fiqhyyah*, vol. 2, pp. 292-295.

\(^{31}\) Al-*Taqrīr*, vol. 3, p. 2; *Fawā'id*, vol. 2, p. 189; *al-*Hafnāwī*, *al-*Ta‘ārūd*, pp. 55-61 particularly p. 61.

\(^{32}\) Al-*Turkī*, *Ikhtilāf*, pp. 27-29. For example, see Ibn Taymiyyah, *al-*Qawā'id*, p. 41.

\(^{33}\) Ibid. See also Kamālī, "The approved and disapproved variety of *ra‘y* (personal opinion) in Islam", in *AJISS*, vol. 7, 1990, p. 59. (cited after as "Ra‘y")

Examples of this can be found in al-Shāfi‘ī’s *Ikhtilāf al-*Hadīth*, pp. 488-490 (whereby al-Shāfi‘ī himself acknowledged the permissibility of this kind of *ikhtilāf* and *Hujjat Allah*, vol. 1, p. 138.
this view tends to evaluate the problem from the standpoint of the fiqh which is quite irrelevant to our discussion. As mentioned earlier, usul al-fiqh has less interest in what is proclaimed in fiqh than in the bases of fiqh themselves. Likewise, it is not accurate, in my mind, to pass judgement on the question discussed by adopting fiqh considerations. It is true however, that a dispute on whether a particular order is obligatory or merely recommended is more reasonable and acceptable compared to a dispute between what is obligatory and prohibited on the same subject. But this is not a concrete argument from which to justify the classification of ikhtilaf to either major or minor where only the latter is acceptable. It is inaccurate to accept this classification since minor ikhtilaf may contradict evidence which is regarded as explicitly provided by the Shari‘ah. Hence, I am of the opinion that conflict can be accepted as long as one of its elements is not based on explicit evidence though it might even be considered as major ikhtilaf e.g. wājib vs. haram.

I am more inclined towards the viewpoint proposed by al-Shafi‘i but with some alterations and additions. It is true that cases containing speculative evidence or having no definite evidence at all are most likely open to ikhtilaf (as is the actual case in fiqh). However, it does not necessarily signify that cases with precise and distinct evidence would encounter no possibility of disagreement. This is found even in al-Shafi‘i’s treatise when he asserts that differences of opinion among the Companions exist even on points where there are explicit rules in the Qur‘ān or the Sunnah.\textsuperscript{34} To add to al-Shafi‘i’s proposal, I have to say that, although ikhtilaf is an historical phenomenon, one should aim to reduce it to a minimum. In other words, fiqh should be one and there should be no

\textsuperscript{34} Al-Shafi‘i, *Ikhtilaf Malik*, p. 243.
major *ikhālāf* other than in minor details. Clearly, efforts must be made to eradicate any major *ikhālāf* in *fiqh* if one has an adequate means of doing so. Hence, al-Shafī‘ī on other occasions has asserted that no conflict is acceptable between two reliable *ahādith* unless means for either *tajjih* or *naskh* are available.\textsuperscript{35} This assertion shows that *ikhālāf* is not acceptable between two reliable texts when this conflict cannot be removed by any means of legal solution which reveals that *ikhālāf* is actually genuine and intended by the Law giver. Therefore, the dispute seems to be apparent and merely verbal since all of the jurists believed and held that genuine conflict i.e. *tānāqid*, cannot possibly take place in the *Shari‘ah*. Only apparent conflict is always expected to occur in the *Shari‘ah*, motivated, as we shall see, by the following causes or reasons.

**Causes of Legal Disagreement.**

The Muslims are divided into groups differing from one another on legal issues. At this stage, an attempt will be made to clarify causes that are believed to bring legal rulings into conflict. As mentioned before, conflict, or even unity of law, is not due to the *fiqh*, rather, to *usūl al-fiqh* which governs the interpretations of *fiqh* from various sources and bases. Since *usūl*-*fiqh* is a human intellectual effort there is little certainty of covering all the arguments produced by *usūl al-fiqh*.\textsuperscript{36} Therefore, it is not surprising that causes of legal disagreement are many and unlimited in number and cannot be fully described particularly within a limited number of pages. Also, it would prove too much of a digression to

\textsuperscript{35} Ibid., p. 191; idem, *al-Risalah*, paras. 574-590. See also *Irshād*, p. 275.


\textsuperscript{37} Ibid.
discuss here in detail all the questions which might produce *ikhtilaf* in *fiqh*. For convenience, only those causes which are common and of capital significance will be thoroughly examined.

Many have held that cases which received a great deal of explanatory attention by the Lawgiver such as ritual, succession or personal laws, are not subject to great conflict other than in minor details, for they are related to those laws that are unchangeable throughout time and because, in consequence, they have been detailed to the extent that they carry clear cut principles to administer their application.\(^{38}\) Other similar statements are also available giving the impression that conflict is unlikely in those prescribed laws. In a practical sense, we often encounter, however, the contrary situation where conflicts remain great in number in those fields of law, a fact which leads to the belief that they too have been variously understood or implemented. Perhaps the dispute over the requirement of guardianship in marriage might shed some light on this problem. In brief, some of the jurists argue in favour of the requirement and others argue against it. Ibn Rushd, whose book, *Bidayat al-Mujtahid* is designed to analyse and explain conflicts of laws in Islamic jurisprudence, concludes his analysis on this point by saying, "the cause of the difference of opinion is that there is no verse of the Qurān and the Sunnah of the Prophet which clearly stipulates guardianship as a condition for the marriage contract, let alone any explicit text on the point. Rather, the verses and the Sunnah cited by the proponents of guardianship and their opponents are equally ambiguous and probable. The authenticity of the cited *ahādīths* is also debatable".\(^{39}\)

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\(^{38}\) Al-Turkī, *Ikhtilaf*, p. 2; Bannerman, *Islam in Perspective*, p. 34.

\(^{39}\) *Bidayah*, vol. 2, pp. 9-10.
This, in my opinion, was due to the fact that, although certain topics are dealt with at considerable length, there is no single comprehensive exposition of the topic. As a preliminary conclusion, we may state that if there appears to be a conflict, irrespective of whatever the cases are, surely, one or the other piece of evidence has been incorrectly understood or applied, for the conflict is largely created by our very human inability to estimate correctly the precise implications of legal texts.⁴₀ Many causes of Ḣukūf have been listed and are regarded by both the ancient and contemporary jurists to be the most influential ones. These, I believe, can be reduced to just five distinct causes⁴¹ which are most prominent and sufficient in themselves to cover other remaining causes. Our discussion therefore, will be devoted to these five causes only. On the other hand, after accepting four elements as the agreed sources of law, namely the Qur‘ān, the Sunnah, Ḥāmah and qiyyāṣ⁴², the jurists are divided not only between two schools of law but also within one school of law in regulating the principles on which the rulings must be extracted or established from these four sources. This is also said to be one of the significant factors which lead to legal disagreement. It is therefore necessary to commit ourselves to these two types of causes. Some of them, as in the latter case, are related to various principles laid down by every school of law in establishing the law from its sources, while others

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⁴¹ The number of causes of legal disagreement varies from one scholar to another. See for example al-Khān, Ikhtilaf, (7 causes) pp. 38-118; al-Balâlyawṣi, al-Inṣaf, (8 causes), passim; al-Misrī, al-Khīlaf, (14 causes), pp. 88-116.
⁴² Fitzgerald, "Sources", p. 87; F. Rahman, Islam, p. 68.
are concerned with the original problems which inevitably cause divisions amongst the jurists. Both types therefore will be equally regarded as causes of legal conflict in this discussion.

I would like to begin with problems which make *ikhtilaf* itself inevitable. *Ikhtilaf* of this kind is originally caused by certain factors which are 'natural' and not influenced by any tendency of thought in Islamic legal theory, as distinguished from the second type of *ikhtilaf* i.e. "man-made principles". Included in this category is the absence of the relevant texts in a particular dispute, the different readings of the Qur'an, the use of words that carry more than one meaning, the texts which are liable to many interpretations and the fact that not all the relevant traditions reach every single jurist. These causes are 'natural' for they are, to a certain extent, beyond human will which makes *ikhtilaf* of the jurists unavoidable.

With respect to the first cause, it is of interest to note that the whole phenomenon of Islamic law, in its basic formation and composition has two major components, namely that which is believed to have been revealed by God and that which is assumed not to have been revealed. The first component handed down to man ready-made, was only to be passively received and applied. On the other hand, the second component, which was not ready-made, was in fact, to be constructed. Regarding the latter, we often find the jurists, or even the Companions, differing amongst themselves in matters personal and social concerning which they found no indication in the Qur'an and the Sunnah of the Prophet. 'Umar ibn al-Khattab and 'Ammar b. Yasir, for example, differed on a journey, concerning the mode of *tayammum* for major impurity (*janābah*)
necessitating the major ablution i.e. ghusl. 'Umar abstained from prayer while 'Ammar performed his prayer after performing tayammum for ghusl by rubbing (besmearing) himself with dust.43

Therefore, in matters that demanded an immediate decision in which texts were not available to the Companions or they were not able to seek guidance from the Prophet owing to distance or some other reason, they had to use their reasoning and then report to the Prophet their agreement or disagreement.44 The point is that, when a particular case in question has no relevant legal or semi-legal texts, disagreement is likely to occur, for the absence of the relevant texts would lead the jurists to resort to reasoning or other speculative elements of evidence.

As regards the different readings of the Qurān, it is commonly understood that on many occasions, a particular verse can be recited in two ways which sometimes create two contrary implications. One of the most distinct examples of this is found in Q. 5:6, "O ye who believe! When ye rise up for prayer, wash your faces and your hands up to the elbows, and lightly rub your heads and (wash) your feet up to the ankles". The case in point is concerned with the feet and whether they are required to be washed or wiped to make ablution valid. What makes this point contradictory is the existence of two readings where both readings are legitimate because they are mutawatir.45 The first reading adopted the

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45 Al-Ṭabarī, Jamī', vol. 6, pp. 126-132; al-Qurṭubī, al-Jamī', vol. 6, pp. 91-96; Ibn Mujahid, Kitāb al-Sab'ah fi al-Ǧirāʿāt, pp. 242-243.
accusative for the feet (wa arjulakum) which gives the impression that they should be washed also as in the case of the face and hands. Others who adopted the reading in the genitive (wa arjulikum) opine that the feet, like the head, need only be wiped. Whichever of these is taken, the ruling of the text would differ from the other.

As with the above, it is said that the singleton reading (qira’ah shadhah) also plays a considerable role in making legal implications oppose each other. The difference between this and the former case is that both types of reading in the former case are legitimate and acceptable to the Muslims while the latter involves a conflict between what is acceptable and what is not. For example, Professor Schacht has quoted Q. 65:6, ("Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them. And if they are with child, then spend for them till they bring forth their burden"), in order to illustrate how different ideas and practices could result from the early transmission of the Qur’an in variant readings. The relevant variant reading, as argued by both Schacht and Coulson, is attributed to Ibn Mas‘ud who inserts, “and expend upon them (wa anfiqū ‘alayhinna)” after “according to your wealth (min haythu sakantum)”. By this, the meaning of the first part of the verse

Al-Qur‘ubi adds that apart from the different readings, the dispute is also credited to the word “mash” for it is believed to be mushtarah. (see al-Jami’, vol. 6, p. 92)

46 Ibid.

47 Origins, p. 225.

For the main differences between the Uthmanic codex of Qur’an and those of some companions e.g. Ibn Mas‘ud and Ubayy, see Cooper, Introduction (al-Tabari), p. xxii; El 2, vol. 5, pp. 406-408.

would be, "Lodge them where ye dwell and maintain them according to your wealth".

Dealing with these two readings of the same verse, the jurists have reached two contrasting opinions. For ease of clarification, it seems reasonable to restrict our discussion to these two readings only and not to open up the entire argument on the issue of legal rights preserved for those who are irrevocably divorced. Obviously, if basing oneself on the common reading, the verse clearly indicates that no right of maintenance need be provided for such a divorced woman. However, the Hanafis have taken the variant reading into consideration which produces a ruling contrary to the other jurists who do not consider the relevancy of this reading in establishing the legal ruling. As is evident from al-Sarakhsi's *al-Mabsūt*, the author has contended that such a woman is entitled to both lodging and maintenance, arguing that both are prescribed in Ibn Mas'ūd's reading. I should however, mention that this cause will be more relevant under the subsequent part of the discussion for it is largely due to jurists' legal thought concerning whether the singleton reading is of authority or not. It is not of 'natural cause' of conflict.

The *mushtarakh*, literally a compound idea or a homonym, has allegedly created conflict in *fiqh*. *Mushtarakh* is nothing other than two

49 See Ibn al-Lajul am. al-Qawa'id, pp. 155-156.
For details on this conflict, see Hawting, "The role of Qur'an and hadith in the legal controversy about the rights of a divorced woman during her waiting period ('idda)", in BSOAS, vol. 52, 1989, passim.
or more equal meanings implied in a single word or a sentence at one time.\textsuperscript{53} Attempts were made to investigate how this feature came to exist. No convincing explanation is yet available except for the suggestion that a particular word was in use among two or more ancient tribes to denote contrary meanings.\textsuperscript{54} More surprisingly, *mushtarak* often occurs in both the Qur\’\textsuperscript{ā}n and the Sunnah without any direct explanation from the Law giver. It is in trying to determine the precise meaning of these words that disagreements amongst the jurists themselves have emerged. A significant example of this is the word *nikāh* which may be variously interpreted as shall be further elaborated in chapter four under the heading “*Tarjīh* in *mushtarak* conflict”.\textsuperscript{55}

To understand how significant conflict could be caused by a *mushtarak* word, I quote Q. 2:228, “Women who are divorced shall wait, keeping themselves apart, three *qurū*”. The verse announces that divorced women have to pass three *qurū* before they can marry another person.\textsuperscript{56} The word *qurū*, plural of *qar*, is unanimously understood as ‘time’. In other words, three *qurū* is identical to ‘three times’.\textsuperscript{57} However, the jurists, as well as the linguists, hold differing views as to whether these ‘times’ refer to menstruation or to the period between two menstruations. For the word *qar*, as it is evident from the statement of the linguists such

\begin{itemize}
  \item \textsuperscript{53} Ibid., p. 70; Ibn Mang\textsuperscript{ū}r, *Lisan*, vol. 10, p. 449; al-Sarakhs\textsuperscript{ī}, *Usul*, vol. 1, p. 126; Kash\textsuperscript{ī}, vol. 1, p. 37.
  \item \textsuperscript{54} *Ahkām*, vol. 1, pp. 430-433; al-Qur\textsuperscript{ū}b\textsuperscript{ī}, *al-Jami’*, vol. 3, p. 113f.
  \item For details, see al-Nashm\textsuperscript{i} in his edition to al-Jassaq’s *Usul al-Fiqh*, vol. 1, p. 47, note no. 1 and al-Zuhayl\textsuperscript{ī}, *Usul*, vol. 1, pp. 284-285.
  \item \textsuperscript{55} See pages 185-189.
  \item \textsuperscript{56} *Ahkām*, vol. 1, pp. 430-433; al-Qur\textsuperscript{ū}b\textsuperscript{ī}, *al-Jami’*, vol. 3, p. 113; *Bidāyah*, vol. 2, pp. 88-91.
  \item \textsuperscript{57} Ibid.
\end{itemize}
as al-Asma‘ī, Abū Zayd, Abū 'Ubayd, al-Akhfash, etc., was originally used among the Arabs to denote both meanings. The conflict occurs when some of the jurists request three periods of menstruation while others determine upon three periods of purity which is shorter than the former in terms of the 'iddah for a divorced woman. Arguments and counter arguments over this problem can be found in books of fiqh and tafsīr āyāt al-ahkām, for the word actually carries two original but contrary meanings. Some of the jurists are able to make a preference between these two meanings not solely on the basis of mushtarak but on the account of qarā‘īn which might clarify what is actually intended by the word qurū‘ in this particular case. This is because a mushtarak offers nothing other than a variety of meanings which equally apply to a single word. In short, it needs qarā‘īn to help in selecting what is preferable and intended.

Besides being a mushtarak, a word or perhaps a sentence may be variously interpreted if it is open to more than one interpretation. This is different from the mushtarak problem because the variety of interpretations in the mushtarak case is due to different 'original' meanings whereas the variety of interpretations in the present case occurs because it is subject to many possible interpretations. I hope that through one example this particular cause of conflict can be understood. I would like to bring forward the dispute over the zakat of associates (zakat al-

58 Ibid.
60 Al-Khin, Ikhtilaf, pp. 72-77; al-Dārinī, al-Manāhīj, pp. 89-90; al-As‘adī, Uṣūl, p. 73.
khaliţayn) to demonstrate the idea. The jurists unanimously agreed that a person whose property is of zakatable amount (nisab) is required to pay zakat. However, the jurists disagreed upon whether zakat is obligatory on property which is of zakatable amount only when the said property is distributed between two persons or associates. The cause of legal conflict is said to be a phrase in a tradition which reads, "Those separated should not be gathered together, nor should those gathered together be separated in order to avoid paying zakat; those gathered together must be equally divided between two owners". 62

As regards the first part of the tradition, "Those separated should not be gathered together", al-Shafti interprets it by citing the example of two persons; one of whom owns one hundred sheep, while the other has one hundred and one sheep. The amount of zakat to be paid is three ewes when the sheep of both are gathered together but only two ewes, one from each, if they are separated. However, it is clear from the tradition, al-Shafti argues, that each of them has to pay zakat for himself independently, for what is separated should not be gathered. 63 That is so because it is commonly understood that if the sheep number between forty and one hundred and twenty head, the owner has to pay one ewe only. On anything above that, up to two hundred head, two ewes. On anything above that, for every one hundred, one ewe. 64 Al-Shafti then interprets the second part of the tradition by giving the example of three owners who possess collectively one hundred and twenty sheep or goats. They have to pay one ewe only to fulfil the zakat requirement. 65 However,

when this collective amount is equally divided between these three owners, every one of them must pay one ewe each which makes the total to be paid three ewes. In this case, al-Shafi‘i opines that this collective ownership should not be separated, as is implied by the second part of the tradition, “those gathered together cannot be separated”, provided that the sheep share one herdsman, one male animal, one pasture and one watering-place.

Malik has another interpretation. The phrase “Those separated should not be gathered together”, according to him, means, for instance, that if there is a group of three men, each of whom has forty sheep and goats, each of them thus has to pay zakat. Then, when the zakat collector is on his way, they gather their flocks together so that they owe only one ewe between them. They are forbidden to do so. By the phrase, “nor should those gathered be separated”, he means, for instance, that there are two associates, each of whom has a hundred and one sheep or goats, and they must therefore pay three ewes by virtue of collective property. Then, when the zakat collector is on his way, they split up their flocks so that they have to pay only one ewe each. They are forbidden to do so.

The Hanafis also come out with their own interpretation. According to them, the first part of the tradition refers to the separation of ownership and not to place i.e. farm. For instance, if two persons possess forty sheep each, they are not allowed to gather their sheep so as to avoid paying two ewes. Instead, each of them is responsible for the amount of

66 Ibid.
67 Al-Shafi‘i, al-Umm, vol. 2, p. 13 ; Nayl al-Awfi, vol. 4, p. 188.
69 Ibid.
sheep he possesses. For the other part of the tradition, they quote the example of one who possesses eighty sheep. In this case, he is not required to separate his sheep into two groups which would require two instead of one ewe in terms of paying zakāt. As we have seen, the statement of the Prophet in this tradition has produced many possible interpretations followed by different examples. This shows adequately how some words or sentences in legal texts could leave the way open to disagreement.

The last major cause of ikhtilāf however, is intimately related with the second source of Islamic law, namely the Sunnah of the Prophet. Although the rule that the Sunnah must be followed was a basic part of Islamic belief accepted among Muslims, different methods of testing whether a particular transmission was actually the Sunnah were in existence. As a matter of fact, conflicting views in fiqh are largely due to the Sunnah and its discussion. Conflicts are due sometimes to the contradictory principles laid down by the jurists to assess the reliability of every individual tradition and sometimes by the natural weakness of human ability to know all the traditions concerning legal precepts. This stage of discussion concerns the latter case only since this is an inevitable cause.

Ibn Taymiyyah, in his excellent work entitled Raf ` al-Mulām `an al-Ā'immah al-A`īm, has successfully drawn a clear example of how the jurists should be excused for their lack of knowledge of all the traditions from the Prophet which would lead to legal disagreement. He has emphasised that even the great Companions were not acquainted with

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detailed knowledge of the Sunnah of the Prophet, as is evident from many cases and incidents. Therefore, many legal decisions were eventually found in conflict with many ahadith for these ahadith were unknown to those jurists. Many relevant examples of this will appear throughout the following chapters. To be fair to the discussion, I shall cite one example which might shed some light on this matter. The case belonged to the Companion period after the demise of the Prophet. Ibn `Abbās and 'Āli b. Abī Talib were reported to have opined that a woman whose husband has died while she is pregnant must observe the longer period of two 'iddahs i.e. the longer between the 'iddah of those whose husbands have died which is four months and ten days (Q. 2: 234) or the 'iddah in the case of pregnancy which is determined only by giving birth (Q. 65:4). This view appears to be the most preferable among some jurists for it provides an intermediate solution (i.e. reconciliation) between

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Ahmad Muḥammad Shakir, the editor of al-Risalah, has pointed out one example where al-Shafī’ī knew one reliable transmission but was ignorant of other reliable ways of transmission on the same issue. See al-Risalah, p. 228, note no. 2.

72 The anecdote of the exchange between Malik and the Caliph al-Mangūr or Harun al-Rashīd is an obvious example of this. Malik refused to make his Muwattā’ a compulsory reference for the entire ummah arguing, among other points, that since the Companions had spread, some had heard ahadith of the Prophet that were unknown to others in other localities. (See Hujjat Allāh, vol. 1, p. 145)

For details, see Guraya, "Historical background to the compilation of the Muwattā’ of Malik b. Anas", in IS, vol. 7, 1968, pp. 384-386. (cited after as "Compilation")

73 Raf' al-Mulām, p. 9; al-Sarakhsi, al-Mabsūt, vol. 6, p. 3; Origins, p. 225.
two contrary 'iddahs prescribed in the Qurʾān. Even so, this conflict, strictly speaking, is impossible to exist in fiqh, since there is a clear evidence from the Sunnah of the Prophet to indicate the contrary. It has been reported that a woman from the tribe of Aslam known as Subay'ah al-Aslamiyah whose husband died, came to the Prophet after giving birth, shortly after her husband's death, seeking permission to marry another person and the Prophet had no objection. This report gives the clear impression that "the longer period of two 'iddahs" was of no legal significance in this case since the Prophet himself did not impose any such prescription. The conflict occurred, from my point of view, because the jurists, including these two eminent Companions, were ignorant of this report.

As regards our study of inevitable causes of conflict, I must say that more explanations and examples of them are available in a variety of situations throughout the following chapters. Leaving aside this part of the discussion, we can proceed to another part. This part is too wide and complex a topic to be able to discuss here in detail all the principles which might produce ikhtilaṭ in fiqh. Again, our discussion will be limited to an examination of the major principles which are believed to be common and obvious.

The first problem which often poses itself is the so-called hierarchical order of legal sources. The absence of a standard and agreed hierarchical order of legal sources would create conflict in fiqh for the

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schools of law and even the individual jurists often had a view of a hierarchy for confirmation of the materials they used. Priority was given, as is apparently observed, to those materials which would make their respective views prevail in cases of conflict. Al-Shafi'i, for example, throughout his treatises, came to conclude that the cause of legal conflicts was the unsystematic method employed by his predecessors, in handling the materials they used to document their doctrines. He asserted that fiqh doctrine should be based on or derived from the four sorts of evidence namely the Qur'an, the Sunnah, ijma' and qiyas and that the hierarchical order of these elements should be strictly observed. Hence, we find him on many occasions criticising his opponents for taking the evidence from the bottom and not from the top of the hierarchy.

Al-Shafi'i's proposal appears to be ideal in theory but not in practice. In the practical sense, however, one finds great difficulty in confining oneself to this hierarchical order of evidence for they are neither sharply defined nor constantly applied. His theory was no longer followed generally by his adherents let alone his opponents. For instance, he places ijma' below the khabar al-wahid while some of his eminent followers such as al-Ghazali consider ijma' as the most important source of religion even over the Qur'an and the Sunnah. More surprisingly, on many occasions, al-Shafi'i himself was inconsistent in applying this

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77 Ibid.
78 Abu Zahrah, al-Shafi'i, p. 28.
79 Al-Risalah, para. 1816f (see particularly note no. 10)
80 Al-Mustasfa, vol. 2, p. 393. See also Irshad, p. 78.
hierarchical order.\(^{81}\) We have no intention of studying this hierarchical order in depth, rather we will suggest that the absence of this order may cause many conflicts in fiqh. It is hoped that the comprehensive result of the present work, as will be suggested in the last chapter, will contribute to the re-systematisation of the proper hierarchical order of legal sources for the sake of tar\(j\)ih or even for the benefit of fresh ijtihad on new cases.

The second problem is related to ra\'y.\(^{82}\) Even though ra\'y or ijtihad holds a significant position in terms of legal interpretation, its application is somewhat vague and controversial. It is true that ra\'y or ijtihad is the well-considered and balanced opinion of someone who aspires to reach a correct decision. In other words, it is a decision which the mind arrives at after contemplative thought and a genuine search for truth in a case where indicators are conflicting.\(^{83}\) Its application however may lead to different conclusions which makes al-Shafi’i emphasise that the decisions taken on the basis of ijtihad are all correct ostensibly (z\(\ddot{a}\)hiran) although not really (b\(\ddot{a}\)\(\mathring{t}\)inan).\(^{84}\) It is exactly on this ground that the Shafi’is and the Malikis were in disagreement regarding the compensation for killing an animal during the pilgrimage. Q. 5:95, “Oh ye who believe! Kill no wild game while ye are on the pilgrimage. Whoso of you killeth it of set purpose he shall pay its forfeit in the equivalent of that which he hath killed...” demands that the obligatory compensation be the equivalent of the animal. The apparent meaning is, therefore, that if two persons jointly kill a deer, the compensation to be exacted is one goat regardless of the

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\(^{81}\) See page 337.

\(^{82}\) Al-Darînî, al-Manâhîj, p. 10; Khan, Islamic Jurisprudence, p. 121.

\(^{83}\) Ibn Qayyim, I’lâm, vol. 1, p. 66 Also see Kamali, "Ra’y", p. 40.

\(^{84}\) Al-Risâlah, para. 1332.
number of people involved. This was the view of the Shafi'is. In contrast, the Malikis decided that the compensation in this case should be two goats, one from each killer. They based this decision on analogy with the case where two persons are jointly involved in a single unintentional murder. In such a case, each of them is obliged to free a slave. 85

Further disagreement arose as a result of reliance on the controversial qiyas as well as on the more speculative iṣṭiḥsān, iṣṭiṣlah and iṣṭiṣḥāb. 86 Though speculative, ra'y or ijtihād possessed a crucial role in usūl al-fiqh for many reasons. This is largely due to the relatively small legislative element in the Qur'an. That is, of the whole Qur'an, no more than about eighty verses could be considered as having legal import. 87 Then the Sunnah of the Prophet further proved to be inadequate for the needs of the expanding society where ijtihād is the only means to cope with new unprecedented cases. 88 Mention should be made that even in cases which are provided with legal texts, ra'y or ijtihād remain necessary in order to arrive at the intended meaning. In response to these, the schools of law employ different methods of reasoning which can be discriminated from each other. As will be elaborated later, methods of

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For details, see Khallaf, Uṣūl, pp. 32-33; Tahir Mahmood, "Law in the Qur'an - a draft code", in ICLQ, vol. 7, 1987, passim.
reasoning such as *qiyyas*, *ta'wil*, *istihsan*, *istișlah*, etc., are often critically disputed for they might suggest an arbitrary argument.\(^{89}\)

Alongside these two major causes, lies, however, the most influential cause leading to legal conflict. As a matter of fact, this has dominated the discussion of *ikhtilaṭ* throughout the centuries. It concerns the second source of Islamic law namely the *Sunnah* of the Prophet or more particularly the so-called *khabar āḥād* of the *Sunnah*. The rationale behind this is that the Qur’an, being the first source of law is well known to all jurists especially those verses which directly treat legal aspects. The situation, however, is different with *ḥadīth*. Some jurists dispute the authenticity of some particular *ḥadīth* for one reason or another or they are not aware of some *ḥadīths*, which obviously leads to different legal conclusions.\(^{90}\) We have to admit that a large number of the traditions are *āḥād* \(^{91}\) and therefore are unanimously considered as speculative (*zanni*) in terms of isnād or meaning or both.\(^{92}\) Transmitted by a small number of transmitters, as opposed to the *mutawātir*, its degree of transmission is merely probable, as error is possible on the part of transmitters. Besides, its implication is also probable when it is susceptible to a variety or may give rise to a multiplicity of views. We should have a clear picture in our mind that the overwhelming number of legal traditions are *āḥād* and therefore any dispute or conflict that arises over their authenticity should

\(^{89}\) See the second part of the coming chapter.


\(^{91}\) *Al-Muswaddah*, p. 520; Weiss, "The primacy of revelation in classical Islamic legal theory as expounded by Sayf al-Dīn al-Āmidī", in *SI*, vol. 59, 1984, p. 90.

\(^{92}\) *Al-Turkī*, *Ikhtilaṭ*, p. 26; Calder, "*Ikhtilaṭ* and *ijma* in Shaftī’s *Risala*", in *SI*, vol. 58, 1983, pp. 60, 61 (cited after as "*Ikhtilaṭ*")
not surprise us. It is precisely to this effect, that every school of law required certain conditions to confirm the reliability of this sort of tradition.

We may begin with the Hanafis. Among other things, they contend that the narrator’s action should not contradict his narration.\(^{93}\) It is on this ground, for example, that they do not rely on the following hadith, narrated by Abū Hurayrah:\(^{94}\) “When a dog licks a dish, wash it seven times, one of which must be with clean sand”\(^{94}\) for Abū Hurayrah has not acted upon it himself.\(^{95}\) They also demand that the subject matter of ahad is not such that would necessitate its knowledge by a vast number of people. The argument is that if the hadith were true, it would not have failed to attain wide circulation or general use, considering that it concerns a matter which was supposed to be known by hundreds or thousands of people. The hadith, for example, “Anyone who touches his penis, must retake a fresh ablution”\(^{96}\) is not accepted by the Hanafis for it would have become an established practice among all Muslims which is not the case.\(^{97}\)


\(^{94}\) Muslim, Sahih, vol. 1, p. 161.

\(^{95}\) Al-Tahawi, Sharh, vol. 1, pp. 2-23; Abu Zahrah, Usul, p. 109.


This argument is known as *umum al-balwa*. It argues that the subject matter of the tradition which would necessitate the knowledge of a vast number of people, should be reported by many reporters accordingly. Otherwise, it is suspected. See al-Mustagfa, vol. 1, p. 171f; Ibn Hazm, al-Ihkam, vol. 1, p. 104f; Musallam, vol. 2, p. 126.
In addition, they further maintain that if his narration contradicts qiyās, the narrator of āhād must be a faqīh. Otherwise, his narration is abandoned in favour of qiyās. 98 For example, they do not take the following hadīth into consideration for it contradicts qiyās. The hadīth - reported by Abū Hurayrah - reads, “Do not retain milk in the udders of a camel or goat so as to exaggerate its yield. Anyone who buys a musarrāt has the choice, after having milked it, either to keep it, or to return it with a quantity i.e. a sā‘ of dates”. 99 This hadīth is held to be contrary to analogy with the rule of equality between indemnity and loss. Abū Hanīfah opines that the sā‘ of dates may not be equal in value to the amount of milk the buyer has consumed. Hence if the buyer wishes to return the beast, he must return it with the cost of the milk which was in its udders at the time of purchase, not with a fixed quantity of dates. 100

All of the above legal conclusions constructed by the Hanafis are found to oppose other schools of law owing to the special conditions laid down by the Hanafis alone. In other words, jurists other than the Hanafis accept all the prescriptions in these āhādīth because they did not examine these āhādīth from the standpoint of the Hanafis. 101 This feature is very common in fiqh. These principles have been widely adopted by the Hanafis either to select or to reject a particular hadīth. On the other hand, the


One scholar attempted to justify this by saying that the hadīth did not reach Abū Hanīfah. Otherwise, he would have regarded the qiyās as istiḥsān since the analogy contradicted the hadīth. (Khādāri, Tarikh al-Tashrī‘, p. 147, as cited in al-Thaqāfī, al-Fiqh al-Hanbali, vol. 1, pp. 44-45)

101 Ibid.
Malikis also have another method to confirm the reliability of *khabar  ahad*. They say that if a tradition of the Prophet is transmitted by only one transmitter and was found to be in opposition to an established practice in Medina, the Medinese practice was preferred and regarded as being more authoritative,\textsuperscript{102} because the practice is a continuous tradition from the Prophet which represents the narration of thousands upon thousands of people until it reaches the Prophet.\textsuperscript{103} The Malikis were thus reported to refuse to follow the *hadith* regarding the option of cancellation (*khiyar al-majlis*) which provides that "parties to a sale are free to change their minds so long as they have not left the meeting of the contract".\textsuperscript{104} It has been said that the reason behind this is that the implication of the *hadith* is contrary to the practice of the people of Madinah.\textsuperscript{105}

On reflection, however, it seems that these conditions are directed towards dealing with conflict between two *khabar  ahad* as well as to examining the reliability of solitary traditions. In conflict between two sorts of tradition related on the authority of the Prophet; the tradition accompanied by practice should be adopted over the one which is not accompanied by the practice.\textsuperscript{106} This applies, to some extent, to the conditions held by the Hanafis as well. In other words, we can say that these conditions are frequently adopted as a means to preferring a particular tradition over the other.\textsuperscript{107} I will look in detail at this critical phenomenon in chapter seven. It should be noticed also that *tarjih*, by

\textsuperscript{102} *Origins*, p. 64.
\textsuperscript{103} *Al-Muqaddimah*, vol. 3, p. 7; *al-Fikr al-Samii*, vol. 1, p. 51.
\textsuperscript{104} *Al-Muwatta'*(Y), vol. 2, p. 671.
\textsuperscript{105} *Al-Shafii*, *Ikhtilaaf Malik*, p. 219-220.
\textsuperscript{106} *Al-A'zami*, *On Schacht*, p. 58.
\textsuperscript{107} Ibid.
this explanation, though originally designed to remove legal conflict, is also one of the major causes leading to legal disagreement and accordingly legal conflict.\textsuperscript{108}

Anyone looking deeper into this problem will find that causes of this type are totally unlimited. Many legal schools have their own 'procedures' in establishing the law. Among other procedures, the Hanafis, for instance, have arrived at two degrees of legal rulings namely \textit{fard} (extra obligation) and \textit{wājib} (normal obligation). In short, they hold to a special legal thought that \textit{fard} can be formed only through the \textit{Qur'ān}. Obligation established through the \textit{Sunnah} is merely \textit{wājib} which is lower than that of \textit{fard}.\textsuperscript{109} Precisely on this ground, they contend that to recite the \textit{Fatihah} in the ritual prayer is merely \textit{wājib}; the prayer of those who did not recite this particular chapter, remains valid. But to recite any verse of the \textit{Qur'ān} is obligatory to the effect that ritual prayer is invalid if any verse of the \textit{Qur'ān} is not recited purposely in that prayer. They argue so, because an order to recite the \textit{Fatihah} is established merely by a \textit{hadīth} whereas an obligation to recite any verse is extracted from the \textit{Qur'ān}.\textsuperscript{110}

Also, the Hanafis are renowned for their principle that the generality of the \textit{Qur'ān} (\textit{umūm al-Qur'ān}) cannot be specified or restricted

\textsuperscript{109} See al-As'ādī, \textit{Usūl}, p. 257.
\textsuperscript{110} Nayl al-Ausūr, vol. 1, p.230.
by a tradition which is ḥadīth. Therefore when a hadīth is reported to have permitted one witness and the oath of the plaintiff in terms of legal procedure of evidence in the courts, the hadīth is left aside because it contradicts the Qur'anic provision that fixes the minimum number of witnesses at two men or one man and two women. However, on other occasions, the Hanafis may either qualify or restrict the Qur'anic injunction by a single narration even though this procedure, theoretically and in principle, is not accepted by them. On the question related to the punishment for adultery in enemy land, Abu Ḥanīfah qualified Q. 24:2, "The adulterer and the adulteress, scourge ye each one of them (with) a hundred stripes", arguing that this punishment cannot be carried out when adultery took place in enemy territory, for the verse has been modified by the following tradition, "The divinely prescribed punishments will not be enforced in an enemy land". Though the hadīth is ḥadīth, the Hanafis have accepted this restriction but called it a well-known hadīth (mashhūr) instead of a single narration. These procedures and the like (particularly inconsistency in applying them) would naturally bring many contradictions in fiqh.

The Hanbalis also have these special procedures. Among others, they prefer to take any weak hadīth into consideration for it is believed to be more reliable than human legal opinion. Ahmad b. Ḥanbal is

111 Al-Mankhūl, p. 173, note no. 1; al-Bājī, Iḥkām, p. 167, note no. 3; al-Thaqāfī, al-Ziyādah 'ala al-nass", in AS, vol. 15, 1404 H, p. 257 (cited after as" al-Ziyādah")
114 Ibid.
reported to have said that "a weak hadīth is better for us than the ra'y of men". The remaining jurists are not of the same view, however. Again, this variety of procedures would bring conflict. As regards principles or procedures of other jurists, increasing numbers of relevant examples will appear in the coming chapters.

Before we proceed to discuss the so-called "ever lasting cause of conflict" i.e. maslahah, I have to indicate that there are sources of law and principles of legal reasoning which some of the Sunni schools accept and others do not. Regarding those sources which they all accept, each school agrees, for example, on the definition of what the Qurān is. However, when they consider other sources of law and principles of legal reasoning such as hadīth, ijmā', qiyyās, istihsān, istislah, or maslahah, 'urf, qawl al-sahābi, sadd al-dharā'i, naskh, takhfsīs and so forth, we find differences among them in definition, not to mention differences regarding authoritativeness, interpretation and application of each. Accordingly, disagreement is bound to take place in fiqh. For example, the Hanafis approve "bay' al-wafā" (i.e. a sale subject to future redemption) on the account of people's need for it. This was done in contradiction to the principle of analogy and in accordance with the principle of istihsān.

117 See al-Qastmī, al-Qawā'id, pp. 113-114.

It is interesting to point out that al-Dawalībī was aware of this phenomenon to the extent he named various chapters in his book as "al-khilaṣ fi al-Sunnah", "al-khilāfī al-ra'y ", etc. (Usūl, pp. 256-346)
principle peculiar to the Hanafi school of law". On the whole, there have always been fundamental and distinctive differences between the legal theories of the four Sunni schools that would open the way for disagreement in the body of Islamic law. Another example refers to the Zahiris who do not regard *qiyaṣ* as a source of law. Other schools which regard *qiyaṣ* as a source accept rulings and judgements made from *qiyaṣ* which may lead, therefore, to conclusions different from those of the Zahiris.

The problem of *maslahah*, regarded as one of the capital causes of legal disagreement, will be the last concern of the present study. We have to say that *maslahah* is an intermediate type in terms of the nature of causes of legal conflict, for it is inevitable from one point and is widely affected by principles held by the jurists from another. No doubt the jurists are concerned with the observance of the *maslahah* which differs according to time and place. It has been stated that there is no objection to the change of the *hukm* to accord with the changes in time, place, circumstance, intention and custom. More significantly, custom, although not recognised theoretically as a major source of Islamic law, has been observed by scholars to have not only played an important role in

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the growth of Islamic law but also to have always coexisted with the law.\textsuperscript{123}

Similar to the above, the failure to study and to consider the effective causes of legal rules may invite disagreement in \textit{fiqh}. Many jurists like Ibn 'Abd al-Salam, Ibn al-Qayyim and al-Sh\textacuted{a}bi\textadetilde{} agreed that legal rules are based on causes and purposes “all of which are founded on the interests of human beings in this life and the life here-after”.\textsuperscript{124} Consequently all rules, even those based on legal texts, should cease to apply when the effective cause on which they are based, no longer exists.\textsuperscript{125} As a logical result of this principle, legal rules are altered with the change of their effective causes and purposes. Therefore, since legal rulings are largely constructed on the basis of \textit{maslahah} and causes that are variable according to many factors such as custom, conditions and circumstances, we find many scholars changing their decisions whenever it appears that these no longer suit public welfare. The fact that al-Sh\textacuted{a}fi\textadetilde{} who is famous for his ‘old doctrine’ and his ‘new doctrine’ (the latter constructed when he moved to Egypt after leaving Iraq) may be mainly related to the change of the \textit{maslahah} in these two different geographical localities.\textsuperscript{126}

The same consequence would apply to other jurists in other different locations since needs and circumstances vary from country to country.\textsuperscript{127} As a result, conflict is easy to understand. By way of example,

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\item\textsuperscript{123} Ibid.; Ibn Qayyim, \textit{Il\textadetilde{am}}, vol. 3, p. 89. See also Rayner, \textit{Contract}, p. 34.
\item\textsuperscript{124} Mahmassani, “Renaissance”, p. 197.
\item\textsuperscript{125} Ibid.
\item\textsuperscript{126} Mahmassani, \textit{Falsafah}, p. 107.
\item\textsuperscript{127} Isma'\textadetilde{i}, \textit{al-Adillah}, pp. 405 ff.
\end{enumerate}
I will cite the problem of testimony in terms of witnessing before the courts. Abu Ḥanīfah, in accordance with his time, did not require anything except an apparent 'adālah i.e. acceptability as witness, in cases other than al-hudūd and al-qisas. His two distinguished disciples, Abu Yūsuf and al-Shaybānī, however, required additional procedures whereby every witness should be recommended by a reliable person (tazkiyyah) before he or she could appear before the courts to give his or her witness. It is necessary to impose such a procedure for the conditions in their time were not the same as in that of Abu Ḥanīfah. People were no longer to be immediately accepted as qualified witnesses. In order to safeguard people's interests, this procedure was adopted to meet the changing needs and interests.\textsuperscript{128}

In terms of concluding remarks, I would like to note that īkhtilāf or ta'āruf are inevitable in many cases for several reasons. Some of them are totally unavoidable such as the different readings of the Qur'ān, the use of reasoning and the like as previously mentioned. We have seen also that in some cases, īkhtilāf is caused by two conflicting pieces of evidence but in other cases, it is motivated rather by consideration of two different times and conditions. Therefore, as in the latter case, it is not a conflict of evidence but a conflict of time and circumstance.\textsuperscript{129} Mention should be made also that disagreement might sometimes be apparent for the variety of opinions are all acceptable in the view of Islam. This sort of disagreement is known as "āl-īkhtilāf min jihat al-mubahā".\textsuperscript{130} Many examples

\textsuperscript{128}Al-Zuhayrī, \textit{Uqūl}, vol. 2, pp. 835-836. For other examples, see Mahmassānī, \textit{Falsāfah}, p. 108.
\textsuperscript{129} Ibid., p. 837.
\textsuperscript{130} Al-Risālah, paras. 752-756; \textit{idem}, \textit{īkhtilāf al-Hadīth}, p. 488; \textit{Hujjat Allah}, vol. 1, p. 138.
could be adduced here but one example might be sufficient. In the case of conflicting traditions on the number of time that one should wash in ablution i.e. one or three times, the jurists have opined that one is free to wash three times or just once.131

Others are relatively 'man-made' but they deserve no condemnation. For people differ from one another in knowledge, reasoning and the capacity to understand the texts and their attendant problems.132 In addition, these conditions are laid down by every school of law to ensure that every argument has a proper foundation. "Whether these principles actually lead to something more accurate is another question, the point is that great efforts were made to work out methods of interpretation which were presumed suitable for application in fiqh and its usul. This is very common not only in fiqh but also in modern law, for both assume, though on different grounds, that men are capable of learning the true nature of right and wrong and that having done so, they can elaborate their knowledge rationally and apply it to concrete situations".133

Thus, the declarations of the jurists, authoritative as they may be, are not characterized as being absolutely definitive. At most, they are statements of the jurists' opinion, a personal expression of what jurists

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This is, in fact, the title of one section in al-Shafi'i's Ikhtilaf al-Hadith. (ibid)  
131 Ikhtilaf al-Hadith, p. 488.  
132 Al-Zuhaylī, al-Fiqh, vol. 1, p. 68; Ma'sumī, "Ikhtilaf", p. 203.  
133 Kerr, Islamic Reform, p. 57.
think to be the Law of God.\textsuperscript{134} This is because the law requires interpretation of what is not self-evident. If all law were self-evident, there would be no need for interpretation; as there would be nothing to interpret.\textsuperscript{135} Thus, law contained in the great juristic works of Sunni Islam is at most a human approximation, albeit a close one, to the ideal Law of God.\textsuperscript{136} Since the fiqh is man's attempt to identify God's command, the detailed rules and regulations and principles are not necessarily immutable. Though not necessarily immutable, they are equally not to be ignored since they were best placed to offer authoritative interpretations consistent with the needs of their age. We have come to know that conflict is nothing other than two or more contrary opinions or arguments of the jurists attributed to a single case and not originally intended by the Law giver. Arguments and counter arguments therefore are not only natural but also a necessity to convince others that a particular legal conclusion is stronger and more relevant to what is actually intended by the Law giver.

I have to say also that all the causes discussed above have eventually led to a central problem which is ta\'arud or conflict itself. To put it differently, two different readings or two methods of reasoning or two considerations of maslahah, etc., would bring legal implications into conflict. Hence, conflict is one of the major discussions throughout the work. It is of interest also to re-emphasise that whenever there appears to be conflict in fiqh, one should know that one or the other conflicting


\textsuperscript{135} Ibid. Weiss, "Interpretation ", p. 203.

\textsuperscript{136} Ibid. See also al-Zuhayli, \textit{al-Fiqh}, vol. 1, p. 72.
pieces of evidence has been incorrectly understood or applied. This is a conviction of the imperfection of human reasoning and its ability to apprehend by its sole power the real nature of evidence implication. Therefore, it is the task of a murajih to detect this fault, which also represents the major discussion in the present work i.e. tarjih. Naturally and spontaneously, before any attempt to favour one evidence over the other is made, a considerable effort should be made first in looking closely for the cause of that conflict. Hence, the examination of conflict and its related discussion is not ended or limited in this particular chapter but will be extended throughout the following chapters.

In general, disagreements among schools were not on the whole related to basic principles and doctrines but rather to details as a result of diversity of interpretations and differences of views in applying principles to practical cases. Rather, the difference does not concern the faith itself, since there is no difference in regard to the Oneness of Allah, that Muhammad is the Messenger of Allah and that he is the last of the Prophets, nor are there any two opinions concerning the Qur'an that it is from Allah, and that it is the greatest miracle of the Prophet, nor on the fact that it has been handed down to us generation after generation through the ages unanimously, neither in the fundamentals like the five daily prayers, zakat, al-hajj and fasting, nor is there any big difference in the way they are performed. In short, there is no difference in any of the

139 Mahmassani, "Renaissance", p. 196.
For the list of literature on 'ilm al-ikhilaf see al-Migr, al-Khilaf, pp. 122-126; Ma'sumi, "Ikhilaf", pp. 215-219.
principles (al-arkan) of Islam, nor in what is regarded as purely religious, such as unlawfulness of wine, pork and carrion, or the general laws of inheritance. The difference only lies in matters which have no bearing on any pillar of dīn or the general principles of Islam.140

After all, in a constantly evolving world, the arrival of new occurrences requiring rulings which are not specified in the Qur'ān and the Sunnah is immanent. With these circumstances, it should not be surprising that today’s jurists will differ on some issues, such as economic and sociological concerns and so on. Regardless of the reasons that lead to diverse fiqhī opinions, the differences themselves should not be looked upon as being inherently evil; on the contrary, they can be a great help to overcome the unyielding rigidity which has stunted the growth and the contribution of the contemporary Muslim nation. In matters that needed to be looked at from a different angle and with different rational views in accordance with the teachings of the Qur'ān and the Sunnah, re-interpretation and re-examination of sources of law are deemed necessary.141 Moreover and above all, the existence of diversity of opinion was a reason for flexibility in Islamic jurisprudence as well as a cause of relief to the people. Thus, it was said, “Disagreements among jurists is the nation’s bliss”.142

140 Ma'sūmī, "Disagreement", p. 30; idem, "Ikhtilāf", p. 201.
141 Esposito, "Muslim family law reform : Towards an Islamic Methodology", in IS, vol. 15, 1976, p. 46. (cited after as "Reform")

‘Allāl-Qārī explained, "Divergence of opinion as to juridical matters is a mercy, as to matters of dogmatic and Islam it is error and innovation". (commentary of al-Fiqh al-Akbar, vol. 2, p. 100, as cited in The Muslim Creed, p. 113)
CHAPTER THREE
CHAPTER THREE

PART A

THE MEANING, HUKM AND CONDITIONS OF TARJĪH

The Meaning of Tarjīh.

Being a derivation of the root word rajahā, tarjīh literally means to make preponderate.¹ In Arabic, it is described as an infinitive noun for the transitive verb rajjahā, as clearly indicated in an Arabic expression "rajjahā ādhā ‘alā dhāka": he made this outweigh that.² Thus tarjīh indicates preponderation or preference which makes the balance of one thing heavier than the other. Accordingly, one scholar has mentioned that tarjīh literally means al-tamkīn wa al-taghīb.³ We understand from the above that tarjīh involves two sides of a balance, one being arjah which is heavier and the other marjuh which is outweighed, the latter in its proper usage meaning surpassed or excelled.⁴

Tarjīh in a technical sense, as well as other terms in Islamic legal theory, remained strictly undefined during the first stage of the development of usul literature.⁵ Although tarjīh is nowhere explicitly mentioned in early Islamic literature, I believe that the general concept of

² Ibid.
⁴ The opposite literal meaning of tarjīh is al-tajīf. (Kashī, vol. 4, p. 77)
⁵ See pages 6-7; 32-34.
In preferring what is more reliable was already well-known to the early scholars as previously indicated in chapter one.

Again in this context, we need to refer to the first available systematic book on usul al-fiqh in our attempt to trace the historical background as well as the meaning of tarjīh. In the Risālah, particularly in the discussion of the contradictory traditions, al-Shafi’ī gives a general view of tarjīh although his major theme is ta’ārūd. It is clear that al-Shafi’ī used "rejected and accepted" instead of "preferred" when dealing with two contradictory traditions. ⁶

In any case, we are able to acknowledge that such an understanding of tarjīh, i.e. to prefer one particular evidence over the other when they conflict, was acquired by al-Shafi’ī or even by the earlier scholars before the appearance of the Risālah. ⁷ Furthermore, other works of al-Shafi’ī such as Ikhtilaf al-Hadīth and Ikhtilaf Malik wa al-Shafi’ī, etc., suggest a similar impression. The major factor behind the absence of a strict legal term of tarjīh was that many terms were in use for a long time before they acquired a standard and technical mould of expression in the later stage. ⁸

Referring to usul writings, we find that the jurists have defined tarjīh variantly because they took different clues into their respective accounts. To begin with, I just quote what the jurists said about tarjīh.

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⁷ See for example, Abu Yusuf’s Kitāb al-Kharāj and al-Radd.
⁸ See page 13, note no. 40.
According to al-Rāzī, *ṭarjīḥ* technically is the strengthening of one side (*ṭaraf*) over the other side so that the superior (between) them can be known and applied while the other is discarded. However, al-Armawī who wrote an abridgement of al-Rāzī's *al-Maḥṣūl* defined *ṭarjīḥ* as the strengthening of one method (*ṭariq*) instead of one side (*ṭaraf*).

Likewise, the Hanafis also share the same point of view in terms of *ṭarjīḥ* being a strengthening. Having said this, most of them have added to the definition a clause that makes it differ significantly from the above. They contend that a strengthening must be determined by reference to the evidence itself. Otherwise i.e. when it is referred to extraneous or additional factors which might tip the balance in favour of either of them, it is not an appropriate *ṭarjīḥ*.

Alongside the approach taken by those scholars, some jurists described *ṭarjīḥ* as the accompaniment of one of the two contradictory

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9 *Al-Maḥṣūl*, vol. 2, pp. 443-444. See also *Nihayah*, vol. 3, pp. 211-212.

10 *Al-Tahsil*, vol. 2, p. 257.


*Ṭarjīḥ*, according to them, should be "*bi waṣf tabī'" or "*bima la yastaqīl"*. Therefore, in a conflict, for example, between two *ḥadīth*s, an attempt to prefer one over the other by considering another *ḥadīth* (i.e. the third *ḥadīth*) which confirms the meaning of the preferred *ḥadīth* is not valid. However, to prefer the one transmitted by a *faqīh* or a well-known over non-*faqīh* or suspected transmitter is a valid methodology of *ṭarjīḥ*. Further details, see *Kasāfa*, vol. 4, p. 79; al-*Taqrīr*, vol. 3, p. 3 and al-Sarakhsī, *Usūl*, vol. 2, p. 250ff.

Further explanation can be found in pages 323–331.
pieces of evidence by some characteristics which led to the accompanied evidence being applied while the other was left. By these two approaches of defining tarjih, we can say that tarjih, generally speaking, provides the methodology from which one can find out which of two parties is worthier of approval and which of two interpretations is closer to what is intended by the Lawgiver.

Most certainly, there are many observations to be taken into account before proceeding into greater depth. It appears that the jurists held different views regarding tarjih. Thus, their definitions are purposely designed to suit their particular viewpoint regarding the nature of tarjih.

From linguistic point of view, the strengthening (taqwiyyah) and the accompaniment (igtiran) indicate a clash of meanings, as the former considered tarjih as an action exercised by the mujtahid while the latter held that tarjih is merely an attribution, or, put another way, a characteristic attributed to one of the two contradictory pieces of evidence which might tip the balance in its favour. In this regard, one scholar attempted to distinguish these two views by saying that the former belongs to the Hanafis and the latter to the Shafi'is. This statement, however, contradicted the actual attitude taken by the jurists when they showed that they were not bound to commit themselves to the approach adopted by

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their fellows in a particular madhhab. Therefore, they had their own wording for tarjīh.\textsuperscript{15}

To conclude, as we shall see, it is certain that tarjīh, theoretically and practically, is an external practice performed by a qualified person, known as mujtahid. Hence, one should adhere to the point which states clearly that tarjīh is a practice exercised upon two contradictory pieces of evidence (i.e. taqwiyyah). However, the above disagreement, in my opinion, is merely superficial and of no real significance.\textsuperscript{16} No doubt, a mujtahid is unable to tend towards one evidence rather than the other, unless he has a proper basis to do so. Therefore, it is clear that both elements, namely the mujtahid and characteristics of a particular piece of evidence, are necessary in the process of tarjīh for one is baseless or useless without the other. However, the primary difference between the Hanafis and the Shafi‘is is accredited to the clause adduced by the Hanafis in the last part of the definition of tarjīh. Inspired by this clause, the Hanafis admit no validity of preference by virtue of "many". This difference will become more clear in chapter seven in which preference based on "many pieces of evidence" will be thoroughly examined.

It is apparent also that some of the jurists opine that contradiction does not occur between two dalīls.\textsuperscript{17} Therefore, they have adopted words such as tariq (method), taraf (side) and amarah (sign or

\textsuperscript{15} Note for example al-Juwaynī, an eminent Shafi‘i jurist, who defined tarjīh as a practice undertaken by a mujtahid which resembles Hanafi definition of tarjīh. (see al-Burhān, vol. 2, p. 1142)


mark) instead of *dālīl* in their definition of *tarjīḥ*.\(^\text{18}\) This gives the impression that these words were utilized by the jurists because they indicate speculative implication known as *zannī* which contrasts with definitive implication known as *qaṭī*'. Here *tarjīḥ* is inapplicable since it has only one meaning and admits of no other interpretations.\(^\text{19}\) Hence the only evidence that is applicable to *tarjīḥ* is the one which has not yet acquired a binding implication. The question of whether *tarjīḥ* is or is not applicable to *qaṭī* evidence has been briefly discussed in the foregoing chapter. As will be further elaborated soon, *tarjīḥ*, strictly speaking, is not applicable to *qaṭī* evidence (at least in theory). However, as will be shown throughout the thesis, both *qaṭī* and *zannī* evidence are neither sharply defined nor constantly applied in the works of *usūl*. Moreover, the distinction between the two, on many occasions, is influenced by *madhhab* contention rather than by concrete argument.

It is interesting also to note that the jurists have stated, as is evident from the definition, that *tarjīḥ* aims at reaching the strongest certain legal opinion (*li yu’lām al-aqwā*). By this, they appear to contradict themselves when they first stated that *tarjīḥ* is only confined to the *zannī* evidence whose result cannot be regarded as *qaṭī*. In my opinion, the results of *tarjīḥ* in any cases of contradiction are no more than a presumptive or more probable implication thus liable to be argued. Accordingly, I would like to suggest the definition advanced by al-Juwaynī as the most precise definition for it is more relevant and parallel to the nature of *tarjīḥ*. He clearly stated that *tarjīḥ* is merely a speculative

\(^{18}\) *Irshād*, p. 273.

preferability of some amārat (signs) over the others. This means that a particular conclusion reached by tarjīḥ, in one way or another, could be challenged and rejected by another contrary strengthening because its implication is merely more likely or probable. In conclusion, tarjīḥ is nothing other than a systematic effort by a mujtahid called a murajjih to show that one of the two conflicting pieces of evidence or arguments should be given more credence than the other for it is the more likely legal consequence.

Before moving to other parts of the discussion, it seems necessary to devote some paragraphs to the relationship between tarjīḥ and the so-called fiqh muqāran i.e. comparative study of Islamic law. On the one hand, one may argue that the latter is only another name for tarjīḥ, for both are interchangeably used to indicate a process of evaluation or refinement of different legal rulings to arrive at the most acceptable. Or one may argue the contrary. Generally speaking, fiqh muqāran has two distinctive meanings in legal study. The first lies in the fact that it is merely collection and composition of varying legal opinions of cases in fiqh without attempting to evaluate the bases of these rulings. The second goes beyond this phenomenon whereby the collection of different legal rulings is always followed by an evaluation of legal bases of these rulings seeking a proper opinion (arjaḥ).

The second meaning of fiqh muqāran, to a greater extent, is identical to tarjīḥ in the point that the two share the same subject matter

21 Al-Mankhūl, p. 426.
i.e. *fiqh*. Also, both involve a process of evaluation. Nevertheless, it is *tarjih* that constitutes the kernel of *fiqh muqāran* for without *tarjih* i.e. evaluation, *fiqh* is no longer comparative. In short, *tarjih* is the tool or instrument required to access a comparative study of *fiqh*. The relationship between the two can be illustrated by saying that, since *tarjih* is a comparative study of *usul al-fiqh*, it is devoted to discussing comparative study of *fiqh*. Many classical works have been carried out to undertake the task of comparative study of *fiqh* in Islam. At the later stage, it becomes a distinct study of *fiqh* in the way that only some of the jurists are capable of producing this type of composition. Those who are qualified are commonly known as *ashāb al-tarjih* or *ashāb al-tashīh*. By this, it is quite clear that *fiqh muqāran* is a reflection of *tarjih* or rather, it is the practical implementation of *tarjih* to conflicting cases in Islamic law. In other words, the difference between the two is an epistemological one; *tarjih* is the mechanism through which comparative study of *fiqh* is conducted.

23 Ibid., pp. 46-47.

24 This is my personal conclusion since *tarjih*, from the viewpoint of legal theory, would dominate the entire discussion of *al-fiqh al-muqaran*. See ibid. In this respect, one scholar has noted that in order to produce a qualified *murajij*, faculties of Shari'ah in Egypt have now introduced the subject of *fiqh muqāran* to the students. See Ahmad Fahmi Abu Sinnah, "Taqdim al-maglahah al-muqlaqah 'ala al-Qur'an wa al-Sunnah", in MA, vol. 62, Mei 1990, p. 1026.

The Hukm 26 of Tarjīḥ

In this part of our discussion, we shall examine the question of the validity of tarjīḥ as viewed by the jurists. Our main aim will be the clarification of this principle in terms of validity or invalidity in removing any cases of legal contradiction. For this purpose, we shall consult the ideas which were expressed in the classical books of usūl.

Generally speaking, a detailed survey of this matter has revealed that the jurists were not of the same view regarding the matter. This prompts us to elaborate this disagreement more and the arguments adduced by each side in order to justify their points of view. In this context, it has been said that disagreement occurred between the majority and some unnamed jurists.27

The majority of jurists or simply the jumhūr were of the opinion that tarjīḥ is legally valid and moreover, an obligatory practice to be undertaken with reference to the most explicit indication, called ṭajīḥ.28 Some unnamed jurists who contended that tarjīḥ is an unacceptable method of solving conflicting pieces of evidence have raised however, an

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26 For the meaning of hukm, see page 55, note no. 21.
objection to the applicability of *tarjīḥ*. Instead of *tarjīḥ*, the so-called *takhyīr* and/or *tawaqquf* should be applied in such cases.

To arrive at a sound judgement, the primary task is to study all the arguments presented by both sides. The *jumhūr*, in order to maintain their point of view, have referred to the practice of the Companions. Their aim is to show that *tarjīḥ* was commonly accepted and practised by the Companions arguing that if *tarjīḥ* was illegal, the Companions would certainly have abstained from practising it.

To this purpose, several instances and incidents have been frequently quoted. One scholar has remarked that the *salaf* were unanimously agreed on the need to grant preference to some solitary tradition i.e. transmitted by a single person, over other transmissions for example, in a case when it is reported on the authority of the Prophet’s wives over the one reported by other women or even over the report which came through a well-known transmitter like Abu Hurayrah, provided that all the contradictory *ahadīth* concern the Prophet’s family affairs. ‘Ā’ishah and Umm Salamah, for example, reported that the Prophet used to start fasting in the morning when he was still in a state of *janābāh* (ritually impure). Abu Hurayrah, however, reported from the Prophet that

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30 Ibid.


such a fast is invalid; "man aqṣabha junuban fālā gauma lahu". The jurists, however, preferred the one which is reported by the Prophet's wives because as stated by al-Āmidī, the Prophet's wives were the persons most likely to know what is actually said or done by the Prophet particularly in such private matters.

The case of the "grandmother's succession" which happened in Abu Bakr's time was fully exploited in favour of the validity of tarjīḥ. It was reported that Abu Bakr refused to give a "grandmother" any portion of the estate in terms of the law of succession even though he had been reminded of a hadīth from al-Mughīraḥ informing him of the Prophet's decision. However, after this particular hadīth had been strengthened by Muḥammad b. Maslamah's testimony, Abu Bakr gave her one-sixth of the property of the deceased. Another similar event occurred between 'Umar, the second Caliph, and Abu Musa al-Ash'arī concerning the salām (greeting) and permission to enter the house. Abu Musa is reported to have gone to 'Umar's house and asked three times for permission to enter the house but there was no reply. Then, Abu Musa went away without entering 'Umar's house. On the next day, 'Umar asked him about his failure to come to the house and Abu Musa simply replied with a hadīth that the Prophet had obliged those who had not been permitted after asking permission three times to enter one's house to return home. This report did not convince 'Umar. However, when this report was further supported

34 Ibid.
35 Ibid. See also Subul al-Salām, vol. 1, p. 165.
by similar report from Abu Sa'id al-Khudri, 'Umar accepted the excuse of Abu Musa.37

The jumhūr have concluded from the above incidents that the ḥammi evidence i.e. hadīth ʿahd prevails and must be taken into account when it is strengthened by another element as shown by the agreed practice of the Companions.38 In addition to what has been presented, the jumhūr also based their argumentation on external considerations. According to them, one is required to prefer the most explicit indication (rajīh or arjah) in cases of conflict. This attitude, indeed, is supported by a legal inspiration conveyed by a hadīth; "What is considered good by the Muslims is also good in the eyes of Allah".39 Furthermore, any abstention from such a practice may necessarily signify preference for the preponderated (marjūḥ). Obviously, to prefer marjūḥ is unreasonable and unacceptable because the Shari‘ah was not based on marjūḥ but on the most reliable evidence, called arjah.40

As previously mentioned, some unnamed jurists have suggested that takhyīr and/or tawaqquf be applied whenever there appears to be a conflict. Tarjīh, in their view, is invalid. Accordingly, I have looked through most of the available books on usūl but the only name mentioned as the representative of this point of view was al-Bāṣrī, the author of ḥ-

37 Ibid.
38 Ibid.
This is often quoted to be a hadīth of the Prophet. It is, however, more likely to be a saying of Ibn Mas'ud. (See Ahmad Hasan, Ijmā', p. 37)
40 Muntahā, p. 222; Irshād, p. 274.
Mu'tamad.\textsuperscript{41} It became more complicated when al-Juwaynī openly refuted this claim by saying that he himself could not find such an opinion in any of al-Bāṣrī's writings even though he had attempted to trace it.\textsuperscript{42}

In spite of our ignorance about those who held this view, I still intend to examine all the arguments used to invalidate tarjih as a legitimate solution in legal conflict. The principal argument was based on what "they" called the similarity between tarjih and shahādah or bayyinah.\textsuperscript{43} The latter is the process of reporting or justifying a case in court which is considered as zanni evidence. To this effect, tarjih and shahādah are alike. Thus, since a single shahādah, in terms of the Islamic law of evidence should not be approved over another, the same rule applies to tarjih. As a result, a qādi in court must pass judgement based on even a single complete shahādah without any hesitation as long as that particular shahādah is valid in accordance with the shahādah requirements.\textsuperscript{44} Similarly, a mujtahid is allowed to select and adopt any conflicting legal opinions without looking first for any strengthening or extraneous support as long as that particular opinion has an adequate legal basis. In other words, there is no harm in doing so since tarjih is equivalent to testimony.

\textsuperscript{41} Al-Mankhūl, p. 426.

Al-Jabūrī, the editor of al-Bājī's Iḥkām, has explained that the attribution of this attitude to al-Bāṣrī was made by al-Ghazālī alone in his Mankhūl. According to many usul works, this attribution, however, should go to Abu 'Abd Allāh al-Bāṣrī al-Mu'tazīlī known as al-Ju'l, and not to al-Bāṣrī, the author of al-Mu'tamad. (see al-Bājī, Iḥkām, p. 645, note no. 2)

\textsuperscript{42} Al-Burḥan, vol. 2, p. 1142.


\textsuperscript{44} Ibid.
It is also recorded that the opponents of *tarjīh* claimed that even the Prophet himself had passed judgement based on the *zāhir* when he said; "We pass our judgement based on the *zāhir* (*nahkum bi al-zawāhir*)." Moreover, they have interpreted the word *zāhir* as *marjūh* and therefore, the tradition clearly shows the validity of applying the *marjūh* instead of the *rajih* or *arjah*. Not only that, a Qur'anic verse (*Q. 59:2*) which reads as follows: "So learn a lesson, O ye who have eyes", is quoted to support their viewpoint. The verse urges Muslims to take stock of everything or to take *i'tibār* on any matter. According to them, the verse obliges us only to have a general consideration without any further searching for the purpose of strengthening.

Nevertheless, the *jumhūr* rejected all the above arguments. The claim of the similarity between *tarjīh* and *shahādah* is baseless because the latter is totally different from the former. As stated in the Islamic law of evidence, *shahādah* must be performed in court in a strict verbal manner and by a fixed number of persons. Otherwise, that particular *shahādah* is deemed invalid. *Tarjīh*, on the contrary, is not subject to such conditions. Therefore, it has been argued that *shahādah*, unlike *tarjīh*, is a purely legal imposition (*ta’abbud*) that has been detailed by the Shari‘ah from the very beginning. To this effect, they are not equivalent.

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47 Ibid.
48 Muntahā, p. 222; al-Bājī, *Iḥkām*, p. 646.
Regarding the issue of zāhir, al-Āmidī explained that zāhir occurring in the tradition carries the meaning of "preference for something over the other". In other words, when there appears to be more than one report or evidence in the court, the one which is supported by another element is then considered as zāhir while the other is no longer valid as zāhir.\textsuperscript{50} The Qur'anic verse used by the opponents of tarjīḥ is irrelevant to the question concerned since the verse has no connection with tarjīḥ. Assuming that the verse has some relation to tarjīḥ, it remains incapable of invalidating tarjīḥ because the verse amounts only to probability i.e. zanni, while the basis of tarjīḥ is qatī'ī as constituted by the consensus of the Companions.\textsuperscript{51} Moreover, it is clear too that the obligation to take i'tibār did not necessarily indicate that the practice of tarjīḥ was prohibited.\textsuperscript{52}

Finally, we can state that tarjīḥ is permissible in Islamic legal theory and has been practised by Islamic scholarship throughout the centuries especially in the so-called fiqh muqaran. The zanni indication of tarjīḥ, however, does not work against its validity because Sunnī

\textsuperscript{50} Al-Āmidī, al-Ibkām, vol. 3, p. 258. See also Badran, Tarjīḥ, p. 66; 'Iwād. Diāsāt, p. 423.


\textsuperscript{52} Al-Āmidī, al-Ibkām, vol. 3, p. 257.
jurisprudence has affirmed the principle that considered opinion (zann) is binding in matters of law; "al-zann wājib al-tiḥār fi al-Shar".\(^{53}\)

The Conditions of Tarjīḥ.

Having approved the application of tarjīḥ to remove legal contradiction, the jurists have demanded, however, that certain conditions be met before tarjīḥ is counted as approved. As mentioned, tarjīḥ will in one way or another overthrow one of the conflicting pieces of evidence; the marjūḥ. This phenomenon appears to clash with the principle commonly accepted amongst the jurists that legal evidence is revealed to be fully applied and any opposite attitude is strongly resisted.\(^{54}\) However, according to them, a mujtahid is allowed to have recourse to tarjīḥ only in cases of darūrah.\(^{55}\) Hence, the conditions laid down are necessary to ensure that tarjīḥ is applied at the correct time and in the correct situation. In short, resort to tarjīḥ is permissible only when it is necessary.

By examining the definition of tarjīḥ, one can easily discover certain conditions which are prerequisite to its application. Contradiction (taʿarud) of evidence is believed to be the most explicit condition requiring resort to tarjīḥ. Indeed, this subject has been frequently discussed together

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\(^{53}\) Al-Zuhaylī, Ugūl, vol. 2, p. 762; idem, Taqniṅ, p. 16; Weiss, "Interpretation", p. 204.

\(^{54}\) Hitū, al-Waṭīṭ, p. 474.

\(^{55}\) Ibid.
with *tarjih* in a chapter called *al-ta’arud wa al-tarjih*.\(^{56}\) Contradiction occurs when each of two pieces of evidence of equal strength requires the contrary of the other.\(^{57}\) Some scholars have added to this particular condition saying that equal contradiction must occur in respect of time and place i.e. at the same time and place.\(^{58}\) This additional condition, in my opinion, is no more than a further explanation of an equal contradiction itself because two different elements of evidence which are contradictory to each other but whose respective rulings refer to different circumstances are not in actual contradiction.

Regarding the occurrence of contradiction in the same time and place, the jurists have held that the opposite situation will change the contradiction to an apparent conflict (i.e. not genuine).\(^{59}\) The prohibition of sale or any contract during the call to Friday prayer\(^{60}\) is the best example of the above. This prohibition is deemed to be confronted by the general validity of sale.\(^{61}\) This contradiction, however, as stated earlier, is unreal because prohibition as well as permissibility refer to a different time and situation; prohibition of sale is restricted only to a particular time.

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\(^{58}\) *Irshad*, p. 273.

\(^{59}\) Ibid.

\(^{60}\) This rule is based on Q. 63: 9.

\(^{61}\) On the contrary, the validity of sale is confirmed by another verse i.e. Q. 2: 275.
namely Friday prayer, while at all other times, sale is absolutely valid and permissible.\textsuperscript{62} Since there is no genuine contradiction, \textit{tarjih} is invalid if applied.

Going back to the question of equality of two pieces of evidence involved in conflict, we may simply say that two unequal pieces of evidence which apparently contradict each other are not in genuine conflict. Consequently, \textit{tarjih} is unnecessary in this situation owing to the fact that the stronger of them would naturally prevail from the very beginning even without any recourse to \textit{tarjih}.\textsuperscript{63} Accordingly, no genuine contradiction takes place between \textit{qat`i} and \textit{zanni} or between \textit{nass} and \textit{ijma`} or \textit{qiya`s} since the text is \textit{qat`i} and therefore, always prevails.

On this occasion, I shall discuss the above condition in greater detail. Broadly speaking, there is nothing worthy of review on the problem of equality of evidence. As would be expected, the stronger always supersedes because it is the rule (or even the nature) of the evidence. But, when one scholar, basing his viewpoint on the problem of equality of evidence, clarifies that there is no contradiction between \textit{`amm} and \textit{khass} or between \textit{mutlaq} and \textit{muqayyad} and other similar subjects which are commonly discussed in the course of conflict and \textit{tarjih}, one is forced to understand precisely what is intended by the equality of evidence in terms of \textit{tarjih} condition. According to this scholar, as far as equality of evidence (\textit{tasawi al-adillah}) is required, the previous cases are not entitled to be

\textsuperscript{62} Al-Tabar\textsuperscript{i}, \textit{Jami'}, vol. 28, pp 101-102; al-Qur\textsuperscript{u}ub\textsuperscript{i}, \textit{al-Jam\textsuperscript{l}}', vol. 18, pp. 107-108; \textit{Irshad}, p. 273.

\textsuperscript{63} Kam\textsuperscript{a}li, \textit{Islamic Jurisprudence}, p. 450; \textit{`Iwad, Dir\textsuperscript{a}s\textsuperscript{k}}, p. 32.
removed by *tarjih*. Suprisingly, however, one can see that most of the cases of conflict and *tarjih* throughout the works of *usul* are typically taken from the aforementioned discussions such as *'amm* - *khāss* conflict and the like. Hence it warrants further investigation.

To begin with, I must say that the general statement that no contradiction exists between *qat'ī* and *zannī* is merely acceptable in theory but not in the more practical sense. As stated previously, the individuals as well as the schools of law do not have a commonly agreed criterion at their disposal to distinguish these two categories of evidence accurately. Thus, a *qat'ī* for one school of law is not necessarily a *qat'ī* in another school of law or even in the same school of law among its individual jurists. Presenting the case of *'amm* - *khāss* contradiction as an example, we may say that, even though it is true that *khāss* prevails in most cases of conflict, the prevalence of *khāss* is not necessarily based on its definitive implication (*qat'ī*) but may be on other factors. Moreover, as we shall see, the determination of the strength of both *'amm* and *khāss* varies from one school to another which renders preference, on the basis of the *qat'ī* and *zannī* consideration, inaccurate.

A further point is that *'amm* - *khāss* contradiction and other similar contradictions, in my opinion, are to be removed by *tarjih* for at least, one major reason which justified the application of *tarjih*. First of all, the classification of the words followed by the knowledge of their

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64 *Al-Taqrīr*, vol. 3, p. 3.
65 See page 51-52.
66 See page 52.
67 See pages 168-171.
strength or the grades of the isnād attributed to them can be known to the murājih only after an attempt has been made to sift out from many possible meanings the one interpretation that is the most likely interpretation or to decide the most reliable isnād. Before that, one is uncertain as to the degree of strength of the words or isnāds involved in a conflict. It is the role of murājih to examine whether a particular word or isnād is stronger or otherwise. Consequently, we can conclude that whenever there appears to be a conflict between two pieces of evidence, a solution is immediately required to remove this conflict regardless of whether the contradiction is genuine or not.

Similar to the above question, it is widely proposed that tarjīh is not valid in the case of the qatī'ī - qatī'ī contradiction since qatī'ī cannot contradict qatī'ī. It is explained that qatī'ī evidence is not open to any alternative meaning or interpretation except its definite meaning. In consequence, the conflict between two pieces of qatī'ī evidence is impossible unless in case of abrogation. In other words, tarjīh which aims at strengthening one of two conflicting pieces of evidence is confined to zanni evidence only because its indication is uncertain and therefore, open to being strengthened by any indication. In turn, if there appears to be a contradiction between two elements of qatī'ī evidence, there is no room for tarjīh to remove this conflict because the case is applicable only to naskh as previously mentioned. Again, in this particular condition, we are confronted with the same problem which is how to make an accurate

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68 Al-Hafnawi, al-Tarjih, p. 45; 'Iwad, Dirāsāt, pp. 32-33.
70 Al-Mustasfa, vol. 2, pp. 392-393; Rauḍah, p. 208.
judgement upon whether a certain evidence is qat'ī or zannī and therefore, tarjīh is or is not applicable. In my conclusion, I agree that a qat'ī cannot contradict another qat'ī but this does not prevent us re-examining the classification attributed to each single evidence when they are conflicting.\(^{71}\) Also, in my opinion, as will be evident later, naskh is invalid in its application as long as tarjīh is capable of removing the conflict whether the evidences involved in that conflict are zannī or qat'ī.

The following condition, to some extent, does no more than explain the details of contradiction. It is said that the two conflicting pieces of evidence must be proved first to be incapable of being reconciled.\(^{72}\) If they can be distinguished from each other whether in respect of their subject matter or time or any other perspective, there is no need for tarjīh. The previous case i.e. prohibition of sale at the Friday prayer time suffices to illustrate the process of reconciliation. In other words, tarjīh is invalid unless the process to reconcile two conflicting pieces of evidence failed. Reconciliation (al-jam') always prevails because other legal solutions such as naskh, tarjīh, takhyīr, etc., lack the authority to remove any conflicts whatsoever as long as al-jam' is capable of doing so.\(^{73}\)

\(^{71}\) In this regard, al-Isnawi has said that "a general statement that tarjīh is not valid in definite matters is questionable". (see Nihayah, vol. 3, p. 214)


For it to be valid, tarjiḥ must also be accompanied by an indication that a particular evidence is superior to the other. The reason why this is believed to be necessary has been supplied by one scholar. He says it is the general rule that every attitude that is not original in character should be supported by an indication to make it valid and acceptable. On the contrary, everything which is original needs no such requirement. Since tarjiḥ is not originally intended in terms of evidence application because tarjiḥ will necessarily abandon one of two contradictory pieces of evidence, it requires a clear justification in legal practice. Accordingly, it is not sufficient or acceptable to justify a preference on the basis of sport (lahw) or in order to satisfy the murajjih's whim and fancy. Therefore, in the course of conflict and preference, a murajjih must clarify his basis for awarding the approval to a particular evidence. In this context, if a jurist cannot find a solid indication from which to make a preference, he simply quotes these conflicting rulings as well as their bases and arguments without giving any strict preference. Al-Shaftī himself, for example, faced certain legal conflicts which lack relevant indications of tarjiḥ and accordingly, these cases are recorded together with their different legal decisions without any preference at all.


75 See al-Darīnī, al-Manāhīj, p. 199.

76 See page 33.

On the other hand, the jurists have noted also that *tarjīh* is relevant only to the so-called *ahkām 'amaliyyah* (practical rules).\(^{78}\) Hence, *tarjīh* is inapplicable to theological and logical (*aqīliyat*) conflicts.\(^{79}\) This means that *tarjīh* is unnecessary in a conflict which does not lead to any practical action. For this reason, I believe, the jurists had already mentioned it when they explained the meaning of *tarjīh*\(^{80}\) in order to maintain from the very beginning that *tarjīh* is concerned only with practical rules called *fiqih*. This condition is commonly accepted on the grounds that *tarjīh* is not an independent discipline but an integral part of *usul al-fiqh* which is primarily concerned with *afāfa al-mukallaftin*\(^{81}\).

It would be better to sketch briefly some "pre-conditions" that are equally important to the *murajjih*. I consider the following matters to be merely pre-condition or "*ādāb" for they are neither stated in the definition of *tarjīh* nor deliberately discussed by the usulists. They are important to ensure that the findings and the result of *tarjīh* application will not contain any possible room for error as well as to make the findings more objective and more probable. In this regard, four elements are believed to have a significant role to play. A *murajjih*, first of all, should be as objective as possible in examining legal conflict. No other interest should

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80 See page 94.


The question of preference of one *madhhab* over the other is also discussed in *usul* books. Al-Juwaynī, for example, argued that the *usul* of al-Shāfi‘ī is superior to those of others. (a-*Burhan*, vol. 2, pp. 1148-1155) For details, see *al-Mankhūl*, p. 427 ; Badrān, *Tarjīh*, p. 70.
co-exist in his purpose of examining legal conflict than to arrive at what is the most likely interpretation to deserve full adherence. Then, he himself should avoid having a pre-conceived and pre-determined bias for a particular legal ruling or madhhab. Also important is that the murajjih should be well versed in the skill of argumentation and counter argumentation (dialectics) and with the hierarchical order of legal evidence. The final element requires a murajjih to be familiar with the so-called fiqh muqaran.82

Finally, it is noticeable that these conditions, most of which are extracted from the definition of tarjīh, remained widely debated amongst the jurists and thus, still lead to great dispute. This was caused by their long discussion about the classification of legal evidence i.e. whether a particular evidence is qatī or zannī.83 As we shall see in the following chapters, cases in fiqh are filled with this kind of dispute.

83 For details, see chapter four particularly pp. 166ff.
CHAPTER THREE

PART B

A COMPARISON BETWEEN TARJIH AND OTHER SIMILAR TERMS

Introduction:

This section seeks to draw a proper distinction between tarjih and some terms similar to it, namely tafsir /ta'wil, taftiq, istihsan and naskh. It is necessary to do so because tarjih might be confused with these terms which are also common in terms of preference. It is true also that these terms were not sharply defined in the early period of usul literature but were used interchangeably. Not only that, but they coincide with one another even in current writings on this discipline. For these reasons, I feel that an explanation of the similarity and dissimilarity between tarjih and these "confusing" terms is vital for the purpose of comparison i.e. in order not to confuse tarjih with others which to a considerable extent, bear the same idea and concept. These 'confusing' terms are as follows.

Tafsir and Ta'wil.

The verbal form of tafsir is fassar, to explain.\(^1\) Explanation and clarification are quite synonymous and equivalent to tafsir.\(^2\) According to the lexicographer Lane, tafsir means clarification of the meaning of the mushkil (unclear) word.\(^3\) Before tafsir became a technical term for

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\(^1\) Ibn Mangūr, Līsan, vol. 5, p. 55; al-Rāzī, al-Siyāh, p. 503.

\(^2\) See Q. 25: 33; Badran, Bayān, p. 97.

\(^3\) Lane, Lexicon, part 6, p. 2397.
Qur'anic exegesis, it was used to refer to the explanation or commentary of any book. Later, when religious knowledge had already been divided into various branches, *tafsīr* as well as other terms acquired a standard meaning. In this regard, *tafsīr* has been defined as an explanation of a verse's meaning together with its situation and its occasion of revelation.

According to al-Zarkashi, *tafsīr* is knowledge necessary to the understanding of the *Qur'ān* revealed to the Prophet and to explain its meaning as well as to deduce its rulings and wisdom. This knowledge comes through the study of language, principles of jurisprudence and also the science of recitation. A knowledge of the background of the revelation and of abrogating and abrogated verses is also necessary in *tafsīr*.

In addition to *tafsīr*, another word, *tawil* is frequently used by scholars particularly the *mufassirūn*. *Tawīl* literally indicates the sense of returning. Technically, it has been distinguished on the basis of the usage of the earlier scholars, called *salaf* and the later called *khalaf* which is commonly attributed to jurists and theologians. *Tawīl* according to the former is merely an explanation of the speech, whether it suits the

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7 Grunebaum, *Islam*, p. 88. See also Demonbynes, *Muslim Institutions*, p. 65.
apparent meaning or not. It is presumably on this basis that ta’wil is identical with tafsīr where both have the meaning "explanation".

The chief argument that tafsīr and ta’wil are synonymous is that it has been reported that the Prophet prayed for Ibn ‘Abbas; "May Allah make him comprehend religious matters and make him know the ta’wil". Since ‘Abd Allah ibn ‘Abbās is widely recognised as the best commentator on the Qurān, ta’wil in the tradition clearly refers to tafsīr. Furthermore, many of the mufassirūn have used ta’wil instead of tafsīr and vice-versa where al-Tabari’s tafsīr is one of the most excellent examples of this.

The khalaf, however, maintains that ta’wil is a diversion of the word or phrase from its literal and apparent meaning to another meaning indicated by an indication. In other words, it reads the word or phrase in a way that is not implied by its linguistic structure and upholds this "new meaning".

10 Ibid

Ibn Manzur Lisan, vol. 11, p. 33; Lane, Lexicon, part 1, pp. 126-127.

12 Al-Dhahabī, al-Tafsīr, p. 18; al-Sabūnī, al-Tibyān, p. 62.

The text and translation of the hadīth are quoted from Hughes, Dictionary of Islam, p. 197.

13 Al-Sabūnī, al-Tibyān, p. 62.

See also Cooper in his Introduction to the translated work of al-Tabari’s Jamāl al-Bayān, p. xiii.

14 Al-Bājī, Iḥkām, p. 49; Abū Zahrah, Usūl, p. 135.

15 Al-Darīnī, al-Manahīj, p. 18.
Accordingly, efforts were made to distinguish between these two words. Al-Asfahānī, for instance, prescribes that *tafsīr* is more general than *ta’wil*; whereas *tafsīr* is usually used with reference to the words, *ta’wil* is used of the sense. In addition, *tafsīr* is commonly used in all types of book, while *ta’wil* is widely used in theology books only.\(^{16}\) Al-Māturīdī, on the other hand, believes that *tafsīr* deals with the definitive meaning of words while *ta’wil* is concerned with selecting one of the presumptive meanings over the other.\(^{17}\) For some scholars, *tafsīr* primarily concerns the *sanad* or chain of transmission and *ta’wil* on the contrary, deals with *matn* or text.\(^{18}\)

In my opinion, the above illustrations in one way or another, do distinguish between *tafsīr* and *ta’wil*. However, the distinction made by al-Sabūnī, a modern scholar in *tafsīr* is more accurate. According to him, *tafsīr* refers to the explicit meaning of the Qur’ān, while *ta’wil* is concerned with the unclear meaning of the Qur’ān.\(^{19}\) Obviously, the later demands an interpretative effort i.e. *ḥijād*, to understand what is intended by such a word since it usually goes beyond the literal meaning of its linguistic capacity.\(^{20}\) To put it differently, although both share the same basic purpose of clarifying the law and discovering the intention of the *Sharī‘ah* in the light of certain indications, *tafsīr* in particular, is

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17 Ibid.
20 According to al-Darīnī, *ta’wil* constitutes the most creative method of *ḥijād* particularly in cases of conflicting indications. At the further step, *tahkīs* is the most frequent type of *ta’wil* used in *ḥijād*. (see *al-Manāhij*, p. 212)
based on definitive indications in the text which provide the necessary explanation to a legal text. Beyond this, all other interpretations are based on reasoning which is assigned to *ta'wil*.\(^{21}\) Moreover, in the context of *ugul al-fiqh*, especially in relation to *tarjih*, it is *ta'wil* rather than *tafsir* with which we are primarily concerned.\(^{22}\)

Let us examine one of the most distinguished cases in *fiqh* for the purpose of comparison. A companion, Firūs al-Daylamī, who embraced Islam while he was married to two sisters, was ordered by the Prophet to retain (*amsik*) one of the sisters as he wished and to separate from the other.\(^{23}\) The Hanafis have interpreted this tradition in accordance with *ta'wil*. They said that al-Daylamī was asked to re-marry one of the sisters and to separate from the other.\(^{24}\) This particular rule of interpretation, called *ta'wil* is employed by the Hanafis on the ground that Islamic law does not permit two sisters to be married in a single contract or at the same time. Other jurists, however, disagreed with this conclusion because this sort of interpretation is not confirmed by the wording of the tradition. The wording is clear to show the continuity of the existing marriage, even it was illegally concluded, when the Prophet simply said; "*amsik mā tashā' wa fāriq al-ukhra*".\(^{25}\) In other words, had


\(^{22}\) Ibid. p. 112.


\(^{24}\) Al-Mankhūl. p. 187.

\(^{25}\) Ibid.

A lengthy explanation of the bases underlying this preference can be found in *al-Mustasfa*, vol. 1. pp. 389-394)
the Prophet wanted him to divorce both two sisters, and only marry or re-marry one of them, he would have said so explicitly.

A more satisfactory example occurs in the Prophetic statement that is "For every forty sheep, one has to pay one ewe". The tradition in question, according to the Shafi'is, requires those who possess forty sheep to pay their zakat, that is, one ewe. One is not permitted to pay the "value" of this one ewe simply because the word "sheep" specifically excludes any possibility of other interpretations such as the "value" of the sheep. This view is shared by the Hanafis but instead of paying one ewe, one can also fulfill the zakat requirement by paying the "value" of this one ewe. The Hanafis have re-interpreted the hadith in question (i.e. ta'wil) based principally on the purpose behind the requirement of zakat in Islam. Its foremost purpose, no doubt, is to meet the need of the poor and the needy in society. The value or the money can, as it appeared to the Hanafis, fulfill this purpose more significantly because by money, the needy can buy the necessities of life such as clothes, foods, medicines, etc.26

Judging by the foregoing argument, it seems that the Hanafi contention is more acceptable since it not only suits the purpose, or the hikmah, of zakat legislation but also has been supported by a precedent at the time of the Prophet. Mu'adh, the judge appointed by the Prophet in Yemen, collected clothes from the people of Yemen whose property i.e. wheat and barley, were of zakatable amount. These clothes were later distributed among the people of Madīnah. Mu'adh did this arguing that

clothes were more suitable to the people of Madīnah at that time because they were in great need of clothes and not of wheat or barley.  

As far as comparison is concerned, we can see how ta'wil was used by the Hanafi jurists for their legal interpretation to prevail. This conclusion certainly helps us to clarify that tafsīr or ta'wil in particular, are used to support a legal interpretation i.e. to make a commitment between two conflicting legal interpretations. Hence, as will be evident later, ta'wil is fully employed as a form of tarjīh particularly in matn contradiction. Therefore, ta'wil is no more than a method of tarjīh.

Talfīq.

As a term in Islamic legal theory, talfīq can be found only in the modern literature of Islamic law, particularly among the so-called "reformers". Literally, it signifies picking things up from different places or sewing two things together to produce a complete article or cloth. Therefore, in relation to usūl al-fiqh, talfīq suggests a kind of selection between different varying opinions of Muslim jurists in order to recognize only the best juristic opinion. This suggestion has been confirmed by many scholars when they stated that talfīq is an eclectic selection of

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27 Ibid.

28 See for example, Kerr, Islamic Reform, pp. 216-217; Esposito, "Reform", p. 20; Layish, "The contribution of the modernists to the secularization of Islamic law", in MES, vol. 14, 1978, p. 263 (cited after as "The Contribution")

provisions from several of the four Sunni schools or even from the opinions of medieval jurists outside the school.\textsuperscript{30}

According to this doctrine, one might adopt the opinion of any recognized \textit{faqīh} which appears to be the most authentic and correct \textit{iṣlaḥat}.\textsuperscript{31} As a matter of fact, \textit{talīf} according to Coulson is the third and final aspect of \textit{takhayyur}; the process of selection adopted by the \textit{Ottoman Majalla}.\textsuperscript{32} The first and most natural step is to consider the dominant doctrine of one of the three other Sunnite schools as a possible alternative to the existing Hanaﬁ law. The second stage of selection is the consideration of any individual jurist's opinion which had preceded or was in conflict with the dominant doctrines of the four Sunnite schools as a whole.\textsuperscript{33} It should be noted that this selection is restricted to the establishment or the codification of the \textit{Ottoman Majalla} which is restrictively based on the Hanaﬁ standpoint. According to Coulson, however, \textit{talīf} as a part of \textit{takhayyur} is the selection of views on the basis of their suitability for modern conditions.\textsuperscript{34} In both situations i.e. irrespective of whether \textit{talīf} selects what is the most reliable legal interpretation or the one that suits the modern implementation most, \textit{talīf} involves only a limited \textit{iṣlaḥat}.\textsuperscript{35}

\textsuperscript{30} Kerr, \textit{Islamic Reform}, p. 216.

\textsuperscript{31} Quadri, "Traditions of \textit{taqlīd} and \textit{talīf}", in \textit{IC}, vol. 57, no. 2, 1983. p. 123. (cited after as "Talīf")

\textsuperscript{32} Coulson, \textit{A History}, p. 197.

\textsuperscript{33} Ibid., p. 185.

\textsuperscript{34} Ibid.

\textsuperscript{35} Kerr, \textit{Islamic Reform}, p. 217.
The exercise of *talfiq* however, remained a controversial question amongst the scholars from two perspectives. As regards validity, one scholar has maintained that *talfiq* was commonly practised by the Muslims prior to the formation of the different schools of law.\(^{36}\) At the present time, this doctrine, as applied to Islamic jurisprudence, is the best means of solving problems arising in modern Muslim life.\(^{37}\) A Muslim is permitted to follow the views of various great jurists in different particulars but only on condition that his motive in picking and choosing between the rules of different jurists must not be to make a mere sport of the law or to satisfy his every whim and fancy.\(^{38}\) On the contrary, some scholars declared that it is invalid and illegal for anyone to adopt any legal opinion from outside his school of law particularly after the formation of the four orthodox schools of law.\(^{39}\) Naturally, to follow strictly a

\(^{36}\) Quadri, "*Talfiq*", p. 123.

\(^{37}\) Ibid.

The doctrine of *talfiq* has been totally employed in the present civil code in many Middle-East countries. *Talfiq*, however, in certain circumstances has been applied in a wider sense of selection. For instance, the present Egyptian civil code was the product of a group of jurists headed by 'Abd al-Razzaq al-Sanhūrī based on (i) appropriate features of European codes particularly the French and German, (ii) juridical precedent in Egypt since 1850 and (iii) Islamic law. (see Kerr, *Islamic Reform*, p. 218) Further details can be found in al-Sanhūrī's "*Wujub tanzih al-quran al-madani wa 'ala ayy asas yakun hadha al-tanzih?*", in *Majallat al-Qanun wa al-Igtisād*, 1936, vol. 6, pp. 3-144.


particular madhhab is obligatory for anyone who is incompetent to exercise *ijtihād* i.e. laymen.\(^{40}\)

The second disputation lies in the valid scope of exercising *talfīq*. Broadly speaking, one might follow one school of law in marriage procedure, another in determining inheritance and still another in performing prayers or in other sections of Islamic law.\(^{41}\) This attitude has been fully approved by those who are of the opinion that *talfīq* is permissible and may validly be practised. For those who invalidate *talfīq* from the very beginning, such an attitude would be null. The actual disagreement intended here is related to the question of whether one is allowed to adopt any legal opinion in a single process e.g. marriage procedure. In this regard, Schacht has told us that according to some scholars, one is allowed to follow the doctrine of the chosen school only in all aspects until the act's completion.\(^{42}\) In the case of marriage, for instance, it would not be acceptable to follow Hanafi rules governing consent and Shafi'i's rules on the dowry.\(^{43}\) On the other hand, the modernists have disregarded this restriction. According to them, even in a single procedure, one is allowed to adopt different legal views from different jurists or schools of law without any hesitation.\(^{44}\)

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\(^{40}\) Ibid. See also EI 1, vol. 4, p. 630.

\(^{41}\) Kerr, *Islamic Reform*, p. 216. See also Mahmassānī, *Falsafah*, p. 98.


\(^{43}\) Kerr, *Islamic Reform*, p. 216.


For details, see Nyāzee, "The scope of *taqlīd* in Islamic law", in *IS*, vol. 22, 1983, pp. 24-26 (cited after as "*Taqlīd*")
One of the *talfīq* examples as recorded by Coulson, where many more are available,\(^{45}\) is that of a Bombay High Court case of "**Muḥammad Ibrāhīm v. Ghulām Ahmad (1864)**".\(^ {46}\) Here, the marriage of a girl who had been brought up a Shafi‘ī and who had married without her father's consent, was held to be valid on the girl's assertion that she had become a Ḥanafī and had married as such. Ḥanafī law in fact is the only doctrine which permits an adult girl to conclude her own marriage contract without the intervention of her guardian.\(^ {47}\)

Generally speaking, *talfīq* coincides with *tarjīh* or vice-versa. Some similarities between both could be summarised as follows. Obviously, both are formulated on the comparative study of different schools of law and the differing *ṭiḥāds* of the various recognized jurists. Moreover, the rules selected through *talfīq* are caused by mutually contradictory interpretations of the textual sources.\(^ {48}\) In addition, the role of *talfīq* is merely to choose between already existing rules of the four schools of law.\(^ {49}\) Again, this and that are also applicable to *tarjīh*.

No doubt, *talfīq* is merely concerned with the selection of certain rulings that already exist, to be applied to certain cases. To this effect, *talfīq* and *tarjīh* are alike. However, the primary distinction between them refers to the bases of their respective operation. Most of the selections

\(^{46}\) Ibid., p. 183; idem, *Conflicts*, p. 35.
\(^{47}\) Ibid. See also Mas‘ūd, "*ṭiḥār*", p. 224.
\(^{48}\) Anderson, "Recent Development", p. 255.
made by talāfiq, unlike tarjīh, are not based on any methodological consideration of usūl al-fiqh other than maslahah.\textsuperscript{50} On the contrary, tarjīh has a more significant role for it concerns the methodological aspects of Islamic legal theory in deducing the rulings. In other words, talāfiq as suggested by its linguistic terminology simply signifies the process of selection and combination of the various legal opinions\textsuperscript{51} while tarjīh is more progressive having many potential discussions in the entire usūl al-fiqh.

The above mentioned case; "Muḥammad Ibrāhīm v. Ghulām Ahmad", for example, can be reconsidered and re-examined in the light of tarjīh methodology. Tālāfiq as previously mentioned, has selected the Hanafi point of view. Tarjīh, however, may prefer another point of view or perhaps the same rule as viewed by the Hanafis. The ruling itself is not the major concern of tarjīh rather it is how this preferred opinion can be achieved. In conclusion, tarjīh is naturally centred upon the methodological arguments of Islamic legal theory and of course, certain methods are to be considered in practising tarjīh other than maslahah.

\textit{Istihsān}.

As long as the major discussion of the thesis is tarjīh, there is no need to give any special consideration to the so-called ṣtihsān.

\textsuperscript{50} Ibid.

Another restriction, if it can be added, is that talāfiq is applicable merely to family and property laws. See al-Mawrūwi, al-Qawl al-Sadīd, pp. 82-84; Muslim, "Islamization", p. 77.

\textsuperscript{51} Ibid.
However, *istiḥsān*, which is an expression of personal preference, was eventually regarded as belonging to the category of *tarjīh*, the acceptance of one of two conflicting rules as "weightier" than the other. Furthermore, many scholars have described *istiḥsān* as a juristic preference. Thus a clear distinction between the two is necessary since both convey the meaning of preference.

As a term used in *usūl al-fiqh*, *istiḥsān* is frequently confused with the so-called *istiṣlah* as a result of their mutual relationship. Accordingly, no one ever seems to have reached a clear and lucid definition of either. However, I shall restrict myself solely to the principle of *istiḥsān* for it is more confusing to one considering *tarjīh*. Literally, *istiḥsān* comes from the root "*hasuna*" meaning "beautiful", "comely", "good", "pleasing" and other similar words. However, in a broader sense, it means the application of discretion in a legal decision i.e. to think something acceptable. Hence the saying: "*sarf hadha istiḥsān wa al-manʿ al-qiyas "

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53 G. Makdisi, "Ibn Taymiyya's autograph manuscript *istiḥsān*: materials for the study of Islamic legal theory", in Arabic and Islamic Studies in Honor of Hamilton A.R. Gibb, Leiden, 1965, p. 446 (cited after as "Istiḥsān") ; J. Makdisi, "Legal logic and equity in Islamic law", in *AJCL*, vol. 32, 1985, p. 73 (cited after as "Equity")

"Preferential interpretation" or "equitable preference" are other translations for *istiḥsān* in English works. (see Kerr, *Islamic Reform*, p. 64; Coulson, *Conflicts*, p. 17; Khān, *Islamic Jurisprudence*, p. 115)


56 Wehr, *Dictionary*, p. 178.
means "making this word perfectly declinable is approvable by way of preference although making it indeclinable is more agreeable with analogy".\textsuperscript{57}

Although the principle of \textit{istihsān} was formulated by the Hanafis\textsuperscript{58}, they established no standard definition of it.\textsuperscript{59} Moreover, some of the definitions have been criticized by the Hanafis themselves.\textsuperscript{60} It is believed that the early Hanafi jurists, including Abū Hanīfah and his two disciples, Abū Yūsuf and al-Shaybānī, never attempted to give a precise clarification of \textit{istihsān}.\textsuperscript{61} This led to a variety of definitions being adopted by the later Hanafi jurists.

In this context, I would like to refer to some of the outstanding Hanafi jurists in order to reinforce this principle. Al-Karkhī, one of the eminent Hanafis, defined \textit{istihsān} as "that one should take a decision in a certain case different from that on which similar cases have been decided on the basis of its precedents for a reason which is stronger than the one found in similar cases and which requires departure from those cases".\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{57} Lane, \textit{Lexicon}, part 2, p. 570.
\item \textsuperscript{58} Esposito, "Reform", p. 35; EI 2, vol. 2, p. 256.
\item \textsuperscript{59} Ahmad Hasan, "The principle of \textit{istihsān} in Islamic jurisprudence", in \textit{IS}, 1977, vol. 16, p. 348. (cited after as "\textit{Istihān}").
\item \textsuperscript{60} Ibid.; al-\textit{Mu'tamad}, vol. 2, pp. 839-840.
\item \textsuperscript{61} Aghnides, \textit{Theories}, pp. 98-99; Kasīm, "Sarakhsi's doctrine of juristic preference (\textit{istihsān}) as a methodological approach toward worldly affairs (\textit{aḥkām al-dunya})", in \textit{AJISS}, vol. 5, 1988, p. 194. (cited after as "\textit{Istihṣān}")
\item \textsuperscript{62} Al-\textit{Mu'tamad}, vol. 2, p. 840; al-\textit{Muswaddah}, p. 453.
\end{itemize}
Al-Karkhī's pupil, al-Jassās offered certain definitions of ṭistiḥṣān and at the same time, distinguished different types of ṭistiḥṣān. A specific type consists in discarding qiyās to adopt a decision which is judged worthier (tark al-qiyās illā mā huwa awlā mirth). Istiḥṣān then is regarded as "particularization" of a hukm in the presence of an illah (takhsīs al-hukm ma‘a wujūd al-illah). Consequently, it is considered by Hanafī jurists as a qiyās khafī implying a hukm which is specification of the qiyās jalī or anslī.

Other schools of law, except the Shafi'is and the Zahiris, accepted this principle. However, it must be noted that they regarded this as valid proof only in the form of a departure from usual qiyās in favour of either the Sunnah or ḫma. Otherwise, i.e. a departure from such to meet the so-called qiyās khafī, is highly disputable and the Hanafis seem to be the only school to adhere to this last prescription of ṭistiḥṣān.

According to Abu Zahrah, the Hanafis have adopted al-Karkhī's definition as it embraces the essence of ṭistiḥṣān in all its various forms. (Usul, p. 262; idem, Abu Hanīfah, pp. 302-303)

64 Ibid.

Ahmad Yusuf observes that even al-Shafi‘ī himself did accept the validity of ṭistiḥṣān as long as this principle does not rely merely on discretion of a jurist. (al-Shafi‘ī, pp. 109-110) The same applies to al-Ghazālī's attitude. (see Makdisi, "Equity", p. 75)

67 Kashf, vol. 4, p. 4; Aghnides Theories, p. 95.
The Shafi'is openly and constantly refuted the application of *istihsān* in Islamic law, arguing that this principle relies on imagination or on discretion of a mujtahid rather than on the texts. Therefore, al-Shafi'i followed by al-Ghazālī declared that "whoever uses *istihsān*, has placed himself in the place of God as legislator (*man istahsana faqad shara'*)".

Since this part of the discussion does not represent a major element of the thesis, there is no strong reason to illustrate this principle in greater detail. In conclusion we might summarise that *istihsān*, subjected to severe criticism particularly from the Shafi'is, is the one which resorts to arbitrary personal opinion. In other words, *istihsān* is being considered an independent basis for establishing law.

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68 Al-Risalah, para. 1464; idem, Iḥṣal al-istihsan, p. 301; idem, *Jimā' al-ʿilm*, pp. 276-277; *al-Mustasfa*, vol. 1, p. 274.

Al-Shafi'i's point of view on this question was clear. He fundamentally rejected *istihsan* claiming this attitude may open for arbitrary decision, "...for if analogy were abandoned it would be permissible to any intelligent man, other than the scholars, to exercise *istihsan* in the absence of a narrative. But to give an opinion based neither on narration nor on analogy, as I have already stated in the discussion of the Qurʾān and the Sunnah, is not permissible according to the rules of analogy". (al-Risalah, para. 1458)

Al-Ghazālī considers both *al-istihsan* and *al-istiṣlah* as purely speculative methods of reasoning (*usūl mawhumah*). (ibid, vol. 1, pp. 274, 284).

69 Al-Mustasfa, vol. 1, p. 274.


71 Coulson, *Conflicts*, pp. 6-7.
stage, it was not clear what the principle of istihsan is. Criticised by
the Shafi`is, the Hanafi jurists felt themselves compelled to maintain that
istihsan is not a free opinion or a jurist's discretion but is propagated as
a type of qiyas, called qiyas khafi or qiyas mustahsan or simply istihsan. Accordingly, they use two different names i.e. qiyas and istihsan which
represent two contradictory qiyas, Istihsan, however, is preferable owing to
its greater effectiveness, or its strong reason.

At this stage, it is certain that istihsan is no more than a
method of tarjih but restricted only to cases where two qiyas are claimed to
be contradictory. Therefore, istihsan is also known as qiyas mustahsan
carrying the meaning of preference which might suggest that it is only a
form of tarjih in qiyas conflict. Even in qiyas conflict, istihsan is not
the only form of tarjih because, as will be elaborated later, there are other

1109.
73 Aghnides, Theories, pp. 97-98. Also see al-Zarqa', al-Madkhal, vol. 1, p. 86
(note no. 1); Kasim, "Istihsan", pp. 188f.
75 See al-Zarqa', al-Madkhal, vol. 1, pp. 77, 84; al-Hafnawi, al-Adillah, p. 9;
Kasim, "Istihsan", pp. 87-88. Cf. Aziz el-Azmeh, "Islamic legal theory and the
appropriation of reality", in Islamic Law, Social and Historical Contexts, ed. Aziz
el-Azmeh, p. 258. (cited after as "Islamic legal theory") (He regards istihsan as
the rejection of a more obvious or 'canonical' judgement in favour of a more
appropriate one)

In the English law the way in which equity developed side by side with the
common law to abate the rigour of law; istihsan developed in Islamic law in
the same manner to remedy qiyas. See Khan, Islamic Jurisprudence, p. 130.
For more comparison between the two, see Makdisi, "Equity", pp. 95ff.
77 See note 73.
ways of deciding preference in *qiyaṣ* contradiction. Consequently, we may note that when *istiḥsān* is compared to *tarjīḥ* the former has a restricted area of application in *usūl al-fiqh* which is only in *qiyaṣ* contradiction, whereas *tarjīḥ* has a broader role to play in any cases of legal conflicts.

*Naskh*

Since *naskh* can be roughly translated as "the later supersedes the earlier pronouncement, to the extent that they conflict", it may be confused with *tarjīḥ* or vice-versa. Moreover, in some cases, contradiction was removed by the application of *naskh* instead of *tarjīḥ* in the sense that when two texts are in conflict, the one earlier in date is taken to have been repealed by the one later in date. These facts have given us a strong reason to consider *naskh* more precisely so that a clear distinction could be achieved.

Nonetheless, the present study does not attempt to open up the entire subject of *naskh* in detail but will concentrate only on the essential outlines of *naskh* which could provide a proper basis to distinguish between *naskh* and the main subject; *tarjīḥ*. Therefore the first few

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78 In *qiyaṣ* conflict, more than one form was established by the jurists to remove the conflict such as *istiḥsān*, preference by virtue of *ʿillah mansūṣah*, simple *ʿillah*, etc. (see the details in part b of chapter six)


paragraphs will throw some light on the background of *naskh* such as its origin, meaning, types, validity as well as its application in Islamic law.

As far as origin is concerned, it is interesting to note that there was no single reported instance in which the Prophet said a certain ruling was abrogated.\(^{81}\) Accordingly, we can assume that this principle emerged in the later age of the history of Islamic law. However, no clear consensus seems to have emerged concerning who was the first to put this principle into writing. Names such as al-Zuhri, al-Shafi’I and Muqatil b. Sulayman are among those who have been claimed to be the first to put this principle into writing in a book.\(^{82}\)

Literally, *naskh* is taken from the root *n.s.kh.* which indicates annulment such as in "*nasakhat al-shams al-zill*", the sun annulled the shade.\(^{83}\) Not only that, but the meaning should be "the sun annulled or superseded, the shade and took the place of it".\(^{84}\) That clearly signifies the changing of a thing by substituting for it another thing.\(^{85}\) Contrasting slightly with the first, the second meaning indicates an annulment but without being replaced as "*nasakhat al-rīḥ āthār al-dār*",

\(^{81}\) Ahmad Hasan, *The Early*, p. 67.


\(^{84}\) Lane, *Lexicon*, part 8, p. 2788. See also Al-l’tibār, p. 8; Ibn Hazm, *al-Nasikh wa al-Mansukh*, pp. 6-7.

\(^{85}\) Ibid.

Accordingly, *nasakha ʿayah*, means, He (Allāh) abrogated or superseded the verse of the *Qurān* by another verse. (ibid)
means the wind changed or altered the traces of the dwelling. In another context, naskh refers literally to transcription and its standard expression is nasakha al-kitab; "he copied or transcribed the writing or book". This meaning however, indicates that something has been transferred from one place to another while its essence remains unchanged. In this sense, naskh has been used in the Qur'anic verse; "verily we write (nastansikhu) all that you do". However, the common meaning which occurred in relation to both the Qur'an and the Sunnah is supersession of the ruling not the wording of the texts.

Naskh as one legal solution of contradiction, is basically confined to the Qur'an and the Sunnah. Whenever there seemed to be a conflict between one Qur'anic verse and another or between a Qur'an and a hadith or between one hadith and another, the jurists frequently selected the later in relative date of revelation and rejected the earlier of

86 Ibid.
88 Al-I'tibār, p. 8; Mustafā Zayd, al-Naskh, vol. 1, p. 55.

This meaning, however, is not intended in legal discussion of naskh. (See al-Dāmin, the editor of Arba'ah Kutub fi al-Nāṣikh wa al-Mansūkh li Qatadah wa al-Zuhrī wa li Ibn al-Jawzī wa li Ibn al-Barzī, (introduction), p. 9.)

89 Ibid., p. 8 and 58; Ibn Hazm, al-Nāṣikh wa al-Mansūkh, p. 7.
90 The application of naskh on this type of conflict is approved by all the advocates of naskh except al-Shafi'i. (See al-Tabgīrah, p. 264, note no. 2.)

Al-Shirāzī, the author of the book, shares his imām’s i.e. al-Shafi‘ī view, and then gained the support of the editor of al-Tabgīrah, Muḥammad Ḥasan Ḥītū. (Ibid).
the two conflicting texts. The selected is the *nasīkh*; the rejected is the *mansūkh* while the process of repeal or abrogation is known as *naskh*.91

As a matter of fact, the jurists have recognized three types of *naskh* which are as follows:

(1) *Naskh al-hukm dūna al-tilāwah* (the abrogation of the ruling but not the wording)

(2) *Naskh al-tilāwah dūna al-hukm* (the abrogation of the wording but not the ruling)

(3) *Naskh al-hukm wa al-tilāwah* (the abrogation of both the ruling and the wording).92

On this occasion, I will have an opportunity to examine the validity of the alleged *naskh*. It is claimed that the validity of *naskh* has been approved by the *jumhūr*93; one who denied it, is presumed to be against *ijmāʿ*94 because the occurrence of *naskh* in the *Qurān* is proven beyond dispute.95

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General agreement exists among the jurists as to the requirement that the abrogating evidence (*nasīkh*) be of later date than the evidence it abrogates. See *al-lībar*, p. 9; al-Āmīdī, *al-Iḥkām*, vol. 2, p. 245.


These classifications are disputed. See *al-Muswaddah*, p. 198; Burton, Abu 'Ubayd, p 5; Mustāfā Zayd, *al-Naskh*, vol. 1, p. 383ff.


94 *Al-Mustasfa*, vol. 1, p. 111; Aghnides, *Theories*, p. 90.

95 *Al-Mustasfa*, vol. 1, p. 111.
In contrast, some scholars argued the applicability or even the occurrence of *naskh* in the *Qur'an*, arguing from different points of view. Abu Muslim al-Asfahānī (d. 322 A.H.), who denied the cases of abrogation in the *Qur'an* altogether, relied on the same Qur'anic verses used by the *jumhūr* to establish the principle of *naskh*. According to Abu Muslim, the word "*āyah*" which occurred in all these verses, is to be understood as meaning "miracle" or "sign" and not a portion of the Qur'anic text. Moreover, he argued that *naskh* is equivalent to *ibtal*, which has no place in the *Qur'an* since Allah has said in Q. 41: 42; "Falsehood cannot come at it from before it or behind it. (It is) a revelation from the Wise, the Owner of Praise." 

96 Some tend not to accept the validity of *naskh* from the very beginning while others, having approved this principle, argued on the actual applicability of *naskh* from different standpoints. Accordingly, when, for instance, it was claimed *naskh* takes place in a particular case between two verses, this was often objected to by others. For details, see Mustafa Zayd, *al-Naskh*, chapter three (passim); *al-Itqan*, vol. 2, p. 22; Hahn, "Sir Sayyid Ahmad Khan's the controversy over abrogation (in the *Qur'an*): an annotated translation", in *MW*, vol. 64.1974, passim. (cited after as "Abrogation")

97 Abu Muslim al-Asfahānī, *Jami' at-Ta'wil li Muṣkam at-Tanzīl*. Since his work is not available to me, my knowledge is quoted from al-Zuhaylī's *Uṣūl*, vol. 2, pp. 947, 953.

Mustafa Zayd has pointed out, however, that Abu Muslim's concern was merely to dispute the fact that the *Qur'an* contains abrogated verses for all the verses of the *Qur'an* are effective. In turn, it was the *Qur'an* that abrogated the previous teachings and laws constructed by the previous divine books. (*al-Naskh*, vol. 1, pp. 50-51)

98 These verses are frequently quoted to show the occurrence of *naskh*, i.e. 2: 106 and 16: 101.


100 Ibid.; *Tanqīḥ*, p. 306.
Other opponents of naskh have argued that the word "āyah" quoted by the jumhur refers to previous codes of law before the Prophet. In this sense, Islam or more precisely the Qur'ān, the final revelation, abrogates all previous scriptures for it contains the final and most perfect solutions for all questions of belief and conduct. This is supported by the fact that all these verses were found within Banū Israilī addresses. On the other hand, some have expressed the view that the verses which claimed to be included under abrogation are rather instances of postponement of promulgation of the full law of Islam because of unsuitable circumstances.

Al-Shafi‘ī, who has also been credited with being the first person to write on naskh, however, has a distinct idea of naskh. He declared that naskh is not a form of annulment; it is rather a suspension or termination of one ruling by another. In other words, naskh is simply a form of bayān i.e. to explain that an end has been put to a particular ruling. Futhermore, al-Shafi‘ī has his own principle concerning naskh such that neither the Qur'ān abrogates the Sunnah nor the Sunnah the Qur'ān.

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101 Grunebaum, Islam, p. 85; Hahn, "Abrogation", pp. 124 (note no. 1) and 132.
102 Ahmad liasan, The Early, p. 70.
103 Bell, Introduction, p. 98.
Regarding the actual cases of naskh, the jurists are divided among themselves on the precise cases of naskh. Al-Suyūṭī, for instance, claimed that twenty instances of naskh in the Qur'ān which are recorded in his book, "al-Itqān" are binding and undisputable. These instances, however, were reduced to only five by Shāh Wālī Allāh as the only genuine cases of naskh for the rest can all be reconciled. This is frequently quoted to show the uncertainty and inconsistency in applying the principle of naskh. Some of the jurists have attempted to clarify the origin of this uncertainty in Islamic legal history. They said that in the early period, naskh was used to denote a wider meaning to include abrogation, qualification, specification and even the additional ruling instituted by the Sunnah over the Qur'ān. This fact has led one scholar to say that "some of the oldest exegetes included indiscriminately under naskh all and every verse where they noted a degree of contradiction however slight". This remark has been clearly manifested by the so called "verse of jihad or sword-verse ". This single verse alone has been claimed to have abrogated more than one hundred verses in the Qur'ān which urged the

106 Al-Itqān, vol. 2, pp. 22-23. See also Bell, Introduction, p. 98.

As a matter of fact, these twenty cases of al-Suyūṭī's were reduced from what were thought to be more than five hundred abrogated verses. (see Hahn, "Abrogation", p. 124, note no. 1)

107 Shāh Wālī Allāh, al-Fawz al-Kabīr (urdu translation), quoted by Ahmad Hasan, The Early, p. 68. Similarly, Mujāhīd Zayd himself came to conclude that only five cases were genuinely abrogated. (al-Naskh, vol. 2, p. 848)


Muslims when they were in Mecca not to fight the unbelievers.\textsuperscript{110} Again, one can see how the uncertainty arose in applying the principle of \textit{naskh}.

For the sake of distinction between \textit{naskh} and \textit{tarjih}, we may begin by saying that both are used to eliminate one contradictory piece of evidence but \textit{naskh} is restricted to text conflict since \textit{naskh} is confined, in terms of time, to one period only i.e. the life time of the Prophet.\textsuperscript{111} \textit{Tarjih}, as shown before, operates on the entire range of legal evidence including that which is established through \textit{ijtih\ddot{a}d} in which no text is provided.\textsuperscript{112} Another fact worthy of note is that \textit{naskh} depends totally on the concrete knowledge of relative dates of revelation to the extent that \textit{naskh} cannot be proven by mere possibility of the time discrepancy between two conflicting texts.\textsuperscript{113} This is usually hard to determine while \textit{tarjih}, on the contrary, is not subject to such conditions.

It seems also that \textit{naskh}, is in fact, merely an historical method in Islamic legal theory i.e. being no longer operative in recent times because the revelation ended with the demise of the Prophet.\textsuperscript{114} In

\textsuperscript{110} Ahmad Hasan, \textit{The Early}, p. 69; al-Qard\ddot{a}wi, \textit{al-Madkhal}, p. 146; \textit{Hibat Allah}, p. 46, as cited in Burton, \textit{The Sources}, p. 1.

In this regard, Mustafa Zayd has devoted one of his chapters "claims of \textit{naskh} which are unaccepted". Moreover, he has given a long discussion on the so-called "claims of \textit{naskh} by sword -verse". (see \textit{al-Naskh}, vol. 1, pp. 551-692 and vol. 2, pp. 693-813).

\textsuperscript{111} \textit{Al-Luma\textquoteright}, p. 33; al-Baj\ddot{i}, \textit{Ihk\ddot{a}m}, p. 359.

\textsuperscript{112} For details, see the second part of chapter six (i.e. \textit{qiy\dot{a}s conflict})

\textsuperscript{113} \textit{Al-Bur\ddot{a}han}, vol. 2, p. 1160; Ibn Hazm, \textit{al-Ihk\ddot{a}m}, vol. 4, p. 458; \textit{Nayl al-Aw\ddot{a}j\ddot{a}r}, vol. 5, pp. 292, 299, 331; \textit{al-Muswaddah}, p. 230.

\textsuperscript{114} Al-Zuhayli, \textit{Usul}, vol. 2, p. 931.
addition, cases which are strictly confined to *naskh*, even without considering the view of Shah Walī Allāh, remained limited in number compared to cases in Islamic law which are applicable to *tarjīh*. Also these cases of *naskh* are already fixed and decided upon to the effect that no more can be added if one wishes to do so. By this, *tarjīh* position is more progressive, relevant and applicable to the modern study of Islamic legal theory particularly to practical purposes of studying *usūl al-fiqh*.

For both these points, I would like to propose, as advanced by the *jumhūr*\(^{115}\), that *tarjīh* is favoured over *naskh* because the latter constitutes cancellation of a particular verse or tradition while the former expresses merely a preference. *Tarjīh*, as is suggested by its function, does not necessarily indicate that a particular evidence is abandoned, rather it displays that one of the conflicting pieces of evidence is better in many respects such as in the hierarchical order of the evidence, the nature of the wording, etc. When *khāṣṣ* is preferred over *‘amm*, for example, this is due to the degree of strength of the wordings involved in conflict. Obviously, there is no cancellation at all of either of them. Thus, to assert that a particular verse or tradition has been abrogated solely on the basis of presumption is considered as misguided for it would render many legal texts void in terms of validity.\(^{116}\) This does not apply to *tarjīh*.

\(^{115}\) See page 146.

CHAPTER THREE

PART C

THE POSITION AND SIGNIFICANCE OF TARJIH

The Position of Tarjih

Another problem related to tarjih that has been extensively debated by the jurists is the position of each method employed to remove contradiction. The dispute simply arose when some of the jurists had utterly contrastive points of view regarding the priority of a certain method to be applied when there appears to be a conflict. A minute examination of this problem, however, demonstrates that it is too hard to make a solid conclusion on the issue owing to its complicated and sometimes confusing discussion. Thus, the following paragraphs attempt to simplify this question.

Initially, we may point out that our discussion concerns particular methods namely jam' (reconciliation), naskh, tarjih, takhyir, tawaqquf and tasaqut.1 These methods, as claimed by the jurists, are the legal solutions that could be adopted to remove legal contradiction. However, they had their own opinion in applying these methods hierarchically. Some jurists, probably the jumhur2, have placed jam' between two conflicting pieces of evidence at the top of the list in all

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2 This point of view is based fundamentally on the fact that the only recorded opinion which opposed the applicability of jam' as the first priority was referred to the Hanafi jurists alone. (see Badran, Tarjih, p. 36-37)
cases of contradiction. Their arguments are based upon a great deal of proof but their key view is simply the fact that legal evidence was revealed to be fully applied and jam' is the best means of achieving this view compared to the other methods. Since jam' provides for the possibility that both of the two contradictory pieces of evidence could be implemented in such a way that they are no longer contradictory, jam' must be given priority in tackling any contradiction in Islamic law.

For this we need an example. The case under discussion concerns the waiting period (‘iddah) enforced on those whose husbands have died. Two texts are involved, one of them prescribing that widows must observe four months and ten days, another stating that they must be provided with a year's maintenance (nafaqah) and residence or lodging (suknā). These two texts are said to be contradictory since they concern the same subject i.e. widows. In response to this, some jurists contend that the earlier revelation is abrogated by the later. In consequence, a widow must observe only four months and ten days instead of one year because the former is the later in terms of the date of revelation. As previously indicated, whenever there is the possibility of reconciliation between two conflicting texts, a resort to any other

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4 Al-I’tibār, p. 9; Ghayat al-Uṣul, p. 141; Ibn Badran, al-Madkhal, p. 197.
5 This refers to Q. 2:234. For details on legal prescription, see al-Qurṭubī, al-Jāmi‘, vol. 3, pp. 186-187.
6 This refers to Q. 2:240 and for details, see ibid., pp. 226-227.
8 Ibid. See also al-Zuhaylī, Uṣūl, vol. 2, p. 965; al-As‘adī, Uṣūl, p. 259.
solution is unnecessary. This applies here. Though both texts are concerned with widows they differ in respect to the ruling. The first verse (Q. 2: 234) constitutes the period of 'iddah while the second (Q. 2: 240) explains only the duty of the former husband to provide maintenance for one complete year. *Jam* provides room for both to be applied respectively. Therefore it is said that "*al-jam* 'yamna* al-naskh". Moreover, *naskh* is unacceptable here for the present conflict is not genuine and the relative dates of revelation are not precisely known.

As a matter of fact, *jam* has a variety of forms that should be thoroughly considered in applying reconciliation to legal evidence. *Ta'wil* ¹⁰, *takhsis* ¹¹, *taqyid* ¹², *bayan* ¹³, etc., are among the dominant forms of reconciliation in Islamic jurisprudence. Therefore, it is not surprising that al-Shawkānī has clearly stated that the application of

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Surprisingly, Wahbah al-Zuhaylī, a distinguished contemporary scholar on *fiqh* and its *usul*, has considered *naskh* as one of the forms of reconciliation. *(Usul*, vol. 2, p. 931)

¹⁰ Ibn Qutaybah’s *Ta‘wil Mukhtalaf al-Hadīth* is the best example of this. In his *Ta‘wil*, he deals at length with the arguments adduced against the upholders of tradition by different groups before he proceeds to his main subject which is to reconcile traditions which seem to be contradictory through 'ta‘wil'.

¹¹ See al-Risalah, paras. 629ff.

¹² See pages 144ff.


tarjîh must be subject to the failure of reconciliation.\textsuperscript{15} If not, tarjîh is not a permissible part of removing legal conflict.

Some scholars, on the contrary, have considered the time of each revelation as a turning point in legal conflict. They believe that if the dates of two conflicting pieces of evidence are known and provided that they are qaṭī, naskh must be applied instead of jam'.\textsuperscript{16} As a result, the later evidence will supersede the earlier which makes the earlier no longer valid. In cases where there is no knowledge of the relative dates of both conflicting revelations or both are zanni, tarjih is applied immediately without any consideration of the possibility of jam'.\textsuperscript{17}

In my opinion, it is clear that in the course of conflict, jam' must be given the first priority because it is better to reconcile than to neglect either of them as resulted from naskh. In his support for jam', Ibn Hazm declares that one is obliged to reconcile, because legal texts have no double standard by which one can be preferred over the other.\textsuperscript{18} Naskh or even tarjih in general, indicates that one of the conflicting

\textsuperscript{15} Irshad, p. 276; idem, Nayl al-Awjâr, vol. 5, p. 292.


pieces of evidence is not operative. Therefore, it is unacceptable to resort
to any method unless an attempt at reconciliation has failed.\textsuperscript{19}

Until now, the position of tarjīh has not been certain. It is only
at this stage that tarjīh becomes a serious concern. According to many
jurists, tarjīh must take second priority in the discussion after the
failure of reconciliation and in the meantime, it takes precedence over
other methods particularly naskh.\textsuperscript{20} The jurists, however, did not clarify
why tarjīh is superior at this stage. The reason behind this, according to
my opinion will be mentioned later. For the moment, I will summarise
this disagreement briefly. For this, we can say that, again, the jurists
disputed two matters, namely the knowledge of the revelation date and
the degree of every evidence. All of them agree that tarjīh is superior
only if the conflicting pieces of evidence are zanni or when a zanni is
confronted by a qat‘ī.\textsuperscript{21} In turn, if both are qat‘ī, the jumhūr held that
tarjīh must be applied first, while some jurists preferred naskh provided
that the dates of revelation are certain.\textsuperscript{22}

Totally contrary to the above two opinions, some jurists have
held another opinion. According to them, when both conflicting pieces of
evidence are qat‘ī or when the dates of revelation are uncertain, both

\textsuperscript{19} Irshād, p. 276; Hujjat Allāh, vol. 1, pp. 138, 139.
are rejected (tasāqut). If this happens, they argue, the conflicting pieces of evidence are set aside and other element of evidence, particularly the one which comes immediately after these pieces of evidence hierarchically should be referred to. Also, it is suggested by other jurists that, in this case, instead of referring to another evidence, one is free to choose any of the conflicting pieces of evidence he wishes.

For a clear and immediate judgement, we may state that tarjīḥ should prevail over naskh in all cases of contradiction provided that jam‘ has failed to harmonize the two conflicting texts. For one thing, naskh is too complicated to be accurately determined and it is frequently confused with takhṣīṣ, taqyīd and istithnā which are part of reconciliation. Moreover, in many cases, tarjīḥ is employed to support an alleged naskh particularly when there is more than one report concerning either nasikh or mansūkh which gives the impression that tarjīḥ is more workable in whatever case of conflict. An opinion which

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24 Al-Bajī, Iḥkām, p. 664.
29 Hītū, al-Ijtihād, p. 22.

Al-Hamdhānī points out that in order to apply naskh in hadīth conflict, one must be certain that the nasikh is the most authentic form of isnad compared to mansūkh. (al-I‘tibār, p. 71) It gives an impression that tarjīḥ, i.e. to distinguish and to prefer accordingly only the most reliable tradition, is prior and superior to naskh for the latter depends on the former.
permits one to choose from the conflicting pieces of evidence whatever evidence he wishes is also rejected because as long as tarjīḥ can be applied, there is no necessity to resort to choice. The same argument is directed to those who suggested that all of the conflicting pieces of evidence are to be rejected owing to their contradiction. Finally, it is certain that tarjīḥ is the most effective method after jamʿ to remove legal contradiction as will be shown clearly in the following chapters.

Nevertheless, we have to say that tarjīḥ is liable to rejection only if all the attempts made by the jurists either to reconcile or to prefer one piece of evidence over the other have proved to be inapplicable.30 Given this possibility of irrelevancy of tarjīḥ, some of the jurists have suggested two means in order to remove the conflict. They said that a jurist may either resort to a general principle of Islamic law such as al-ībāḥah al-asliyyah, meaning that it is the principle that everything is considered as valid until the contrary is proved, or he may resort to other evidence, that of lower status of the two conflicting pieces of evidence. That is, should two Qur'anic verses contradict each other, a resort should be made to find another provision in the Sunnah or other legal arguments.31

On the other hand, there is another discussion regarding the position of legal solutions but in respect to qiyyās contradiction. Obviously, qiyyās does not have the relation to the date of revelation that the texts have. Therefore, the proposed legal solution is quite different

30 'Iwad, "al-Taʿarud", p. 278.
31 Ibid.; al-Badakhšī, Manāḥīj, vol. 3, p. 204; Musallām, vol. 2, p. 188.
from that discussed previously. There is an agreement amongst the scholars that if one *qiyaṣ* can be preferred over the other *qiyaṣ*, this must be done without any hesitation.\(^\text{32}\) However, when *tarjīh* is inapplicable, the jurists have disagreed. In short, two points of view are recorded on this problem; one consists in an obligation to choose one of the two conflicting *qiyaṣ* \(^\text{33}\) for otherwise, it would cause legal problems to be abandoned without having reached a solution which is unacceptable in the formation of Islamic law.\(^\text{34}\) Another view suggests that one should avoid giving any judgement until the balance and accordingly the superiority of one of them is clear.\(^\text{35}\)

It is possible at this stage, therefore, to note that *tarjīh* is applicable to legal text contradiction only when it is impossible to reconcile. Compared to *naskh* or other legal solutions, *tarjīh* must be given full authority after the failure of reconciliation in terms of removing any legal conflicts whether in legal text or in other legal evidence. If *tarjīh* failed to do so, another solution is referred to. This order of position to remove legal conflict will be adopted consistently throughout the following studies.


\(^\text{33}\) Ibid.

\(^\text{34}\) Ibid.; al-Zuhayli, *Usul*, vol. 2, p. 1181.

The Significance of Tarjīḥ

It is now relevant to show how significant tarjīḥ is in usūl al-fiqh. For this, I propose to treat two points that, to my mind, constitute the key to a sound understanding of the significance of tarjīḥ. The first point deals with how valuable tarjīḥ is in the entire usūl al- fiqh and the second displays a specific function of tarjīḥ in legal conflict.

To begin with, one needs to know whether tarjīḥ is equivalent to ijtihād or not. The latter constitutes taqlīd: unquestionable acceptance of a given doctrine. One who applies taqlīd is known as a muqallid who memorized the doctrine of the school and understood its details but was incapable of mastering the methodology that the eponym and older teachers applied in order to reach their legal reasoning. Hence, it is certain that tarjīḥ is not taqlīd; rather it is a sort of ijtihād since the murajjīḥ must be a qualified person capable of ijtihād.

However, it remains undetermined what kind or rank of ijtihād tarjīḥ refers to. For one thing, it is agreed that the independent kind of mujtahid who could set up his own school of law had became extinct after the formation of the four schools of law. This was confirmed by

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37 Abu Zahrah, Usūl, pp. 398-399.
38 Ibn Badran, al-Madhkhal, p. 196.
al-Zuhayli.\textsuperscript{40} The latter prescription of \textit{mujtahid} is also known as \textit{mujtahid \textit{fi al-madhhab}}; one who is well versed in one school's legal system and can discover the law of any case of any kind at any time in all domains of law within the framework of that school.\textsuperscript{41} In short, two major types of \textit{ijtihād} have been distinguished; independent and restricted \textit{ijtihād}.\textsuperscript{42}

Considering the fact that tarjīh is applicable to more than one school of law, the so-called \textit{ijtihād muqayyad} is not the one that tarjīh refers to, because tarjīh involves a considerable \textit{ijtihād}, though it is relatively limited and does not go beyond the existing legal opinions and arguments. However, it was only at a later period, precisely in the seventh century of Hijrah that the number of ranks reached five and by the tenth century, seven ranks of \textit{mujtahidūn} were distinguished.\textsuperscript{43} The \textit{ashab tarjīh}, one of the seven ranks, are those who were competent in making comparisons and distinguishing the correct (\textit{sahīh}) and the preferred (\textit{arjāh} or \textit{rājīh}) from the weak.\textsuperscript{44} This type of \textit{ijtihād} was regarded as of lower rank than the two mentioned \textit{ijtihāds} and frequently put together with the ranks of the \textit{ashab al-takhrij} and \textit{ashab al-tashīb}.\textsuperscript{45} It should be noted that these three categories overlap somewhat


\textsuperscript{42} Hitū, \textit{al-ijtihād}, pp. 37-47 particularly p. 42.

\textsuperscript{43} See Hallaq, "The Gate of \textit{ijtihād} : A Study in Islamic Legal Theory ", Ph.D dissertation, University of Washington, 1983, p. 84. (cited after as "\textit{ijtihād} ")

\textsuperscript{44} Abu Zahrah, \textit{Usūl}, p. 396; Aghnides, \textit{Theories}, pp. 122-123; Introduction to \textit{al-Mawsu'ah al-Fiqhiyyah}, vol. 1, p. 35; Ma'sumī, "\textit{ijtihād} through fourteen centuries", in \textit{IS}, vol. 21, 1982, p. 63. (cited after as "\textit{ijtihād}").

\textsuperscript{45} Ibid.
and could be unified in one category to comprise all those who drew comparisons and evaluated the strength and weakness of the existing views. What is clear is that *tarjīh*, on the whole, relied somewhat on *ijtihād*. In other words, we can say that *ijtihād* particularly the first two ranks of *ijtihād*, are primarily concerned with legal interpretations from the very beginning while *tarjīh* as a proper study occurs at a later stage to re-interpret the already existing rulings in the light of *tarjīh* methodology (as will be fully discussed later).

Nevertheless, we can also see that *tarjīh*, neither as a proper methodology nor as a term to distinguish between certain categories of the rank of *ijtihād*, already existed even before the technical names of the rank of *ijtihād* started to occur in *usūl*-oriented work. This is so simply because *tarjīh* is an inevitable resort on which every jurist must rely particularly after the failure of reconciling two contradictory pieces of evidence. Generally speaking, all types of *mujtahid* can be considered as *murājjīh* including great jurists or the founders of Islamic legal schools in the first and second century of Hijrah.46 As legal studies developed, the works of the third century onwards were principally devoted to studying and re-examining carefully legal writings of those in the earlier stage in more systematic juristic discussions. The nature of the study in this period of time involved a comparative study not only between two or more

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It is best evident from the definition of an independent *mujtahid* itself. Hitū, for example, writes that independent *mujtahid* is one who is not only of ability to set up his own school on his own principles of law but also of capacity of preferring conflicting indications. (see *al-Ijtihād*, p. 17)
schools of law but also between two authorities or more in a single school of law. Accordingly, scholars in this age especially after the formative period, were better known as murajjih and no longer as mujtahid. Later, the title of murajjih is of restricted use. Tarjih is applicable only within one school of law in order to arrive at the most authorised view in that particular school of law. The jurists often classify this rank of ihtah by providing names of the jurists that qualified to be the murajjih in every madhhab such as al-Nawawi in the Shafi'i madhhab, al-Mirghaynani in the Hanafi school of law, Khalil in the Maliki madhhab and al-Qadi 'Ala' al-Din al-Mardawi in the Hanbali madhhab.

After this explanation, it seems to me that modern writers who attempted to classify the rank of ihtah or in particular to attribute the position of tarjih to this rank have confined themselves to the later stage of legal studies where murajjih was a quite distinguished rank of mujtahid; restricted to application of preference in one madhhab. This contention, in my opinion, contains two errors. One error consists in not giving any considerable attention to the application of tarjih in the pre-formative period. We have already shown elsewhere that tarjih is an integral part of legal studies and of ihtah in particular. The other error appears when tarjih application is said to be restricted within one madhhab. Moreover, the names of some jurists and their respective works have been cited to support the idea. It is true, in my opinion, that al-Nawawi, for example, is a murajjih in the Shafi'i school of law but at

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47 See al-As'ad, Usul, p. 270, note no. 1; al-'Alwan, "The Crisis", p. 332.

48 See al-Zuhayli, al-Fiqh, vol. 1, p. 48. See also Nadiah, Ijtihad, p. 190; Mahmasan, Falsafah, p. 94.

the same time, he is also a well-known jurist in comparative study between madhahib. His distinguished book entitled al-Majmu' Sharh al-Muhadhab is a clear evidence for what has been said. In conclusion, we can say that although tarjih as a proper study has been placed at the bottom of the rank of ijtihad, the list is unable to suggest that tarjih is less important than the first rank of ijtihad in the list because tarjih is a central key to all types of ijtihad.

Nowadays, the materials of fiqh, the results of ijtihad, have been systematically collected, composed and arranged in innumerable numbers of volumes. Unfortunately, this huge mass of materials is always contradictory as is evident from the books of fiqh. Not only that, how these materials were derived through ijtihad was also familiar to the students of Islamic legal theory. Therefore, tarjih is an important instrument in the entire usul al-fiqh, in my opinion, for the following reasons:

(1) To re-examine the reliability of every single method or principle of interpretation which has been adopted by the ancient scholars, e.g. āmm and khāss, 'amal ahl al-Madinah, 'illah mustanbatah, etc., in establishing legal rulings.

For more details, see al-Nawawi, al-Majmu' (introduction), vol. 1, p. 4.

50 See al-Nawawi, al-Majmu' (introduction), vol. 1, pp. 5-6.

He describes his book as "sharh li al-madhhab kullihi; bal li madhahib al-'ulama' kullihim". (ibid)
(2) To re-organise the *maratib al-adillah* (hierarchy of legal sources) where most legal disagreements are due to the lack of knowledge of these *maratib*. 51

(3) *Tarjīh* provides the possibility that only the best legal opinion with respect to methodological considerations will be advanced.

(4) Also significantly, it offers a proper basis for the so-called "comparative study of *fiqh*". Many books concerned with *fiqh* have adopted the methodological considerations of *tarjīh* which make these books full of arguments and counter arguments in order to reach the *arjah* opinion according to the authors' point of view. 52

(5) To contribute to the codification of Islamic law across several Muslim countries. This is done by selecting the opinion preferred by considering the one most suited to modern life, particularly in cases which have no textual evidence 53 and sometimes by selecting the opinion preferred by most where *tarjīh* is a form authorised to do so.

In the light of the above outlines, we can understand that the study of *tarjīh* has occupied an important position next to *usul al-fiqh* itself. In other words, we may say that the study of *tarjīh* is not only directed at Islamic law i.e. to the so-called *furūʿ*; but also to a far greater extent, at the methodology of *usul al-fiqh*, the rules for the deduction of the *furūʿ* from the canonical sources of law. It serves, to some extent, as a cross examination of the reliability of every single principle of

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51 The problem of *maratib al-‘adillah* or the hierarchical order of the sources is a significant cause of legal disagreements in Islamic law. See page ¶.  


53 See Anderson, "Recent Development", p. 244.
interpretation adopted by the jurists. The direct consequence is that only the principle which is more accurate and consistent will be put forward as an appropriate principle to govern the establishing of legal rulings to new cases in the contemporary Muslim world.

The significance of *tarjīh* in legal conflict has another explanation. Since more than one method was employed by the jurists to remove contradiction such as *naskh*, *takhyīr*, etc., *tarjīh* must be shown to be the most practical and applicable method for removing any contradiction. Our previous discussion of the position of *tarjīh* as a legal solution is quite clear in showing that *tarjīh* is the most systematic and effective way to eliminate any conflict after the failure of reconciliation.

*Istihsan* for instance, has a limited function in removing contradiction while *naskh* is argued about in terms of validity and sometimes of its application. Ta'wil as well as *tafsir* as shown before, are merely part of *tarjīh* methodology. *Talfiq*, however, does not concern the methodological arguments rather than the *maslaha* in selecting the most perfect opinion. All these suggest that *tarjīh* is always upheld and prevails in terms of removing legal conflict.

54 See pages 132 and 136-141.
55 See page 122.
56 See pages 126-127.

In addition, Ahmad Hasan has rightly argued that *talfiq* might produce dangers saying that ".... by exercising the principle of *talfiq* we may unconsciously build an edifice with a mixture of rules based on conflicting principles enunciated by various schools of law which may fit in their system and thought, but not in the system of others. In the wake of such an
It is hoped that *tarjīh* could play a significant role as a workable instrument to remove whatever conflicts exist because the knowledge of *tarjīh* is not only important in re-examining the existing legal disagreements but also in establishing rulings for new and unprecedented cases to the extent that a *mujtahid*, among other requirements, has to be familiar with how to apply *tarjīh*. By these two advantages and for all practical purposes, *tarjīh* is eminently superior to other principles discussed above. Therefore, this interesting topic has been chosen because it gives an excellent opportunity to examine, or more precisely to re-examine, the phenomenon of contradiction in Islamic law with special emphasis on *tarjīh* methodology.


57 Al-Qardawi, Madkhal, pp. 286-287.

*Tarjīh*, in this context, is called *al-ijtiḥad al-intīqāl* (ibid)


CHAPTER FOUR
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THE METHODOLOGY OF TARJĪH IN MATN CONFLICT

Part A: Introductory Remarks:

It is widely acknowledged that Islamic law is extracted foremost from two sources namely the Qurʾān and the Sunnah. Accordingly, an interpreter, whatever the title attributed to him, is required to obtain a high standard of knowledge of the language in which the Qurʾān and the Sunnah were revealed and pronounced. Thus a legal interpreter is a person knowledgeable in the classification of Arabic words and their precise implications in addition to the methodological aspect of interpretation, called usūl al-fiqh. Therefore, it is obvious that rules which govern the origins of words, their usages and classification are of prime importance in usūl work and this sort of discipline is well known in usūl terminology as nass or matn.

Though nass or matn is commonly used in the sense of text as opposed to sanad or chain of transmission, the word matn will be used in

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1 A legal interpreter is called a mujtahid by al-Ghazālī while al-Jurjānī used the title faqīh to refer to a legal interpreter. See al-Mustasfa, vol. 2, p. 350 and al-Jurjānī, Kitab al-Ta‘rīfāt, p. 8.

2 Al-Risālah, paras. 143ff ; al-Burhān, vol. 1, p. 169 and vol. 2, p. 1330f ; Khalīfah, Manāhīj, p. 27.


4 The language discussions are found in both the mutakallimūn and the jurists method of writings. Nevertheless, the location and classification of discussion vary from one method to another. (see Khalīfah, Manāhīj, p. 29, 55-56)
the entire chapter instead of *nass*. The central reason behind this is that *al-nass*, as a term in *usul*, has a variety of meanings that are common in *usul* study. Apart from its dictionary meaning, that is, the text or the word (*al-lafz*), it is also used to represent a category of wording in relation to the degree of clarity.\(^5\) Moreover, this category of clarity varies from one school to another particularly between the Shafi‘ī and the Hanafi schools of law.\(^6\)

To avoid any confusion and since our present discussion will involve this category of wording, it will be easier to use the word *matn*, instead of *nass*, to refer to the text in both the *Qur‘ān* and the *Sunnah*. *Matn* or *mutūn* in plural, is derived from the root *matana* which comprises several literal meanings such as beat (the back part of the body), oath, stay, etc.\(^7\) In technical use, it still conveys many meanings but the most dominant is described as a hard or elevated piece of something e.g. *matn al-ard* (the surface of the earth).\(^8\)

For academic purposes, *matn* simply signifies the original text as opposed to any commentary.\(^9\) *Matn al-hadīth*, for example, constitutes the wording of the *hadīth* which provided the meaning.\(^10\) On the whole, the jurists have used this word of a legal text to refer to its total original

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\(^5\) See page 200.


\(^8\) Ibid.

\(^9\) Ibid.

\(^10\) Ibid.

Goldziher notes that the word *matn* is pre-Islamic and did not originally signify *hadīth*-text. In old Arabic it had been used to denote 'written text'. (*Muslim Studies*, vol. 2, p. 20)
wording and linguistic structure as distinguished from isnad or sanad or even from footnotes, annotations and commentary as well.\textsuperscript{11}

Despite the ability of a matn to provide some legal provisions, disagreement still arose as to the precise meaning of a word or a sentence in a legal text. Possession of a text, does not mean that a disputation cannot arise.\textsuperscript{12} This is because, as stated by one scholar, "the whole process of Muslim jurisprudence from the definition of the sources of law to the derivation of substantive rules, was a speculative effort of the human intellect".\textsuperscript{13}

The statement shows that the matn is in need of interpretation through the so-called \textit{ijtihad}. According to one scholar, an attempt to interpret legal texts correctly is crucial since the greater use of legal texts is classified as speculative. Thus, this large number of speculative texts is open to a variety of interpretations as is actually the case in the overwhelming number of discussions in Islamic law.\textsuperscript{14} Even if the texts are clear cut i.e. definitive, one must also resort to \textit{ijtihad} in order to distinguish where a text applies and where it does not.\textsuperscript{15} Hence, conflict may arise and accordingly, \textit{taṣ\ jūh} should have a significant role in this

\textsuperscript{11} Wehr, \textit{Dictionary}, p. 890.

\textsuperscript{12} Al-Darini, \textit{al-Manahij}, pp. 7-12.

\textsuperscript{13} Coulson, \textit{Conflicts}, p. 23.

Another scholar has maintained that "law contained in the great jurist works of sunni Islam is at most a human approximation, albeit a close one, to the ideal law of God". (Weiss, "Interpretation", p. 205)

\textsuperscript{14} Weiss, "Interpretation", p. 203.

area of conflict and the present chapter is an attempt to investigate this. Before that, I would like to outline how matn or the wording of the legal texts is conventionally classified in terms of usul study.

Broadly, matn is divided into two main categories namely the word classification and implication. The word implication is then divided into two main indications known as qat'ī and zanūl while its classification is again divided into different groups owing to different clues. With reference to the degree of clarity, the word is classified into clear and unclear which involves many degrees of clarity and ambiguity as well. On the other hand, by referring to the limitation or scope of the word covering, it is often classified into certain types such as 'āmm, khaṣṣ, mushtarak, etc. The last classification however, is based on the usage of the word whether it is used in its original, secondary, literal, technical or customary sense. Obviously, the knowledge of these classifications and indications of either the word or the sentence in legal texts assists a mujtahid in his efforts at resolving cases of contradictory legal texts which is the bulk of this part of the study.

Part B: The Methodological Aspect of Tarjih in Matn Conflict

1. Tarjih Within 'Amm - Khass Contradiction.

As far as legal texts are concerned, in deriving legal rulings, the knowledge of 'amm and khass is a prerequisite since some verses or Prophetic statements are general and others are particular. From a historical point of view, it is reported that al-Razī, one of al-Shāfi’ī's biographers, has claimed that the terms "general" and "particular" were introduced for the first time by al-Shāfi’ī.3 The above illustration, in fact, apparently conflicts with what follows. Fatimah, the daughter of the Prophet, has been reported to have made a claim to inherit the Prophet's property based on the generic sense of understanding the Qurʾān 4:11, "Allāh chargeth you concerning (the provision to ) your children: to the male the equivalent of the portion of two females.....". However, the claim by Fatimah was rejected on the ground that the verse has been particularized (talchs isi. e the act of excluding a specific member from the members of the class or group) by a tradition from the Prophet, saying, "

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1 With reference to tarjih in matn conflict, al-Amīdī has listed 51 modes of preference (al-Iḥkām, vol. 3, pp. 265-273). Nevertheless, not all of these methods will be examined here.

2 From the viewpoint of the scope or capacity of covering, words are primarily classified into 'amm (general) and khass (specific). However, terms like mutlaq, muqayyad and mustharak are brought together in discussion for they are always confused with 'amm -khass implication. See al-Sarakhsi, Uṣūl, vol. 1, p. 124; Kashīf, vol. 1, p. 28.

We, the Prophets, can not be inherited from and whatever we leave is for charity (sadaqah). 4

This incident concerns us for two purposes. First, it shows that the principle of 'amm and khās as previously evident, was in existence in a practical case even before the time of al-Shāfi‘ī. Then, it clearly displays how easily 'amm conflicted with khās since each of them opposes the other in the scope of the word's implication. 5 Accordingly, this phenomenon has been seriously dealt with by the jurists particularly after the appearance of the Risālah. Our aim in this part of the study is to tackle this well-known contradiction with a sufficiently consistent methodology of preference.

'Āmm in usūl has been variously defined. On the whole, 'āmm may be defined, as stated by al-Jassās, as a word that pertains to, includes or affects the whole of a class or group. 6 In other words, it is a word which applies to many things, not limited in number and includes every thing to which it is applicable. 7 The word "al-mutallaqat" (the divorced women) which occurs in Q.2: 228 is an example of 'āmm. The verse reads


For another example of conflict in the Companion period, see al-Qurtūbī, al-Ja'mī', vol. 3, pp. 174-175.

5 According to one scholar, "generalisation and particularisation (as well as abrogation) afford scope for differing interpretation as wide as that provided by the establishment of analogical connection". See Azīz el-Azmeh, "Islamic legal theory", p. 255.

6 Al-Jassās, Usūl, vol. 1, p. 31.

as follows; "Women who are divorced shall wait, keeping themselves apart, three (monthly) courses ..". In consequence, all those who have been divorced, regardless of whoever they are, are required by the Shari‘ah to wait for three qurū‘ as an ‘iddah (waiting period) before they can be remarried to another person.\(^8\) To identify the ‘amm in legal texts or even in the Arabic language, one must observe certain linguistic patterns laid down by the linguists or jurists.\(^9\)

Khāss as opposed to ‘amm, is frequently defined as a word used originally to indicate a specific reference.\(^10\) In other words, it is a word that pertains to, includes or affects only certain members of a class or group.\(^11\) Even though it is restricted to specific matters, it still includes everything to which it can be applied. For the sake of clear example, the word "al-mu’tallaqāt" is again exemplified but this time as a khāss word. Quoted as an example is Q. 33:49, "O ye who believe! If ye wed believing women and divorce them before you have touched them, then there is no period that ye should reckon ..". In this particular case, those who are divorced prior to consummating the marriage are excluded from the requirement of observing the ‘iddah. This exclusion applies specifically to certain divorced women: those divorced before any sexual intercourse (qabl al-duktul).\(^12\) Although it is restricted to such divorced women, it includes all who have been divorced without sexual intercourse. With respect to

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\(^8\) Khalīfah, Takhsīs, p. 44.


\(^11\) Ibid.

\(^12\) Khalīfah, Takhsīs, p. 44.
patterns of identifying \textit{khāṣṣ}, the jurists have also outlined some which do not represent all the forms of \textit{khāṣṣ} in Arabic.\footnote{See for example \textit{al-As'ādî}, \textit{Uṣūl}, pp. 71-72.}

As shown by the jurists, conflict usually occurs between \textit{āmm} and \textit{khāṣṣ} in two situations namely before and after the process of \textit{takhsīṣ} (particularization). Regarding the former case, these two types of words may oppose each other under four circumstances.\footnote{\textit{Al-Jāṣṣās}, \textit{Uṣūl}, vol. 1, p. 381.} The first of these being when the specific verse is revealed after the general verse and after the possibility of acting on it has passed.\footnote{Ibid., p. 383.} For the Hanafis, the later of the revealed verses in terms of dates, abrogates the earlier, provided that both are equal in strength i.e. \textit{qatūn}, and refer to the same subject matter i.e. equal in generality.\footnote{Ibid.; \textit{Kashf}, vol. 1, p. 291.} They argued that since \textit{āmm} is earlier in practice than \textit{khāṣṣ} and there is a gap in time between \textit{āmm} and \textit{khāṣṣ}, it cannot be considered as specification since specification is actually a form of excepting.\footnote{Ibid.; \textit{al-Muswaddah}, p. 134; \textit{al-Bājī}, \textit{Ijābām}, p. 158, note no. 1; \textit{Irshād}, p. 163.} It is an abrogation, they argued, rather than a specification but it is called a partial abrogation in which the text subject to partial abrogation is abandoned while the remaining part of the text continues to operate.\footnote{\textit{Fawātih}, vol. 1, p. 345; \textit{Mustafā Zayd}, \textit{al-Nāṣkh}, vol. 1, p. 73; \textit{Khallaīf}, \textit{Uṣūl}, pp. 186-187; \textit{Taqquṣīn}, p. 179.} Some scholars, on the contrary, criticised those who applied \textit{nāškh} to this particular case. They argued that a mere
discrepancy in time does not justify the conclusion that takhsīs changes its character into abrogation.\textsuperscript{19}

The incident of Hillāl b. Umayyah who had accused (qadhf) his wife with Shurayk b. Sahmā' is the best illustration of what we have discussed. It is unanimously acknowledged that Q. 24:4 was earlier in revelation compared to the next verse in the same chapter i.e. Q. 24:6.\textsuperscript{20} The earlier verse (i.e. Q. 24:4) is as follows, "And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony...". Then, after one verse, came the verse, "As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies, (swearing) by Allāh that he is of those who speak the truth".

According to the Hanafis, the li'ān case (Q.24:6) which is proved to be later in revelation date abrogates the earlier verse (Q.24:4).\textsuperscript{21} Other jurists did not agree with this conclusion and in turn, removed this apparent contradiction by applying takhsīs. As a result, the punishment for qadhf is valid in general or in other words as long as qadhf did not come from a husband upon his wife. Otherwise, when a husband accused his wife and charged her with adultery, li'ān is implemented.\textsuperscript{22} The second view, indeed, seems to be preferable on the grounds that takhsīs

\textsuperscript{19} Al-Bajī, \textit{Iḥkām}, p. 162; al-Tabṣīrah, p. 152.

\textsuperscript{20} In showing the gap in time between these two Qur'anic texts, see \textit{al-Durr al-Manḥūr}, vol. 5, pp. 20-21; al-Shawkānī, \textit{al-Fath al-Qadīr}, vol. 4, p. 10.


\textsuperscript{22} \textit{Al-Risalāh}, para. 426.
grants the possibility for both verses to be applied together on the account that khaṣṣ only limits the application of 'āmm and does not invalidate it as naskh would do. Moreover, to make the application of takhsīs approved and accepted, takhsīs which is a form of bayān, does not need to be in any particular chronological relation with 'āmm. Thus takhsīs can be applied even though the khaṣṣ did not come immediately after 'āmm or in the same context as required by the Hanafis.

Before we move to the second situation of 'āmm-khaṣṣ contradiction, I would like to re-examine the first case more precisely to understand the cause of the conflict. To begin with, we may note that the jurists have held two contrary views regarding the dilālah or degree of implication of each of 'āmm and khaṣṣ. The Hanafis maintained that 'āmm provides a definitive (qātī) reference to all its individual elements in respect both of coverage and rulings. Accordingly, when an 'āmm is applied, it should be regarded as definitive until there is a proof to show the contrary, because a word implication must be first based on its lexical application (mantiq lughawī) instead of involving any other consideration.25 To support their argument, the Hanafis have cited the practice of the Companions in which a total adherence to 'āmm


Regarding reconciliation through takhsīs, see al-Baiji, Iḥkām, p. 161 and al-Tabāṣirah, p. 150.


The jurists unanimously agreed that khaṣṣ implication is qātī. (see al-As'adī, Uṣūl, p. 72 and al-Zuhaylī, Uṣūl, vol. 1, p. 205)

implication was clearly demonstrated by those Companions.\textsuperscript{26} However, the main foundation of such thought, I believe, as put by al-Sarakhsi himself, was the consideration that this legal theory has been the official view of the early jurists in Hanafi school of law. Al-Sarakhsi simply said that "\textit{wa 'ala hadhā dallat masa’il 'ulama’īnā}."\textsuperscript{27}

The Shafi’is view, relatively speaking, is totally different from that of the Hanafis. ‘\textit{āmm}, according to them or generally the \textit{jumhūr}, brings only \textit{zanni} or probable proof whether it is before or after \textit{takhfīs}.\textsuperscript{28} This means that the rule attached to ‘\textit{āmm} is applicable to every individual element within its meaning but only to the degree of speculative probability. Their argument is a brief one. Since ‘\textit{āmm} is liable to possible specification, its certainty (\textit{qat‘ī}) no longer exists.\textsuperscript{29} In addition, the \textit{jumhūr} have also based their attitude on their personal observation that almost all instances of ‘\textit{āmm} in legal texts were particularized.\textsuperscript{30}

\textsuperscript{26} Al-Sarakhsi, \textit{Usul}, vol. 1, p. 135 ff. See also \textit{Kashf}, vol. 1, p. 294.
\textsuperscript{27} Ibid., pp. 132-133. See also \textit{Kashf}, vol. 1, pp. 291, 308.

Though this is the official viewpoint of the Hanafis, Abu Hanīfah, in many places, was criticised when he always made specification of general texts even without a proper evidence of specification. (see \textit{al-Mankhūl}, pp. 180-186).

It should be kept in mind that ‘\textit{āmm} is of three categories, namely (i) ‘\textit{āmm} which is absolutely general; (ii) ‘\textit{āmm} which is meant to imply \textit{khass} and (iii) ‘\textit{āmm} which is not accompanied by any indication to show either the first or the second. The disputation over the degree of ‘\textit{āmm} implication (as in the present case) confines merely to the last category. See Khallaf, \textit{Usul}, pp. 185-186 and Khalīfah, \textit{Takhfīs}, pp. 33-34.
\textsuperscript{29} \textit{Kashf}, vol. 1, p. 304; \textit{al-Thaqāfī}, "\textit{al-Ziyādah}," pp. 266-267.

Hence, they said that what is intended by the Lawgiver when He uses ُاًم in most likely some of its reference even though takhṣīs did not actually take place, for it is so common that anything general can be particularised that it becomes a legal maxim known as "مَآ مِن ُاًم َّلَا وَا َّقَد كُحِسِسَا".31

Obviously, the above disagreement does not produce anything contradictory in fiqh as long there is no khāṣṣ evidence. In other words, ُاًم should refer to every individual under its coverage. The disputation arose when ُاًم was contradicted by khāṣṣ. The Qur'anic injunction (Q. 6:121), "And eat not of that whereon Allah's name hath not been mentioned, for lo! it is abomination", for example, which clearly prohibits the Muslims from consuming the flesh of animals slaughtered by a Muslim, if for whatever reason, he has not mentioned the name of Allah consciously, has been claimed as a general provision in contrast to the following specific tradition i.e. "The believer slaughters in the name of Allah whether he pronounces the name or not".32

Since hadīth āḥad is regarded as zannī, it is not capable of particularising the 'umūm conveyed in the Qur'anic text. In consequence, one is totally prohibited from eating such flesh by virtue of the general Qur'anic provision.33 It was the Hanafī jurists who held this view arguing that a zannī hadīth cannot specify the generality of the Qur'ān because takhṣīs is applicable only between two equal pieces of

32 Badrān, Usul, p. 383.
evidence. On the contrary, the Shafi'is have clearly declared that it is permissible to eat any flesh as long as it has been slaughtered by a Muslim. Of course, the tradition for them is a valid proof in particularising the Qur'an since both, according to them are probable; the Qur'an in terms of its 'umum and the tradition on account of its ahd.  

Despite the acknowledgement by some scholars that the above conflict is merely apparent, the problem remains disputed among the jurists. Without trying to open the entire arguments of the conflict, it is adequate, in my mind, to show that as far as hadith is concerned in explaining the meaning of the Qur'an, it is appropriate to do so, irrespective of the degree of the hadith provided that it is a valid and reliable hadith. For one thing, most of the Prophetic traditions are ahd and accordingly, any inclination to neglect them as in the previous case would render most of the Prophetic traditions pointless. By applying takhsis, however, both legal texts could be jointly implemented, for takhsis signifies only the specification of one category within a group of related categories. Moreover, the determination that such and such is qatif or zanni is questionable and sometimes baseless. But those who did not admit the possibility of takhsis, have in fact, led themselves into a complicated situation in justifying their legal view. As in this case, they said that the verse abrogates the tradition, although it is widely known that the verse is

34 Al-Sarakhsi, Usul, vol. 1, pp. 133-134.
35 Al-Khin, Ikhtilafl, p. 211.
36 Khallaf, Usul, p. 185.
Meccan and the tradition apparently belongs to the Medinan period. Moreover, naskh is inappropriate if applied because naskh is inapplicable unless in qat'i-qat'i conflict. From this explanation, we come to know that partial abrogation as claimed by the Hanafis in the case of 'amm, is but a natural consequence of the Hanafi's legal theory that both 'amm and khass are qat'i and therefore applicable to naskh.

The following three situations however, display how dispute exists not only between the Hanafis on the one hand and the Shafi'is on the other but also within one school of law especially among the Hanafis in order to maintain these contradictions. The second case is when the specific verse is revealed before the general verse. The Hanafis held that 'amm abrogates khass. In other words, 'amm is favoured in such a way that khass is abandoned because 'amm is later with respect to the time of the revelation. Therefore, in the Hanafis' view, khass is totally rejected and unimplemented. According to the other jurists, however, 'amm should be particularized by khass and in consequence, some individual cases of 'amm are excluded by takhsis but others which are not subject to takhsis remain operative.

Many examples have been put forward by the Hanafis to show how 'amm abrogates what is indicated by khass and the same examples have been used by the jumhur to show the contrary. However, I believe, one example might be sufficient in this context. Abu Hanifah, as

42 See al-Mahdī, vol. 2, p. 453; Irshad, p. 163; Badran, Tafīl, p. 76.
reported by al-Jassās, claimed that Q. 47:4; "...when ye have routed them, then make fast bonds and afterward either grace or ransom till the war lay down its burden..." is abrogated by Q. 9:5; "Then, when the sacred months have passed, slay the idolaters whenever ye find them...". According to Abū Hanīfah, the first verse which gives the head of the state an absolute choice whether to free the defeated idolaters through ransom or grace is earlier in revelation while the verse which urges the Muslims to kill all idolaters is later. Hence, the later in time abrogates the earlier in the sense that all idolaters must be killed and there is no room for release.43

Naturally, the Shafi'is, in accordance with their principle, held that khāss (Q. 47:4) was not abrogated by the later ʿāmm but was khāss that specified the general provision indicated by ʿāmm. As a result, defeated idolaters are entitled to be freed either by grace or ransom.44 By this, both texts could be implemented together.45

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Other examples can be found in al-Sarakhsī’s Uṣūl, vol. 1, p. 133.
44 Ibid.
45 Badrān, Taqīh, p. 76.

If one wishes to apply the argument of Abū Hanīfah to other cases relevant to the question of dealing with unbelievers, one will notice that this argument is not accurate. In other words, if the obligation to kill all unbelievers is taken as valid on the basis it was the later in revelation, it may invalidate not only the freedom given to the head of state in dealing with defeated believers but also other matters such as the permissibility of making treaty between Muslims and unbelievers, the law of jizyah, etc. It is not a surprise that Abū Hanīfah has been criticised for his inconsistency in applying his principle. (see note no. 27).
The third case of 'āmm - khāṣṣ conflict is when both are revealed together in the same statement which might suggest that there is no separation in the time of revelation between them. To this kind of contradiction all the jurists agreed to apply takhsīṣ. No disagreement occurs because this is the only form which is recognized by the Hanafis as takhsīṣ because takhsīṣ, according to them cannot take place unless both 'āmm and khāṣṣ are in the same text or speech, not separated. For the Shafi'is, there is no doubt that in this case, one is obliged to resort to takhsīṣ because takhsīṣ is applicable whether by an independent or dependent clause of speech regardless of whether they are in the same text or not.

Therefore, it is agreed that 'āmm which occurs together with khāṣṣ in the same verse is specified in the sense that 'āmm is no longer applicable to all its individual cases rather than to some of them. For example, Q. 5: 3; "Forbidden unto you (for food) are carrion and blood and swine-flesh...." is said to be specified by a clause which comes afterward but still in the same verse which is as follows, "Whoso is forced by hunger, not by will, no sin (for him) lo! Allah is Forgiving, Merciful".

Al-Sarakhsi says, "idhā kāna al-kalām mašūlūn kāna ākhiruhu bayā‘an nīāwālihi, wa idhā kāna mafṣūlūn kāna naskhan". (ibid)
Hence, one who is in such a condition is allowed by a specific indication that occurs in the same text to eat what has earlier been prohibited. 49

The fourth and final case exists when it is not known which one came first, the general legal proof or the specific legal proof. The Hanafis, however, held different views which can be summarised as tawaqquf from practising both until the dates of revelation are known 50; preference for one of them 51 and finally, both are abandoned and in turn, other elements of evidence are referred to. 52 However, another opinion which was personally expressed by al-Bukhari, the author of Kashf al-Asrar, suggests that 'amm should be applied on the grounds of precaution. 53

The Shafi'is, in accordance with their principle, together with the remaining jurists, gave the preference to khass without any hesitation for more than one specific reason. Al-Amid, for instance, has listed three reasons why khass should prevail; it is stronger and more specific in indication; to prefer 'amm means to abandon khass while the opposite action does not bring the same result where both could be jointly applied and the possibility that 'amm is subject to specification is greater than that khass be interpreted as having a metaphorical meaning. 54

50 See al-Jassas, Usul, vol. 1, p. 407, note no. 1; Irshad, p. 163.
51 Ibid.; Khalifah, Takhfs, p. 40.
53 Kashf, vol. 1, p. 299.
54 Al-Amid, al-Ihkam, vol. 3, p. 269. See also Irshad, p. 163.
For an immediate conclusion, we may say that the Shafi‘i’s point of view in all cases of ‘amm -khāṣṣ conflict is sound and reliable because recourse to abrogation in some cases of conflict is often found to be unnecessary. Furthermore, by applying takhsīs, both can co-exist in their respective spheres which is better than neglecting either of them. Consequently, the application of li‘ān as an exceptional form of qadhf punishment, freeing the defeated unbelievers either by grace or ransom and eating the prohibited things in darūrah situations are all valid cases by virtue of takhsīs. These three rulings are upheld for they are more specific and contain no cancellation of general provision.

To complete our discussion of tarjīḥ in ‘amm -khāṣṣ conflict, I shall examine the possibility of contradiction after takhsīs. It is said that when a fresh ‘amm i.e. unspecified, contradicts the specified ‘amm (‘amm makhsūs), the former prevails. Those who adhered to this preference have claimed that ‘amm makhsūs is weaker for two reasons; its degree of indication is disputable and it became majāz after takhsīs. However, this sort of argument has been disapproved by some of the jurists arguing that ‘amm makhsūs is preferable because it is more dominant (al-ghālib) compared to the one which is not yet specified.

55 In fact, in modern law too, one often notices that the particular usually specifies the general whereby both can co-exist. See Abu Zahrah, Ugul, p. 168.
57 Ibid.
58 Irshād, p. 278.

Al-Shawkanī attributes this view to al-Safi al-Hindī (ibid).
This view they owed to the fact, as we have already stated, that "amm which remains with its generic meaning is very rare to the extent supported by a legal maxim; "mā min "amm ilā wa qad khussīsā". Subsequently, "amm makhsūs predominates because takhsīs has made it more specific than the one which has not yet been specified.59

The claim that "amm makhsūs is considered as majāz and therefore "amm ghayr makhsūs which is regarded as haqīqah should be preferred, in my opinion is baseless and questionable.60 Even if this claim is accepted, it is the majāz which is supposed to be upheld, owing to its more dominant nature, and as we shall see, that dominant majāz always prevails. Supporting the view which gives more credence to "amm makhsūs, I should like to note that the jurists, in this particular case, did not attempt to provide even a single example, which might suggest that the above discussion is theoretical rather than practical.

Similar to "amm and khāṣṣ conflict,61 mušlaq and muqayyad are often found in contradictory situations.62 Hence, it is not surprising that

59 Ibid.

60 This is due to the maxim cited above. In other words, "amm ghayr makhsūs is of very rare of occurrence and accordingly, the conflict between it and "amm makhsūs is unreal.

61 Although mušlaq and muqayyad are apparently identical to "amm and khāṣṣ i.e. with reference to the scope of covering, the former is different from the latter in that the latter comprises all to which it applies whereas the former is applicable to any one of a multitude, not to all. (see Badran, Ḥusul, pp. 351 and 371; al-As'adī, Ḥusul, p. 109)

62 Al-Khin, Ikhtilaf, p. 246ff.

one can easily find the methodology of tarjih in mutlaq and muqayyad discussion since both not only differ from, but contradict, each other. Mutlaq as well as muqayyad have been variously defined but still offer a standard definition. A word which is neither qualified nor limited can be considered as mutlaq while muqayyad is a qualified and limited implication. A standard example used by the jurists is the word raqabah (a slave) which occurs as mutlaq in Q. 58: 3; "... (the penalty) in that case (zihār) is the freeing of a slave". The same word occurs on another occasion but as a qualified word i.e. in Q. 4: 92; "He who hath killed a believer by mistake must set free a believing slave ". One must set free a Muslim slave as a kaffarah for the latter case i.e. accidental killing, while in the first case, it is sufficient to release any slave regardless of whether he is Muslim or not.

Generally speaking, the texts have no conflict since each of them has a different cause i.e. zihār and accidental killing, even though the word 'slave' occurred in both texts. However, when some of the jurists maintained that the slave required to be freed in both cases is one who is Muslim, it prompts us to study the relation between mutlaq and muqayyad in more detail. Those who held that view have qualified a mutlaq slave in the first verse by the second verse and as a result, it is obligatory to set free a Muslim slave in order to fulfil the requirement of kaffarah in both cases.

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63 Al-Āmidī. al-Iḥkām. vol. 2. p. 162; al-Bājī, Iḥkām, p. 48; Rawdah, p. 136; Irshad, p. 164
64 Ibid.
The case, indeed, is one of the four circumstances where *mutlaq* and *muqayyad* are said to oppose each other. On this occasion, I shall examine all of those situations for the purpose of preference methodology. To begin with, it is said that *mutlaq* and *muqayyad* are expected theoretically to contradict each other in (1) the ruling as well as the cause; (2) the ruling alone; (3) the cause alone and (4) not in either of them. Of the four, the jurists reach the same conclusion only in the first and final cases of conflict. 66

The first case exists when *mutlaq* and *muqayyad* conveyed the same ruling as well as having the same cause. To this effect, *mutlaq* must be qualified by *muqayyad* in a way that *mutlaq* is applicable only to the matter qualified by a *muqayyad*. 67 This is commonly demonstrated by quoting two Qur'anic texts, namely Q. 5: 3 and Q. 6: 146. The first verse reads as follows, "Forbidden unto you (for food) are carrion and blood and swine-flesh..." , while the second verse reads as, "Say: I find not in that which is revealed unto me aught prohibited to an eater that he eat thereof, except it be carrion, or blood poured forth, or swine-flesh...". In this case namely the consumption of blood, the jurists noted that the verses refer to the same ruling namely the prohibition of eating and they have the same cause namely the consumption of blood. According to the principle stated

66 *Al-Mankhul*, p. 177; *al-As'adī, Usūl*, pp. 105-107.


One may argue why did the Hanafis apply qualification between two texts that are separated while they had abstained from making specification between two texts which are separated. Obviously, they have their justification for that, since qualification, in their opinion, differs from specification. For details, see *al-Darīnī, al-Manāhiṣ*, pp. 573-574; Khalīfah, *Tahdhīḥ*, p. 51.
earlier, the muqayyad qualifies the mutlaq and makes the implication of the muqayyad prevail i.e what is prohibited from the above two texts (concerning blood) is only blood poured forth.  

The jurists are also in agreement in situations when both are contradictory and have different causes and rulings. Unlike the first case, the jurists in this case declared that each of them should be implemented independently since they differed totally from each other. Two Qur'anic verses are quoted to illustrate the above. A mutlaq word which occurs in Q. 5: 38, "As for the thief, both male and female cut off their hands", is said to contradict the muqayyad in Q. 5: 6; "O ye who believe! When ye rise up for prayer, wash your faces and your hands up to the elbows...". Obviously, though these two texts convey the word "hand", they are not related to each other and must be implemented independently i.e. the hands in the case of theft should not be cut up to the elbows.

The remaining two cases are cause of disputation among the jurists. One is when mutlaq and muqayyad have the same rule but different causes. We have shown before that the order to set free a slave as kaffarah is based on different causes. Freeing a slave is caused by zihar while freeing a Muslim slave is kaffarah for an accidental killing. According to the majority of the Shafi'is, the muqayyad i.e. the Muslim slave, qualifies the mutlaq implication. Thus, one who committed zihar or particularly an erroneous killing must set free a Muslim slave because

71 Irshād, p. 165.
"a slave" has been qualified as one who believes in Islam. Having proposed this preference, they based their argument on the unity of the Qur'ān (wihdat al-Qur'ān); the Qur'ān explains what is intended by itself e.g. ḥayrah ḥayrah mu'minah.

The Hanafis have a contrary point of view; they said that each of them must stand separately. Qualification (taqīd) of muṭlaq by muqayyad is not approved by them because each of the verses stands independently on its own. Moreover, they claimed that by qualification, some meaning is added to a muṭlaq text. To add some meaning to the text, according to the Hanafis is considered as naskh and naskh in this particular case is invalid because naskh in the form of taqīd is unapproved.

The third point of view is the view of a group of leading Shafi'i usulists. They contend that qualification could take place only if both serve a similar idea and objective. As in the case of freeing the slave, the whole idea, they argue, is to release a Muslim from slavery as often as possible, which is the intention of the Shari'ah. Hence, there is a common idea between both cases which leads the way to qualification accordingly. Otherwise, each of muṭlaq and muqayyad must operate

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73 Fawātih, vol. 1, p. 365; Abu Zahrah, Uṣūl, p. 171.
For details, see al-Thaqafi, "al-Ziyādah", passim.
76 Irshad, p. 165.
respectively. This view is the more acceptable among the overwhelming majority of the Shafi'is.

The other and final situation comes from the fact that *mutlaq* and *muqayyad* have the same cause but different rulings. For some of the Shafi'is, the *muqayyad* qualifies the *mutlaq* which gives the impression that one should observe only the *muqayyad* requirement instead of the *mutlaq*. On the contrary, the Hanafis have stated that the *mutlaq* as well as the *muqayyad* must operate in their respective areas without any qualification. The problem of *tayammum* or more precisely the required part of the hand to be wiped in *tayammum* is said to be qualified by another Qur'anic verse which speaks of "washing the hands" in ablution. With reference to *tayammum*, the relevant verse is as follows (Q. 4: 43): 

".. and if ye find not water, then go to high clean soil and rub your faces and your hands (therewith). Lo! Allah is Benign, Forgiving". As regards ablution, "the hand" however, is limited by 'up to the elbow' in Q. 5: 6: "O ye who believe! When ye rise up to prayer, wash your faces and hands up to the elbows".

Although both texts have a common cause, namely purity for prayer, they differ in their respective rulings: wiping in *tayammum* and

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78 Ibid.
79 Al-Shawkānī cites al-Rāzī, the author of *al-Maḥsūl* who has described this view as the intermediate opinion. (Irshād, p. 165)
80 Ibid.
wearing in ablution. Consequently, according to some of the Shafi`is, one is required even in *tayammum* to wipe the hands up to the elbows because the word "your hands" has been qualified by limiting it to the elbows as implied by the other verse. Other jurists, however, did not accept such an action in *tayammum* because *muflaq* cannot be qualified by *muqayyad* owing to the ruling difference. For some scholars, the word "your hands" is qualified but by a *hadīth* from the Prophet which explains that one must wipe the hands in *tayyamum* up to the elbows. As regards qualification by the *hadīth*, it actually refers to the first case of *muflaq-muqayyad* conflict where both have the same cause and ruling and not to this last type of conflict between both.

In conclusion, I believe that *muqayyad* is more specific and obvious than *muflaq* in all cases of contradiction on condition that both have the same cause and ruling. In other cases, one is advised, however, to refer to other sources before trying to qualify *muflaq* because they differ, as we have seen, in either ruling or cause which may affect the soundness of the qualification. The problem of qualification of "the hands" in *tayammum* is the best evidence to show that qualification might be based on other elements of evidence taken from outside the conflict. The *Sunnah* of the Prophet is of great help in doing so, for the Prophet's role is to explain the ultimate meaning of the *Qurʾān* as shown in many other cases.

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82 Ibid.
83 Ibid.
84 Al-Fiṣr al-Sāmī, *Usul*, vol. 1, p. 46.
The last task to be undertaken here is related to the problem of mushtarak.\textsuperscript{85} This problem is to be discussed for it creates conflict in fiqh.\textsuperscript{86} Differences of view in the fixation of words such as "qurū" (Q. 2: 228) and "sulṭān" (Q. 17: 33) are believed to be the product of mushtarak. The word qurū (plural of qar) for example, i.e. periods, divided the jurists; some opine that it refers to the period of menstruation and others contend the opposite meaning, i.e. purity.\textsuperscript{87} As the word "sulṭān" which can be translated into two equal meanings; power and right, may signify qisas (retaliation) as well as compensation or blood money (diyāh) in case of murder. Again, for the same reason, the jurists have arrived at two contrary rulings.\textsuperscript{88} By this, we can safely conclude that mushtarak applies equally to either of its two (or more) meanings.\textsuperscript{89}

The only difference between mushtarak on the one hand and 'āmm as well as mutlaq on the other is that the former is applied to more than one meaning from the very beginning and all of them bear the original meaning.\textsuperscript{90} Contrary to this, 'āmm and mutlaq, have each a single meaning only but this applies to an unlimited number of individuals relevant to this meaning. The word "'ayn", for instance is a

\textsuperscript{85} Since it is difficult to render the Arabic word into English, I shall use the word as it is pronounced in Arabic namely mushtarak instead of its common translation such as compound and homonym.

\textsuperscript{86} See page 6\textsuperscript{6}.

\textsuperscript{87} See page 6\textsuperscript{7}.


For details on this question, see al-Zanjani, Takhrij, pp. 314-315.

\textsuperscript{89} See Lane, Lexicon, part 4, p. 1543; al-Sarakhsi, Usul, vol. 1, p. 126; Irshad, p. 20.

\textsuperscript{90} Al-Darīnī, al-Manahijk, p. 194.
mushtarak word for it comprises more than one meaning such as eye, spy, gold, water spring, etc.91

Discussion should be made to examine conflict caused by mushtarak. Relatively speaking, it corresponds largely to principles laid down by the jurists when dealing with a mushtarak word which has more than one meaning. These can be summarised into three opinions. The majority of the Shafi'is contend that a mushtarak word may be interpreted as having more than one meaning provided that they do not contradict one another to the extent that both could be possibly and jointly understood whether in the positive or negative form.92 On the contrary, as held by some of the Hanafis, only one meaning should be assigned to a mushtarak word, irrespective of whether the statement is positive or negative.93 The last opinion which is expressed by the other Hanafis tends to propagate the view that mushtarak may convey both possible meanings provided that the statement is in the negative.94

Not to prolong the preliminary explanation, I shall quote one example of fiqh in order to match the theory discussed with the actual case. A primary instance which comes to mind is the dispute concerning the interpretation of the word “nikāḥ” in Q. 4:22, “And marry not those whom your fathers married (wa mā nakāha ʿabaʾukum)”. The word “nikāḥ” carries three possible meanings which in turn may point to three contrary legal rulings accordingly. The verse could mean, “and do not marry those

91 Lane, Lexicon, part 4, p. 1543; al-Sarakhsī, Usūl, vol. 1, p. 126.
94 Kashf, vol. 1, p. 41; Irshād, p. 21; Taqānīn, p. 185.
women with whom your father had sex”; and it could mean, “with whom your fathers married (‘aqd)” or “with whom your fathers married and had sex”.95 If the first meaning is chosen, then a son is forbidden to marry any women with whom his father had sex but not women his father married if he did not have sex with them. If the second meaning is chosen, then a son is forbidden to marry women with whom his father married even though he did not have sex with them. The last interpretation of the verse forbids a son to marry women with whom his father had married and had sex.

Owing to this variety of meanings indicated by the word “nikāh”, the jurists are divided amongst themselves and each has his own argument. Al-Jassās, for example, who deduced the first ruling mentioned above, stresses that “sex” is the original meaning of nikāh and therefore should prevail.96 Some of the jurists select however, the second ruling arguing that marriage is the common meaning implied by the word “nikāh” in both the Qur’ān and the Sunnah.97 The last ruling is drawn by Ibn al-‘Arabi because of his principle that both the literal and figurative meanings must be taken together, barring a legal proof.98 It is evident from this discussion that the jurists have, to some extent, regarded mushtarak as identical to haqīqah and majāz discussion. Therefore, the basis of selecting one of the above views is grounded on that principle as shown by al-Jassās and Ibn al-‘Arabi’s argument respectively.

95 Al-Khin, Ikhtilaf, p. 81.
To select only one as the correct legal opinion is rather difficult, for each of these views is well grounded in the Qur'an (as well as in some of the works on Arabic). To use the word “nikah” to refer to sexual intercourse is implied by Q. 4:6, “Prove orphans till they reach the marriageable age (hatta idha balaghu al-nikah)”. The capability of having sexual intercourse is identical to what is meant by marriageable age.

As regards the second meaning i.e., the contract aspect of marriage, it is argued on the basis of Q. 33:49, “O ye who believe! If ye wed believing women and divorce them before you have touched them, then there is no period that ye should reckon...”. Ibn Manzur asserts that this is the preferable meaning of nikah. The last meaning which comprises both marriage and sexual intercourse meanings, bases itself on Q. 2:230, “And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband”. According to many authorities, those who have been irrevocably divorced (mabtutah) are not allowed to be remarried by their former husbands unless those women had been married and covered by another man through a complete legal contract of marriage. This view is supported by many traditions where the Prophet instructed those women not to return to their ex-husbands until marriage and sex have genuinely taken place between them and their second husbands.

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99 See al-Khin, Ikhtilaf, pp. 81-84.
100 Ibid. See also al-Razi, al-Tafsir al-Kabir, vol. 9, p. 188.
101 Ibid. See also Q. 4:3; Q. 24:32.
104 Ibid.
At this stage, I cannot point to any one of these three views as preferable. What I can do is merely extract from the preceding discussion one remarkable feature known as qarînah. In legal theory, the concept of qarînah plays an important role in linguistic interpretation of the texts. Qarînah, in short, is divided into two basic distinctions namely verbal and circumstantial. It is of great importance particularly in problems dealing with words having two or more meanings. The function of qarînah is to determine the precise meaning of such a word or perhaps a sentence. In mushtarak, therefore, qarînah reduces ambiguity and pinpoints the object intended. We may realise that the jurists have resorted to a kind of qarînah. Some of them observe that the word nikâh is used throughout the Qur'ân and the Sunnah to indicate the meaning of marriage as a contract procedure only. In case of conflict, the common usage should be favoured. In contrast, the argument of Ibn al-`Arabî might correspond to qarînah lafziyyah i.e. the sentence of "hatta tankiha zauijan akhar (until she hath wedded another husband)". Since the meaning of marriage is implied by the word "zauijan " i.e. husband, the word "nikâh " should indicate another meaning other than marriage, that is, sexual intercourse. Furthermore, this result is in line with a hadîth from the Prophet that such a woman cannot return to her ex-husband unless sexual intercourse has taken place between her and her new husband. The hadîth indeed, offers another qarînah to be further considered. These arguments are of great significance in

105 Hallaq, "Notes on the term of qarîna in Islamic legal discourse", in JAOS, vol. 8, 1988, passim particularly p. 475. (cited after as "Qarîna")
conflict and taqīh and the details of qarīnah will be supplemented in the following discussion.

2. Taqīh in Contradiction Between Haqiqa and Majaz

As previously mentioned, in terms of textual interpretation, determining what meaning is intended in a given text is crucial and sometimes difficult. Therefore, rhetorical considerations constituted the major part in textual implication because rhetorical principles are believed to have a principal role in legal reasoning. For this purpose, the principles of haqiqa and majaz will be examined as they are put together in usūl as indicating different and conflicting implications. Our aim is merely to seek a strict methodological preference in their conflict because many words have two meanings, a haqīqa (literal) and majaz (figurative) and it is possible for two or even three meanings to be intended at the same time; the haqīqa, the majaz or both.

It is useful to point out that haqīqa -majaz discussion is too wide and too complicated not only in usūl literature but also in other disciplines where the subject of majaz is common such as rhetoric, theology and logic. Moreover, it has always been connected to other discussions like sarīh and kinayah which also play a significant role in textual interpretation. Therefore, any part of the discussion which is not

109 With reference to the usage i.e. whether a word is used in its primary, secondary, literal, technical or customary sense, the word is commonly classified into haqīqa and majaz as well as to sarīh and kinayah. (al-Sarakhsi, Usul, vol. 1, pp. 170-183, 187-199)

a priority in our present concern will be left aside even though it may be of importance in other fields of discipline or even in *usūl* study itself.\textsuperscript{111}

Historically, the *haqīqah-majāz* discussion did not exist in the early literature of *usūl al-fiqh* or in other fields of study.\textsuperscript{112} It is of interest to note that their discussion as a terminological usage did not exist even in the works of the great scholars such as those of al-Khalīl, Sibawayh and Abū ‘Amr b. al-‘Alā.\textsuperscript{113} In the field of *usūl al-fiqh*, al-Jassāṣ (d. 370 A.H.) has been credited as the first who introduced this subject in legal methodology.\textsuperscript{114} Alongside these efforts, there are a number of works on the same subject but in the different fields of discipline such as Ibn Farīs (d. 395 A.H.) in lexicology i.e. the theory of words and their meanings, in his book, *al-Sāḥibī fī Fiqh al-Lughah* and ‘Abd al-Qāhir al-Jurjānī (d. 471 or 474 A.H.) in rhetoric in his well known book called *Asrār al-Balāghah*.\textsuperscript{115} At the later stage, however, this variety of works is narrowed down to only two basic approaches namely, *usūl al-fiqh* and *ʿilm al-bayān*.\textsuperscript{116}

\textsuperscript{111} Problems such as determining those who are qualified to distinguish *majāz* from *haqīqah* or examining the existence of *majāz* in the *Qurān* and the like are purposely omitted since the immediate concern of the present study is to arrive merely at methodologies of removing conflict between *majāz* and *haqīqah*.

\textsuperscript{112} Ibn Taymiyyah, *Fatāwā*, vol. 20, pp. 400-403.

\textsuperscript{113} Ibid. p. 404.

\textsuperscript{114} Heinrichs, "On the genesis of the *haqīqah-majāz* dichotomy", in *SI*, vol. 59, 1983, p. 114.

\textsuperscript{115} Ibid.

\textsuperscript{116} Ibid.
Although ḥaqīqah -majāz terminology has existed since the third century of Hijrah, the scholars have no common definition of either, particularly of majāz. According to Abū 'Ubaydah, for instance, majāz is used in the exegetic sense of the word i.e. the ideas which are not explicitly explained.\(^{117}\) For al-Jurjānī, majāz is any word which is used, because of some relationship, in a sense other than the original lexicographical one.\(^{118}\) Majāz definition in ʿUsūl al-Jassās is similar to what has been defined by the bayānīyyūn. First, he began to explain ḥaqīqah by saying that it is the original meaning of a word, the meaning for which the word was initially coined (maʿ summiya bihi al-shay').\(^{119}\) Majāz, he simply defined as "that by means of which its initial literal usage is disregarded so that the name it is given is not its literal one".\(^{120}\) As usual, he has quoted his teacher, al-Karkhī's, opinion in this matter and both are of the same opinion.\(^{121}\)

The standard example of majāz used by the scholars is the sentence "So and so is a lion" (fuḍān asad) in the sense of a brave man.\(^{122}\) Al-Jassās, however, quoted a Qur'anic verse (Q. 2: 228) in showing an example of majāz. It is the word Qurūʾ which is as follows: "Women who

\(^{117}\)Ibid. See also Cooper, Introduction to al-Ṭabarī's ʿJāmiʿ al-Bayān (translated), p. xiii.


\(^{119}\) Al-Jassās, ʿUsūl, vol. 1, p. 359.

\(^{120}\) Ibid.

\(^{121}\) Ibid.

\(^{122}\) Al-Jurjānī, Kitāb al-Taʾrīfāt, p. 214. See also al-Sarakhsi, ʿUsūl, vol. 1, p. 170.
are divorced shall wait, keeping themselves apart, three qurū' ". The word "qurū'", plural of "qar'" has two meanings in Arabic namely the menstruation and the clean period between two menstruations or simply the purity.123 According to al-Jassās, menstruation is the original meaning called haqīqah and the purity is majaz.124 This example has been rejected by other jurists on the ground that it actually demonstrates the principle of mushtarak and not the haqīqah - majaz principle.125 For us, this reveals that a strict distinction between these terms is still absent which would create more complexity in the following discussion.

The first matter to be noted is that should there be any conflict between haqīqah - majaz, most of the jurists have held that haqīqah always prevails because majaz is weaker than haqīqah.126 There are many reasons why majaz is weaker than haqīqah. First, majaz is in need of a qarinah to be correctly understood while haqīqah has no need of that because it is the original meaning. Then, the meaning of haqīqah springs to mind faster than the majaz.127 According to al-Jassās, since majaz is used as inappropriate meaning i.e. not with its original linguistic usage, it is not reasonable and permissible to have recourse to what is

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123 Al-Jassās, Usul, vol. 1, p. 47.
124 Ibid. ; idem, Ahkam, vol. 1, p. 432.
125 Al-Qurṭubi, al-Jami', vol. 3, pp. 113-117.
For details, see al-Nashami's comment in Usul al-Jassās, vol. 1, p. 47, note no. 1.
inappropriate instead of appropriate. Therefore, when an expression has two meanings, one of them majāz and the other haqīqah, it must be construed in a literal sense until a legal proof indicates that the figurative meaning is intended.

On the contrary, al-Rāzī, favoured majāz over haqīqah arguing that the meaning of majāz is more established and dominant compared to the haqīqah meaning. The sentence, "so and so is an ocean" is employed by him to support his viewpoint. The word "ocean", according to others must be understood in its literal sense, i.e. ocean is a sea. Al-Rāzī, in contrast, stressed that the use of the word 'ocean' in the sense of a generous man is more obvious in the meaning (ablagh) and therefore, should be inclined towards whenever it contradicts haqīqah meaning.

A further examination of the above case displays that the disagreement is an apparent one. It is true that majāz prevails in the above conflict but due to the effect of qarīnah which makes its balance heavier. To this effect, the jumhūr said that haqīqah always prevails in all cases of conflict unless the word or sentence in question is supported by qarīnah (as in the previous case) or when majāz is dominant (al-majāz

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128 Al-Jassās, Usul, vol. 1, p. 46.
129 Ibid.
131 Ibid.
132 Ibid.

For details on various degrees of majāz in contradiction to haqīqah, see Ibn al-Lahham, al-Qawa'id, p. 123.
al-ghālib), that was clearly metaphorical. In other words, majāz as an independent style of speech does not carry any strength at all against haqīqah. This conclusion leads us to discuss the contradiction between two majāz in greater detail where the qarīnah and the dominant usage of majāz will be treated seriously in order to acquire a solid measure of preference in majāz contradiction. As regards the example of haqīqah -majāz conflict, however, it will be only pointed out together with sarīḥ-kināyah conflict, for both conflicts, to a considerable extent, are typical and overlapping. It is hoped that a single example may shed light on both.

The jurists in majāz conflict, generally speaking, hold the same opinion. They clearly viewed that whenever two majāzs appeared to be contradictory, the one whose meaning is nearer to the original meaning is preferred. Some scholars called this particular majāz the common majāz which is stronger than the uncommon majāz. This, indeed, gives the impression that haqīqah continually prevails not only in haqīqah -majāz conflict but also in majāz-majāz conflict where the one which has more common meaning is likely to be preferred because it links to haqīqah meaning which is easier and more common to understand.

133 Bidayah, vol. 1, p. 38; al-Hafnawi, Athar, p. 18 (note no. 2). An excellent example of dominant majāz is Q. 4: 43; "or one of you cometh from the closet (al-gha’ūl)"

For details, see Ibn al-Arabi, Aḥkām al-Qurān, vol. 1, p. 443.


135 Ibid.
The saying of the Prophet, "lā ṣalāt li man lā yaqra' bi fāṭihat al-Kitāb (there shall be no prayer for whoever does not recite the Fāṭihah of the Scripture)"\textsuperscript{136}, could be a clear example of the above clarification. What is obvious from this Prophetic saying is that the denial intended by "lā " (no) does not refer to non-existence of any action which is considered as the literal meaning of the sentence, "lā ṣalāt". Simply because the occurrence as well as the non-existence of any action including prayer does not rely on the recitation for being or not.\textsuperscript{137} Therefore, it must be understood metaphorically. As regards the hadīth, there are two possible meanings constituted by the sentence "lā ṣalāt "; one is the denial of the validity and the other tends to deny the perfection of such prayer which is performed without Fāṭihah. Comparatively speaking, the denial of the validity is more common and parallel to the original meaning on the grounds that the invalid prayer is equal to the absence of that prayer as far as legal conclusion is concerned.\textsuperscript{138} Consequently, the above hadīth informs us that any prayer, performed without reciting the Fāṭihah is invalid and unacceptable.\textsuperscript{139}

A problem which is frequently discussed together with haqīqah-majāz is the so-called sarīḥ and kināyah.\textsuperscript{140} Sarīḥ, literally is a noun which indicates an obvious meaning to the listener in an explicit way and

\begin{itemize}
\item \textsuperscript{136} Muslim, Sahīh, vol. 1, p. 295.
\item \textsuperscript{137} Al-Hafnawi, Aḥār, p. 31; al-Khin, Ikhtilaf, p. 276.
\item \textsuperscript{138} Ibid.
\item \textsuperscript{139} See Nayl al-Awjar, vol. 2, pp. 229-230.
\item \textsuperscript{140} From the standpoint of whether a word is used to denote its meaning explicitly or implicitly, the word is categorised to sarīḥ (explicit statement) and kināyah (implicit statement). See al-Sarakhsi, Uqlū, vol. 1, p. 170.
\end{itemize}
its meaning could be rapidly understood by anyone.\textsuperscript{141} If a master or a husband, for example, informs his slave or wife in such expressions as "you are free" (\textit{anta hurr}) or "you are divorced" (\textit{anti tāliq}), their sayings are considered \textit{sāriḥ} and therefore, the slave and the wife are free from any legal ties. In other words, \textit{sāriḥ} is a word or a sentence which clearly discloses the speaker's intention. In the case of divorce, if a husband tells his wife "you are divorced" the divorce would take place \textit{regardless of the husband's actual intention}.\textsuperscript{142}

Contrary to \textit{sāriḥ}, \textit{kīnāyah} is a form of speech which does not clearly disclose the intention of its speaker.\textsuperscript{143} Thus when a husband tells his wife "you are forbidden to me" or when he ask her to "join your relatives", it remains indeterminate whether this particular husband wants to divorce his wife or not. As a result, no divorce will take place unless there is evidence to show that the husband actually intended a divorce.\textsuperscript{144} In this context, the \textit{qarīnah} will play an important role in textual interpretation. As mentioned before, \textit{qarīnah} has two distinct categories, namely the verbal (\textit{qarīnah lafziyyah}) and the circumstantial (\textit{qarīnah haliyyah}). Both are necessary in determining the precise meaning of \textit{kīnāyah} (as well as \textit{majāz}).\textsuperscript{145}

As noted before, both conflicts of \textit{haqīqah-majāz} and \textit{sāriḥ-kīnāyah} will be provided with the same example for they co-incide with

\textsuperscript{141} Al-Zuhaylī, \textit{Uṣūl}, vol. 1, pp. 308-309.
\textsuperscript{142} Ibid.; Kamālī, \textit{Islamic Jurisprudence}, p. 150.
\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid.
\textsuperscript{145} \textit{Irshād}, p. 25.
each other. It is hoped that the problem of touching a woman in connection with ablution may serve our purpose. The case is taken from Q. 4:43, "And if ye be ill, or on a journey, or one of you cometh from the closet, or ye have touched women...". We are concerned with the last phrase only i.e. "or ye have touched women". Touching or lamasa in Arabic, may imply two different meanings namely, haqiqah and majaz particularly when it is understood from a legal viewpoint. Touching a woman by hand is regarded as haqiqah while sexual intercourse as implied by lamasa falls under the category of majaz. Not only that, at the same time, lamasa is also alleged to be an allusion (kinayah) to sexual intercourse. By this, we know that the verse is not only related to haqiqah-majaz conflict but also to sarih-kinayah conflict for they are overlapping. Owing to this, it is difficult to reach a clear distinction between them.

For the Shafi'is, the literal meaning is intended here and therefore the verse necessitates the performance of ablution to remove a minor impurity resulting from touching a woman. In other words, whoever touches a woman with his hands, his ablution is null and a fresh ablution is needed. The Hanafis follow, however, the allusive meaning for it is supported by legal proofs that show that the original meaning is to be

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146 Bidayah, vol. 1, p. 38.
147 Ibid.
148 See note 125, page 142.
abandoned in favour of the majāz meaning.\textsuperscript{150} In other words, they manage to acquire a strong qarīnah to make the figurative / allusive meaning of the word 'touching' preponderate over its original and sarih meaning. Among other things, they quote ahadīth indicating that the Prophet kissed his wives and afterwards performed the ritual prayer without another ablution.\textsuperscript{151} Then, al-Jassās, one of the leading Hanafi jurists, asserts that to argue that touching a woman would require an ablution is contradictory to the principle, arguing that since impurity applies to both sexes i.e. male and female, there should not be any distinction between the two as far as touching is concerned. In other words, since touching between men does not require ablution, the same should apply to touching between man and woman.\textsuperscript{152}

By virtue of these qarā'īn, we can conclude that the view of the Hanafis seems preferable. It must be pointed out therefore, that this preference is not due to the consideration of majāz or kinayah but rather to the help of qarīnah. For qarīnah may add, reduce, explain, specify and define words and sentences.\textsuperscript{153} Dealing with ambiguous legal texts, qarā'īn might offer a valuable help to lending clarity and credibility to interpretation as in this case. As regards our case, the meaning of majāz or allusion is superior for it is indicated by, apart from what is adduced by al-Jassās, two obvious qarā'īn. First, we may notice that Allah never mentioned the word jīmā' as denoting sexual intercourse in His Book. Instead, He usually used the words such as lamasa, bāshara, massa, etc.,

\begin{footnotes}
\item[150] Al-Jassās, Usul, vol. 1, pp. 48-49.
\item[151] Bidayah, vol. 1, p. 38.
\item[153] Hallaq, "Qarīna", p. 477.
\end{footnotes}
to imply sexual intercourse obliquely.\textsuperscript{154} These words are used metaphorically or allusively, for Allah did not use the direct expression for sexual intercourse.\textsuperscript{155} Second, if we understand ‘touching’ to mean mere touching by hand, therefore, one word would have two meanings namely touching by hand and sexual intercourse. Two meanings intended at the same time is disliked or perhaps unacceptable in Arabic.\textsuperscript{156} Nonetheless, I must say that in the absence of any relevant and adequate qarinah, the preference should go to the haqiqah and sarih for they are the overriding intended meanings in any language. Only the existence of obvious qarinah, will change the meaning to metaphorical or allusive meaning accordingly.\textsuperscript{157}

3. Tarjīḥ on Conflict Between Clear and Unclear Words.

In the Hanafi legal theory\textsuperscript{158}, there are four degrees of clarity and four of ambiguity. Moreover, each of them represents a particular degree of clarity or ambiguity. In other words, some words are clearer than others. The same applies to ambiguous words. This condition, as could be

\textsuperscript{154} Bidayah, vol. 1, p. 38.
\textsuperscript{155} Ibid.
\textsuperscript{158} I have purposely selected the classification of word as established in the Hanafi school of law to be thoroughly discussed because it is more comprehensive (aslam min al-tadakhul) and has an immediate concern with legal conflict (abyan ind al-ta’aruf). See al-Darini, al-Manāhij, pp. 158-159, 161; Khalifah, Manāhij, p. 22.
expected, would make contradiction possible within these degrees of clarity and ambiguity.

As far as conflict between clear and unclear words is concerned, we are primarily confined to four terms known as al-zāhir, al-nass, al-mufassar and al-muhkam and the corresponding contrary terms namely al-khafī, al-mushkil, al-mujmal and al-mutashābīh. Naturally, a brief explanation of these terms is a pre-requisite before we embark on a consideration of how conflict could exist between them. Al-zāhir is a word or a sentence that can be understood by merely hearing it without any contemplation. That is the first meaning to come to mind for it is obvious and conventionally used for the meaning it carries. The common example of this is Q. 2: 275, “Allāh permitteth trading and forbiddeth usury”. This part of the verse indicates clearly the validity of sale and on the contrary, the prohibition of usury. Both meanings are easily understood by anyone who reads the verse. Though its meaning is clear, it accepts the possibility of ta’wil, that is the second meaning other than previously implied.

The following rank in terms of clarity is al-nass. It is what is made clearer in meaning by a qarīnah associated with the speaker’s effort

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162 Al-Darīnī, al-Manāhij, p. 47.
for without this, the word would not be so clear. Some have contended that *al-nass* applies to the text associated with the cause implying the context of the text in question. Hence, we may conclude that a text is *zahir* by reference to the form of speech and on the other hand, regarded as *nass* by considering the *qarīnah* on the basis of which the context is formulated. A clarification of this is Q. 2: 275, “Allāh permiteth trading and forbiddeth usury”. The verse is *zahir* with regard to general permissibility of sale and it is *nass* in respect of distinguishing between sale and usury in terms of permissibility and impermissibility. The latter consequence is considered *nass* for the text is originally formulated to serve the purpose of distinguishing, since it was revealed as a reply to those unbelievers who alleged that sale and usury are alike as in Q. 2: 275, “That is because they say; Trade is just like usury”. The degree of clarity between both becomes obvious when both are compared with each other which will be the main concern of the following paragraphs.

Then, a word or a sentence is known as *mufassar* when the clarity of its meaning is gained through either an internal or external

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164 Ibid.
165 Ibid.

There is no conflict between these two prescriptions of *al-nass*. Alough *al-nass* indicates primary meaning of a legal text, this knowledge is often based on the context of the text or on a particular occasion on which the *Qur'ān* and the *Sunnah* was revealed or pronounced. (See al-Darini, *al-Manāhij*, p. 51)

166 Ibid.
167 Ibid.

explanation to the extent that it accepts no further possibility of ta'wil. Therefore, in theory, al-mufassar is superior to both al-zahir and al-nass, for the latter are liable to ta'wil or could be variously understood. An excellent example of mufassar word is Q. 15 : 30, “So the angels fell prostrate, all of them together”. The name angel is general, accepting the possibility of specification whilst the saying “all of them” exhausts this possibility. Moreover, the saying “together” denies the uncertainty over whether the prostration is collective or partial. For this reason, al-mufassar is 'heavier' than both al-zahir and al-nass, even though the possibility of al-mufassar being abrogated remains, that is in the life time of the Prophet.

With reference to al-muhkam, it is clearer in meaning for there is no possibility whatsoever of either ta'wil or abrogation. As far as nashk is concerned, it is applicable only to al-mufassar and not to al-muhkam; the perspicuous text of the Qur'an and the Sunnah. A text of this nature is often worded in such a way as to preclude the possibility of abrogation. Q.5:97; “And Allah is Knower of all things”, for example, is a muhkmam. For it is known that this attribute i.e. the most knowledgeable, is permanent to the extent that it accepts no possibility whatsoever of cancellation.

169 Ibid.
171 Ibid.
173 Ibid.
The difference in the degree of clarity between these words would become obvious when they contradict.\textsuperscript{174} As a logical consequence, the less clear or the weaker among them in terms of clarity is overruled.\textsuperscript{175} To know precisely how this is done, some cases of conflict will be brought forward. The purpose behind this is to show that the first concern in any cases of wording conflict, is to enquire closely into the degree of clarity of each statement. If a murajjh is clever enough, he could remove this type of conflict on the grounds that a text which is clearer should take precedence over another which is of lesser clarity.

We may begin with the conflict between \textit{al-zāhir} and \textit{al-nass}. This can be illustrated in the following two Qur'anic passages, one of which is \textit{nass} as regard the limitation of the number of wives permissible in marriage and the other \textit{zāhir} with regard to the permissibility of marrying women in general. Q. 4: 3 corresponds to the former that reads; "...marry of the women, who seem good to you, two or three or four..". The latter is represented by Q. 4: 24; "Lawful unto you are all beyond those mentioned..". \textsuperscript{176}

The limitation of the number of wives is the theme of the first text. Therefore it is a \textit{nass}. The permissibility of marrying any women without any restriction is not the main purpose of the second verse. It is rather to clarify that marriage is permissible. As already noted, should there be a conflict between the two, \textit{al-nass} prevails over \textit{al-zāhir}. As a

\textsuperscript{174} Al-Darīnī, \textit{al-Manāfi'ī}, pp. 41-42.
\textsuperscript{175} Ibid.
\textsuperscript{176} Kashf, vol. 1, p. 49.
consequence, the permissibility to conclude a marriage contract should not violate the limitation laid down by the Law giver. It is the latter that must be adhered to by a Muslim for its text is *nass*, that is stronger than *zahir* i.e. in terms of clarity.177

Regarding the conflict between *al-nass* and *al-mufassar*, we may cite the case of the bleeding of a woman as if menstruating. There are two reports that are contradictory to each other owing to different wordings. The first reports that a woman of such condition is merely obliged to perform ablution for each prayer (*'ind kulli salāt*).178 It is known through many reports that a woman during her period is forbidden to perform prayer and she must take *ghusl* when her menstruation is ended.179 But when she is still bleeding after this period, according to the report cited above, she must do ablution for every single prayer. Those who adhere to this report contend that she has to renew her ablution if she wishes to perform another prayer, though the subsequent prayer is still within the time of a particular obligatory prayer.180 The second however, reports that, instead of performing ablution for each prayer, she is asked to perform ablution for every respective time of a particular obligatory prayer(*li waqti kulli salāt*).181 This report pronounces that she can perform prayer as many times as she likes with one ablution as long as all the prayers are performed within the time limit of one obligatory prayer. Put differently, when she performs ablution for *zuhr* prayer, for instance, she is able to

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177 Ibid.
178 Ibid.
180 Ibid. p. 480.
181 *Kashf*, vol. 1, p. 51.
perform other type of prayer till the last minute of the *zuhr* time-band. After that, she must perform another ablution for ‘*asr* prayer and so forth. This view is held by some jurists contrary to the above. 182

To apply what has already been said, precedence should go to the second report for it accepts no possibility of re-interpretation. On the contrary, the first report is susceptible to *ta’wil* for the wording “for each prayer” may raise the possibility of another meaning. In other words, one is uncertain whether ablution is applicable to obligatory or supererogatory prayer. According to the first report, that particular woman does know that her ablution is considered valid for one prayer only but she does not know precisely whether she should or should not perform another ablution if she wants to perform a recommended prayer after a particular obligatory prayer for the word ‘prayer’ in the report is uncertain. However, this uncertainty does not exist in the second report, for ablution is required only at the time of every prayer and the same ablution is sufficient for any number of prayers within that particular time. 183 Therefore, in terms of *tariqah*, *al-mufasdar* is superior to *al-nass* for the latter opens to other meaning. 184

I have tried to find an appropriate case of conflict between *mufassar-muhkam* but none is available. Modern literature on *usul al-fiqh* however, has produced one example thought to be relevant for this conflict. It cites the disagreement between the Shafi‘is and the Hanafis on the question of the repentant *qadhif* (slanderous accuser), that is, whether

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182 Ibid.
183 Ibid.
184 Ibid.
he, after a true repentance, is entitled to stand before the court to give his testimony.\textsuperscript{185} The Shafi'i's accept his testimony while the Hanafis reject it. The latter argue that the order not to accept such testimony is \textit{muhkam} by virtue of Q. 24 : 4; "And those who accuse honourable women but bring not four witnesses, scourge them eighty stripes and never (afterward) accept their testimony - They indeed are evil-doers". The verse clearly provides no room to accept the \textit{qādhif}'s testimony for the denial is forever. The Shafi'i's however, have quoted the following verse (Q. 24:5; "Unless they repent afterward and rectify themselves", to declare that a repentant \textit{qādhif} can give a valid testimony before the court.\textsuperscript{186}

As hinted above, this is not a satisfactory example to reflect this conflict. This is admitted even by contemporary books on \textit{usul al-fiqh}.\textsuperscript{187} Furthermore, they say that the disagreement does not involve \textit{mufassar-muhkam} conflict but rather differential interpretation regarding the clause "unless they repent afterward". The Hanafis thought that this specification refers to the title of "wrong-doer" only and not to the testimony. In other words, repentance would save the \textit{qādhif} from the title mentioned in the \textit{Qur'an} but his testimony in the future is unacceptable for he is a wrong-doer. By contrast, the Shafi'i's contend that specification applies to both in a way that true repentance would free the \textit{qādhif} from the title of \textit{fasiq}, as well as from disqualification as witness.\textsuperscript{188} By this, we can see that this conflict does not fit the present


\textsuperscript{186} Ibid. See also al-Dimashqī, \textit{Ikhtīsāf}, pp. 420-421.

\textsuperscript{187} Al-Zuhaylī, \textit{Usul}, vol. 1, p. 325.

discussion. Moreover, as noted by the jurists, the only difference between *mufassar* and *muhkam* is that the former is liable to abrogation. However, after the demise of the Prophet, no abrogation can take place. Therefore, *mufassar* and *muhkam* overlap and for this reason, I believe, cases of conflict between both are not available. But should there be a conflict between the two, *muhkam* always prevails.\(^{189}\)

It is now relevant to point out the conflict between four degrees of unclear words. As previously mentioned, these four words are *al-khāfī*, *al-mushkīl*, *al-mujmīl* and *al-mutashābih*.\(^{190}\) They are purposely organised in this order of ranking, according to the degree of ambiguity that each of them represents. The first in rank is less ambiguous whereas the last in rank is the most ambiguous word.\(^{191}\) Theoretically, they may contradict each other. However, to my best knowledge, no convincing cases of conflict between them are available in classical and modern works on *usul al-fiqh*. Accordingly, I shall devote no discussion to the study of these degrees of ambiguity in detail even though all of these types of words are present in both the *Qurʾān* and the *Sunnah*.\(^{192}\)


\(^{191}\) Ibid.

\(^{192}\) See al-Mankhūl, p. 164.

\(^{193}\) What is intended by *dilālat* here is how the word or the text indicates a meaning (*dilālat al-alfāż*) as distinguished from language principles such as *‘amm*, *khass*, *haqiqah*, *majaz*, etc., for the latter is an indication of a particular meaning by the word (*al-dilalāh bi al-alfāż*) See Khalīfah, *Manahīj*, p. 3, note no. 1.
Legal or semi-legal texts, from the standpoint of the interpretation viz. directly or indirectly interpreted, can be variously understood. A text, in other words, may imply the meaning directly or indirectly. The former is known as mantūq while the latter is well established in usūl as mafhum.¹⁹⁴ Both may have the same legal consequence or may contradict each other. As far as taʿārud and tarjih are concerned, we shall confine ourself to the latter case for it demands a solution.

The previous outline gives the impression that mafhum, implied meaning, is not necessarily contrary to what is implied by the mantūq, the direct implication of the text. In short, mafhum may be either harmonious or contradictory with the mantūq. In usūl terminology, the former is known as mafhum muwafaqah (harmonious implied meaning) and mafhum mukhalafah (divergent implied meaning), on the other hand, is the label of the latter phenomenon.¹⁹⁵ Though we are more concerned with the second situation, a few paragraphs will be devoted to illustrate what mafhum muwafaqah is. For this, we may refer to the Qur'anic text which forbids the utterance of “an uff”. The verse reads, “If one of them or both of them attain to old age with thee, say not ‘Fie’ unto them nor repulse them...”. It is clear through mafhum muwafaqah, that to abuse one's parent physically is not only forbidden but also deserves greater

¹⁹⁴ The division of textual implication into these two kinds is adopted by the majority of the jurists except the Hanafis. (see al-Zuhaylī, Usūl, vol. 1, p. 360)
condemnation from God for it is more serious in terms of injuring parent's feelings.\textsuperscript{196}

\textit{Maf\textsuperscript{f}hum mukh\textsuperscript{a}lafah}, on the contrary, is a purely linguistic argument.\textsuperscript{197} It stipulates that if an act is commanded, it is concluded that any act to the contrary is prohibited. Conversely, it may be argued that the contrary of an act which is prohibited is either recommended or obligatory. Therefore, it may be defined as a meaning which is derived from the words of the text is such a way that it diverges from the explicit meaning thereof.\textsuperscript{198} To give an example, we may quote the Prophetic statement that; "Zak\textsuperscript{a}t is owed on goats which are put out to pasture (\textit{f}\textit{i al-s\textsuperscript{a}'imah zak\textsuperscript{a}t})".\textsuperscript{199} Those who adhere to \textit{maf\textsuperscript{f}hum mukh\textsuperscript{a}lafah} as a legitimate method of interpretation,\textsuperscript{200} have questioned the obligatory status of \textit{zak\textsuperscript{a}t} on goats which are maintained on fodder.\textsuperscript{201}

It seems to me that conflict between \textit{maf\textsuperscript{f}hum muw\textsuperscript{a}faqah} and \textit{maf\textsuperscript{f}hum mukh\textsuperscript{a}lafah} is relatively personal in consideration. We can see from the foregoing discussion that both \textit{maf\textsuperscript{f}hums} are nothing other than methods identified generally to encourage rational enquiry in the deduction of the rulings from the texts. If we take, for example, the prohibition to say "uff" to one's parent which suggests that beating one's parent is also forbidden through the so-called \textit{maf\textsuperscript{f}hum muw\textsuperscript{a}faqah}, it may

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{196} \textit{Al-Mankhul}, p. 208.
\item \textsuperscript{197} \textit{Al-Luma'}, p. 27.
\item \textsuperscript{198} Ibid.
\item \textsuperscript{199} \textit{Nayl al-Aw\textsuperscript{f}ar}, vol. 4, p. 140.
\item \textsuperscript{200} \textit{Al-Mankhul}, p. 208.
\item \textsuperscript{201} Ibid., p. 216. Cf. \textit{Tanq\textsuperscript{i}h}, p. 272.
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be conversely argued that beating one's parent is permissible by virtue of mafhum mukhālafah. As we shall see, conflict between both is not originally motivated by these two methods of reasoning and their implications, rather it is by the attitudes of the jurists towards the authority of both methods of interpretation.

The Shafi'is and those who are in line with their opinion contend that mafhum mukhālafah is a proof provided it fulfills certain conditions. Among other requirements, the restriction which qualifies a statement should be only for the purpose of proof and not for any other reason. In other words, the restriction stated by the Lawgiver is only to indicate the existence of a particular rule to the effect that if this restriction no longer exists, the relevant rule would also cease to apply. The following verse for example, should not be understood conversely for the restriction it contains proves other than what is stated above. Q. 3:130 reads, "O ye who believe! Devour not usury, doubling and quadrupling (the sum lent). Observe your duty to Allah, that ye may be successful". From this may not be understood, in terms of legal studies, that undoubled and unmultipied usury is permissible, arguing that the verse's condemnation is directed only to what is doubled and multiplied. The verse in question is not subjected to mafhum mukhālafah for the qualification it contains i.e. double and multiplied usury, is only to create hatred for usury or to emphasise that this kind of usury was the most

202 Irshad, p. 179.
204 Al-Mankhul, p. 216; Khalifah, Manahij, p. 261.
205 Al-Zuhayli, Ugl, vol. 1, p. 373; Khalifah, Manahij, p. 264.
common usury practised in the pre-Islamic period. The verse has no concern with an indication of the contrary meaning, that is, a little amount of usury is permissible.

The following condition lies in the fact that there should not be a strong evidence contrary to what is conversely implied. As for Q. 2:178, "O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female...", it cannot be understood conversely that a woman should not be retaliated upon when she murdered a man because the implied consequence would violate the explicit ruling of another Qur'anic text (Q. 5: 45) which requires retaliation for all intentional murder on the broadest possible basis of a life for a life.

In short, many conditions are put forward to ensure that mafhūm mukhālafah, if applied, would be accurate. The whole idea behind these conditions is to ensure that the converse meaning will not be permitted to play a role in establishing legal ruling unless one is fully certain that the qualification that qualifies a particular legal text has no other impact than to show that the ruling depends on it and the ruling, on the other hand, should cease to apply if this qualification no longer exists.

On the contrary, the Hanafis do not import any legal significance to mafhūm mukhālafah in questions exclusively related to both the Qur'an

and the Sunnah for it is not a valid method of interpretation. They did apply this sort of interpretation to people's written and verbal statements for the following reason. They believe that one cannot comprehend with certainty what is actually intended by the Lawgiver when He pronounces a text qualified by a particular restriction. One can never give the answer as to whether the Lawgiver does or does not tend to imply both direct and indirect meaning in legal texts. This task is beyond human capacity while this is not the case in the wordings and the writings of the people. As a logical consequence, *mafrūm mukhālafah*, as a way of interpretation, is relevant and applicable to human activities and rational proofs alone and not to divine texts.

I will set forth one or two examples to illustrate the idea of conflict caused by these two contrary attitudes held by two major schools of law. In the question related to the duty of providing *nafaqah* to divorced women, there is a relevant verse (Q. 65:6) which reads, "... and if they are with child, then spend for them till they bring forth their burden". Undoubtedly, the verse clearly provides the right of *nafaqah* for those divorced women who are pregnant. This is the *mantuq* of the verse whereby the pregnancy is an immediate reason for the right of *nafaqah*. The disagreement occurs in questions concerning those who are not pregnant at the time of irrevocable divorce. According to the Shafi'is, they receive no *nafaqah* during the waiting period. This consequence is conversely understood from the verse. The reverse consequence is adopted by the

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208 *Irshād*, p. 179; *Aminī, Jīyahd*, p. 62; *Khālīf, Usūl*, p. 157; *Taqīnīn*, p. 135.

209 *Aṭ-Ṭaqīr*, vol. 1, p. 117; *Irshād*, p. 179.

210 *Al-Khīn*, *Ikhtilāf*, pp. 187-188.
Hanafis for they, as previously mentioned, did not consider legal interpretation through *mašūm mukhālafah* as legitimate. 211

The same dispute occurs in the problem of legal guardianship of a girl. The Shafi'is say that the girl needs to have her father as legal guardian before she marries if the girl is a virgin. 212 Among other arguments, the Shafi'is argue on the basis of *mašūm mukhālafah* of the hadīth, "A once-married girl had a better right to take a decision about herself (in terms of marriage) than the guardian". 213 Conversely, it shows that if the girl is a virgin, a guardian has more substantiated right to decide on his daughter's marriage. In other words, the consent of a legal guardian is necessary to validate marriage. 214 Rejecting this interpretation, the Hanafis have imposed no such requirement. Accordingly, in the Hanaft school of law, an adult girl is permitted to conclude her own marriage contract without the intervention of her guardian. 215

As a matter of fact, many conflicts will occur in *fiqh* if we continue to interpret all legal and semi-legal verses conversely. Having preferred the Hanaft method of interpretation, I have to say that, as far as *mašūm mukhālafah* is concerned, this superiority is not due to the accuracy of the Hanafis' method of interpretation but largely to the inaccuracy of the Shafi'is method. *Mašūm mukhālafah* is somewhat vague and doubtful to the degree that no one ever seems to have laid down clear

211 Ibid.
212 Ibid., p. 190.
213 Ibid.
214 Ibid.
and agreeable principles to distinguish the reliable from the unreliable mafhūm mukhālafah. We should realise that on some occasions, the application of mafhūm mukhālafah leads to a correct legal consequence whereas on other occasions, it does not. A tradition from the Prophet that, "There is no zakāt on production below five wasaq (a unit of measurement)"\textsuperscript{216}, could be referred to the first case. Through mafhūm mukhālafah, we come to know that agricultural products less than five wasaq are not liable to taxation.\textsuperscript{217} This is a correct legal interpretation for it does not contradict other legal pieces of evidence and it has been implemented throughout Muslim communities in the past, up to, and including, the present day.\textsuperscript{218}

However, mafhūm mukhālafah may sometimes render the interpretation of legal texts doubtful and confused. An excellent example of this refers to the prohibited degrees of relationship in marriage as implied by Q. 4:23, "Forbidden unto you are your mothers,... and your step-daughters who are under your protection (live with you i.e. \textit{fī huji-rikum}) born of your wives unto whom ye have gone in but if ye have not gone in unto them, then it is no sin for you (to marry their daughters)...". This text is explicit on the point that marriage to a step-daughter who is under the guardianship of her step-father is forbidden to the latter if he has had sexual intercourse with her mother. Nevertheless the text, through mafhūm mukhālafah, may suggest a contrary interpretation; those step-daughters who do not live under their step-father's guardianship i.e. live

\textsuperscript{216} Al-Muwaṣṣa (S), p. 114.
\textsuperscript{217} Abu Yusuf, Kitāb al-Kharaj, p. 53.
in another place, are permitted. However, this consequence is not intended here for the verse's restriction "those who are under your protection (fi hujurikum)" is merely to illustrate the custom common among the people. That is, the step-daughter always lives together with her mother in her mother's new marital home. The intended restriction in terms of marriage between step-daughter and her step-father is the following qualification, "but if ye have not gone into them, then it is no sin for you (to marry their daughters)". In short, as long as the husband did not have sex with his wife, irrespective of whether her daughter is living in the same house or not, that daughter is marriageable to her step-father.

As hinted above, mafhum mukhala'afah is neither certain nor accurate for extracting legal rulings from the texts. Though many conditions have been laid down to ensure the proper use of this mode of interpretation, the problem remains for at least one major reason. As stated earlier, it is beyond human ability to give a precise and definite estimation of what is actually intended by the Lawgiver when He qualifies or restricts legal texts by certain conditions, restrictions or qualifications. The qualification, "fi hujurikum", for example, brings considerable problems to fiqh for it can be understood conversely to imply a ruling that, to some extent, is acceptable according to rational argument. What makes this interpretation void of authority is the knowledge that this qualification does nothing other than to show the custom common at that time. The same problem applies to other legal texts whereby one cannot

221 Al-Taqrir, vol. 1, p. 115.
decide once and for all whether the opposite meaning of the text is intended or not in legal reasoning. This is because qualification and restriction in both of the Qur'ān and the Sunnah are widely variable in terms of purpose. They may be used to illustrate the custom\textsuperscript{222} or the dominant practice\textsuperscript{223} or for other purposes related to Arabic usage\textsuperscript{224} that might have no legal significance. By this, we can safely conclude that \textit{mašhūm mukhalafah} should not be given precedence in cases of conflict for its nature is highly doubtful. In other words, \textit{manṭūq} always prevails over \textit{mašhūm} when they conflict.

\textsuperscript{222} See note 220.

\textsuperscript{223} Al-Zuhayli, \textit{Usul}, vol. 1, pp. 373-374.

\textsuperscript{224} See note 205.
CHAPTER FIVE
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THE METHODOLOGY OF TARJĪH IN ISNĀD CONFLICT

As mentioned elsewhere, the Qurʾān and the Sunnah are the foremost sources of Islamic law. As already known also, both have two distinct aspects namely the matn, the text and the isnād, the chain of transmitters. The problem of matn conflict has been dealt with in the foregoing chapter which took both the Qurʾān and the Sunnah into account for they are entirely Arabic texts. As regards the isnād, it is unanimously agreed that it is the Qurʾān alone that was transmitted through a mutawātīr chain and therefore no single verse in the Qurʾān can be subjected to any challenge or further examination on its narration.\(^1\) Except for a relatively limited number of legal verses associated with variant readings, the remaining legal verses are totally undisputed which naturally invites no disagreement from the standpoint of its transmission.\(^2\) The Sunnah involves a contrary phenomenon, however. For this reason, our discussion will be restricted only to the Sunnah which records a critical disagreement over the isnād and its implication for legal issues.

Every single hadīth or khabar or athar\(^3\), as noted before, consists of the matn as well as the isnād, the chain of authorities through whom the tradition has been transmitted. As far as tradition is


\(^2\)The problem of the variant reading has been basically dealt with in chapter two (pages 65-66).

\(^3\)The majority have used these three terms synonymously whereas other have used them to refer to three different meanings respectively. See Lane, *Lexicon*, part 2, p. 696; al-Qāsimī, *Qawaʾid*, p. 61.
concerned as evidence, the chief emphasis lies on the study of isnad and not on the matn. It is the isnad that guarantees the validity of the matn for without isnad, matn is baseless in terms of authenticity.\textsuperscript{4} As far as isnad is concerned, Muslim, in the introductory chapter to his Sahih, has a section entitled, "This science (the science of isnad ) is (part of) the religion".\textsuperscript{5} Among other things, he says, "(This science is a religion) therefore scrutinize those from whom you learn your religion".\textsuperscript{6} Schacht commenting on the isnads, says that "...the isnads constitute the most arbitrary part of the tradition".\textsuperscript{7} This displays how critical the isnad is compared to the matn in terms of validity.

As a matter of fact, the discussion of hadith concerns many discussions such as the degree of authority it possesses, the persons from whom it is derived, the manner in which it has been transmitted and other related matters. Each of them will be of great help when we proceed to discuss the conflicts of hadith and how to remove them. What is meant by conflict here is that hadiths with different isnads require two contrary rules such as obligation and prohibition of the same act i.e. one provides a ruling which differs from that provided by the other.

\textsuperscript{4} Robson, "Tradition: the second foundation of Islam", in MW, vol. XLI, 1951, p. 26. (cited after as "Tradition"); Khadduri, Islamic Jurisprudence, p. 30. It ought to be noted that the genuineness of the isnad, however, is no proof of the actual genuineness of the text of the traditions to which they are attached. See Robson, "Isnad in Muslim tradition", in GUOST, vol. 15, pp. 25-26. For details on text criticism, see al-Khalif, "Sunna's role in expounding Islamic rulings and refutation of suspicious cast on its authenticity", in IC, vol. 42, 1968, pp. 239ff (cited after as "Sunna")

\textsuperscript{5} Muslim, Sahih, vol. 1, p. 12.

\textsuperscript{6} Ibid.

See also Shaukat, "The isnad in hadith literature", in IS, vol. 24, 1984, p. 445.

\textsuperscript{7} Origins, p. 163. See also EI 1, vol. 2, p. 190.
Accordingly, it demands tarjīḥ to determine which of two conflicting traditions prevails on the consideration of the isnād. Only in this sense, can one appreciate the significance of the discussion of isnād in terms of conflict and tarjīḥ. In this regard, we quote al-Shafi’ī who says that “two contradictitory hadiths can never be equally reliable and therefore, we should choose the more authentic of them”.8 It is clear that a jurist is obliged to select only the one which has more weight than the others when they are conflicting provided that efforts to harmonise them or to ascertain the abrogating and the abrogated hadiths have been made and failed.9

The chain of transmission is therefore of importance when one seeks to exclude a tradition. I believe the basis of such exclusion will involve unlimited methods10 but we will restrict ourself only to those principles which are predominant in usūl discussion. In turn, many of the methods of excluding a particular tradition discussed either by the jurists or the traditionists are purposely omitted, being irrelevant to legal conflict or of no significant legal import.11 Also, factors that are not

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8 Al-Risalah, para. 588. See also Hulyat al-Awliya’, vol. 9, p. 105.
9 This conditional statement i.e. “provided that......”, is disputed amongst the jurists as previously discussed. See pages 142-146.
10 As far as methods of tarjīḥ in hadith conflict are concerned, al-Suyūṭī in his book, Tadrib al-Rawi ‘ala Taqrīb al-Nawawī, has mentioned more than one hundred modes of preference. My knowledge of this is taken from al-Qardawī, al-Madkhal (p. 142) since al-Suyūṭī’s book is not available to me. Al-Amidī, however, has stated 51 methods of tarjīḥ pertaining to isnād conflict. (al-Iḥkām, vol. 3, pp. 259-265).
11 e.g. The conflict between the transmission of men and women and the superiority of the former, etc.
immediately related to the problem of isnad are not discussed in the present chapter but will be studied in chapter seven.  

To begin with, we may say that the traditions are of different grades of reliability. Conflict and tarjih in this area of study, therefore, can be carefully maintained by a detailed knowledge of those degrees of reliability whereby a tradition which is well attested by the more reliable isnad would prevail. Accordingly, a person who is able to distinguish the sound from the weak transmission and between reliable and suspect transmitters would be competent in solving the problem of conflict and tarjih successfully. As far as usul al-fiqh is concerned, however, we may not discuss the problem exclusively on the basis of 'ulum al-hadith. Instead, we will take both the science of tradition and usul into serious consideration to arrive at more satisfactory solutions, for the two are closely related.

As established earlier, the jurists have indicated many murajjihat to be considered in terms of isnad conflict. Furthermore, they have said that more can be added because tarjih may employ unlimited methods to reach the strongest view. For our purpose, we are concerned only with those principles which deserve to be pointed out for the sake of an

12 i.e. "Tarjih based on external factors" will discuss many forms of preference which are, generally speaking, applicable not only to a specific area of conflict (e.g. isnad) but also to other areas.

13 For a substantial information concerning the science of hadith, apart from those books written exclusively on this area of study, see the introductions in the commentaries of al-Qastallani and al-Nawawi, on al-Bukhari and Muslim respectively. (The latter is also printed on the margin of the former i.e. al-Qastallani, Irshad al-Sari li Sharh Sahih al-Bukhari, pp. 2-46; 2-60.

14 Al-Itibar, pp. 11, 23; Irshad, p. 278; al-Qasimi, Qawaid, p. 313.
immediate *tarjih*. Among other major problems discussed by the ancient jurists, was the problem of *ahad* that stands against *mutawatir*. In fact, al-Shafi'i, was the first scholar to classify *Isnād* into these two technical categories. According to al-Shafi'i, the *Isnād* which contains innumerable transmitters of all generations including several of the generation of the Companions who knew the Prophet is *mutawatir* and constitutes certainty. However, instead of *mutawatir*, he calls a *hadith* handed down with this *Isnād* *khabar 'āmmah 'an 'āmmah*. The *Isnād* with the contrary description i.e. reported by one person or a few persons who do not possess the authenticity of the same scale as that of *tawātur*, is called interchangeably by al-Shafi'i as *khabar al-khāṣṣ, khabar al-wāḥid* or *khabar al-infīrād*. Only specialists are obliged to know and adhere to such a *hadith*. The overwhelming majority of the traditions however, are of the latter type, whereas only a small part of them are *mutawatir*.

If a *hadith* transmitted by *tawātur* i.e. transmitted constantly by a large number of people who cannot possibly agree upon a falsehood

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15 See Muhammad Ahmad Shakir in his introduction to al-Shafi'i's *al-Risalah*, p. 13. Ahmad Yusuf, on the other hand, has considered *al-Risalah* the first ever written book on *ugul al-fiqh* as well on *'ulūm al-hadīth* (see al-Shafi'i, p. 47).

16 *Al-Risalah*, paras. 961, 1329, 1815.


19 *Al-Risalah*, paras. 1000, 1010, 1260, 1816; idem, *Ikhtilaf al-Hadīth*, pp. 476, 482.

20 *Al-Risalah*, para. 1260; Ahmad Yusuf, *al-Shafi'i*, p. 76; Abu Zahrah, *al-Shafi'i*, p. 160.

because of their huge number, geographical situation and reliability,\textsuperscript{22} happens to be in conflict with the solitary tradition, the preference, the jurists argue, goes to the mutaw̱atir. For it is impossible to assume that it is a false statement since the large group of transmitters could not have agreed on falsifying the report.\textsuperscript{23} Hence, mutaw̱atir traditions are said to lead to certain knowledge (qaṯ̄i) and are superior in that to solitary traditions.\textsuperscript{24}

In addition, the solitary tradition is disputed in terms of validity as evidence of fiqh. To this effect, Abū Yūṣūf, as recorded by Schacht, is reported to warn against isolated traditions which he considered to be irregular (shadh) and thus argued against accepting them.\textsuperscript{25} Similarly, al-Shaybānī, was quoted to remark that “because the majority is not in favour of isolated traditions, we do not accept them”.\textsuperscript{26} Al-Jassās however, distinguished between two groups of khabar wahid; "(1) There is the report which entails 'ilm and that occurs when the report is accompanied by a proof authenticating its realibility, and (2) there is the report which does not entail 'ilm and that occurs when its authenticity cannot be proven".\textsuperscript{27} Al-Shāfi‘ī, on the contrary, as mentioned before,

\textsuperscript{23} Al-Mustasṣīn, vol. 1, pp. 141 ; Ibn Badrān, al-Madkhal, p. 197. See also al-A‘zāmī, Studies, pp. 223-231. Cf. Jüynboll, He said, "...that tawātūr as such is no guarantee for the historicity of a hadīth's ascription to the Prophet". (Muslim Tradition, p. 98)
\textsuperscript{24} Al-Ibhaj, vol. 2, p. 286 ; Irshad, p. 48 ; Badrān, Uṣūl, pp. 84-85.
\textsuperscript{25} Origins, p. 51. For details, see Abū Yusuf, al-Radd, pp. 24-25, 31, 41.
\textsuperscript{26} Ibid.
\textsuperscript{27} Al-Jassās, Uṣūl, as cited in Marie Bernard," Hanafi Uṣūl al-Fiqh", p. 631.
opined that though *khabar wahid* does not constitute certainty, it is incumbent on scholars to accept such reports because they are *mansūs.* Such a *haddith,* accordingly, is authoritative (*hujjah*) and cannot be rejected by means of mere *ta'wil* of the Qurʾān or of the general meaning of another *haddith.*

Ahmad b. Hanbal and the Zahiris, however, not only unquestionably considered *ahād* as authoritative but also as having certain and positive authority. Regarding the opinion that considers solitary tradition as equal to *mutawatir,* we can see that the exponent of this opinion was reported to have made two different contentions. Ahmad b. Hanbal opined, at one time, that *ahād* amounts only to probability and at another time, has said that the solitary tradition, like *mutawatir,* leads to certainty. Ibn Qudāmah, the leading usulist in the Hanbalī school, has this to say regarding the contention of his Imam, Ahmad b. Hanbal. He says that, principally, solitary tradition amounts only to speculative meaning. He ascribes this opinion to Imam Ahmad and the majority of the Hanbalis. Having said this, Ibn Qudāmah has explained that the second contention by Ahmad b. Hanbal was constructed on special or exceptional conditions. It was about traditions related to the problem of "ru'yah" i.e. to see Allāh on the day of judgement. Ahmad b. Hanbal has been reported to opine that all these traditions, though they are *ahād,* are true and definite. Ibn Qudāmah argues that the *haddiths* in

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28 *Al-Risālah,* para. 1260. See also *al-Burhān,* vol. 1, pp. 599-601.
31 See *Muntahā,* p. 71.
question are definite because they are very well-known and wide-spread.\textsuperscript{32}
In other words, solitary traditions should be regarded as merely probable and cannot be regarded otherwise unless supported by a considerable indication that could alter their character from uncertain into certain.\textsuperscript{33}

In this disputation, broadly speaking, I am inclined to believe that al-\textit{\textbar{h}ad} may establish a rule of law provided it is related by a reliable narrator in an uninterrupted chain of transmission.\textsuperscript{34} Though it is a \textit{hujjah}, it remains inferior to \textit{mutaw\textbar{a}tir} in case of conflict because it is clearly of less authority than the \textit{mutaw\textbar{a}tir}.\textsuperscript{35} This, at least, can be employed as a first stage in an attempt to evaluate two contradictory hadiths particularly from isnad point of view. With this in mind, we should not ignore how the comprehensiveness of evaluation of conflicting pieces of evidence may reduce significantly the room for possible errors and inaccuracy contained in every single method of preference. In other words, the superiority of \textit{mutaw\textbar{a}tir} over al-\textit{\textbar{h}ad} should not be considered binding and final on its own merit.

Thereby, we can safely conclude that \textit{mutaw\textbar{a}tir} prevails over khabar w\textbar{a}hid in respect of transmission (whereas khabar w\textbar{a}hid, may

\begin{itemize}
\item \textsuperscript{32} \textit{Rawdah}, p. 52.
\item \textsuperscript{33} Al-Hafnawi, \textit{Dirasa\textbar{a}}, p. 171.
This view is held by many leading usulists such as al-Razi, al-Amidi, Ibn al-Hajib, etc. See ibid, pp. 175ff.
\item \textsuperscript{34} This is inspired by a lengthy discussion devoted by al-Sha\textbar{f}i in the first part of his \textit{Ikhtilaf al-Hadith}, which adequately shows that solitary reports are of full authority in establishing legal rulings though, in terms of strength, they are merely probable. (See \textit{Ikhtilaf al-Hadith}, pp. 475-479) See also Mahmassan\textbar{a}, \textit{Falsafah}, p. 74.
\item \textsuperscript{35} \textit{Irshad}, p. 48.
\end{itemize}
however be decisive in respect of the meaning of the text concerned). A particularly interesting example of this is the problem of the legal controversy surrounding the rights of an irrevocably divorced woman during her waiting period. The Qur'anic verse with which the question is most frequently associated is Q. 65:6, "Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them. And if they are with child, then spend for them til they bring forth their burden". The verse clearly provides the right of sukna (lodging) for those who are irrevocably divorced and who are not known to be pregnant. Having approved her right to be lodged in the former marital home during the 'iddah, Malik and al-Shafi'i assert that, no right of nafaqah (maintenance) is provided. The Hanafis, on the contrary, contend that 'she' has a right to both sukna and nafaqah. Ahmad b. Hanbal and a group of the scholars deny both rights arguing solely by reference to the report of Fatimah bt. Qays, which reads as follows, "The Prophet said to her that " you have right to neither the sukna nor the nafaqah ".

Though the report is regarded as hasan sahih, the overwhelming number of the jurists attach no significance to this report for it is a solitary tradition. This is clearly evident from 'Umar's denial of the reliability of the report when he says, "We do not accept the saying of a woman of whom we do not know whether she tells the truth or lies, and

38 Ibid.
39 Ibid.
we do not abandon the Book of God". In another version, the second Caliph is reported to have stated that "We shall abandon neither the Book of God nor the Sunnah of our Prophet for the saying of a woman". This reveals in one way or another that, as stated by al-Jassas, the report of Fatimah is void of authority, for it is a solitary tradition that was further denied by one of the authorities in the first generation i.e. 'Umar. I admit that this is not an accurate example of mutawatir-āhād conflict but at least it can show that a report transmitted by one person is inferior to that which is transmitted by a group called mutawatir. Moreover, khabar wahid is always subject to a number of pre-conditions before it can be accepted as legal evidence.

The later jurists however, distinguished a third type of tradition which they termed al-mustafid. This type holds the central position between the mutawatir and the āhād. It is well-known also as mashhūr. The mashhūr, literally wide-spread, is a report originally

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42 Ibid.
45 The inaccuracy of this example lies in:
   a. it involves conflict between the Qur'ān and the Sunnah and not between the Sunnah and another Sunnah with which we are concerned.
   b. 'Umar did not accept Faṭimah's report not because her report was solitary but rather 'Umar was not quite sure whether Faṭimah was telling the truth or not. (see al-Khan, Ikhtitaf, p. 208-209)

The reason that has led me to cite this incident as an example is that I am not able to find a genuine example of mutawatir-āhād conflict within the Sunnah.
47 This is found in most of the contemporary books dealing with the science of traditions such as the following:
conveyed by an individual transmitter among the Companions but later spread and transmitted by a numerically indefinite group of people whose agreement upon a lie is inconceivable.\textsuperscript{48} By this, there will be no sharp distinction between \textit{mutawātir} and \textit{mashhūr} for both are well known to the later scholars.\textsuperscript{49} According to the Hanafī view, the \textit{mashhūr} stands higher than the solitary tradition and is of a lesser degree of certainty than the \textit{mutawātir}.\textsuperscript{50} In contrast, the jurists other than the Hanafis, opine that this type of tradition stands on the same level as solitary tradition which supplies only probability.\textsuperscript{51} \textit{Al-mashhūr}, according to the \textit{jumhūr}, as a matter of fact, is merely one of three categories of solitary traditions.\textsuperscript{52}

Thus, the \textit{mashhūr} prevails over the \textit{āhād} in case of conflict in the Hanafī point of view alone. This can be illustrated by the problem of one witness and the oath of the plaintiff as contrasted to the wide-spread \textit{hadith} i.e. \textit{mashhūr}, "The burden of proof rests upon the plaintiff and the oath falls on the defendant".\textsuperscript{53} The former principle however is overruled owing to the fact that it is based merely on the so-called solitary tradition which is of lesser degree compared to \textit{mashhūr}.\textsuperscript{54} According to

\begin{footnotes}
\item[48] Al-Nasafi, \textit{Kashīf}, vol. 2, pp. 11-12; \textit{Irshād}, p. 49; al-Zuhayli, \textit{al-Fiqh}, vol. 1, p. 69, note no. 2; \textit{Taqātīn}, p. 44.
\item[51] Al-Burhaan, vol. 1, p. 584; Badran, \textit{Uṣūl}, p. 86.
\end{footnotes}
the jumhūr, though there is an apparent opposition between the two hadiths in relation to the law of evidence, the so-called wide-spread hadith has no extra strength whatsoever to undermine and overthrow the hadith pertaining to the validity of one witness and the oath of the plaintiff since the two belonged to one family i.e. solitary tradition. By this, we may say that conflict between mashhūr and āḥād is of no significance unless it is viewed from Hanafi legal point of view.

The following significant point of tarjīḥ is related to the problem of the classification of hadiths into saḥīḥ, hasan and daʿīf. These classifications are well documented in ʿulūm al-hadīth because they constitute the major task of such a discipline. Though different grades of reliability are assigned to traditions which may serve the problem of conflict and tarjīḥ in usūl in a way that only the strongest form of hadīth will be adhered to, the jurists have placed no special emphasis on this particular classification. In my view, that is partly because the problem is so well known among the usulists that saḥīḥ prevails over the hasan and hasan over the daʿīf to the extent that it demands no further explanation in usūl literature. In this situation, we should turn to the science of tradition to ascertain more of these classifications.

55 In fact, both hadīths, according to al-Shāfiʿī are reconcilable. See al-Umm, vol. 7, p. 8.
56 Being equal to mutawatīr, mashhūr unlike āḥād, is of capacity to specify and qualify the general of the Qurʾān. In fact, this is the only difference between mashhūr and āḥād from the Hanāfī view point. (See Khalīf, Usūl, p. 42 ; Badran, Usūl, pp. 85-86)
For practical cases, see al-Hidayah, vol. 2, p. 209.
From the general point of view of reliability i.e. the trustworthiness of the individual transmitters and the continuing of the isnād, traditionists came to divide the traditions into three main categories. The first, known as saḥīḥ, received not only full authority but also superiority in case of conflict with the following kinds of hadīth.\(^{58}\) Saḥīḥ is a reliable or genuine report fulfilling all the required conditions. In other words, to be labelled fully reliable, it is necessary for a tradition of the Prophet to be preceded by an uninterrupted isnād, reported by the trustworthy and containing no abnormality (ṣhādīh) or weakness ('illah).\(^{59}\) Trustworthiness is measured by two criteria namely the accuracy (dabī'ī) and 'adālah of each transmitter.\(^{60}\) Of six canonical collections of hadīth, two are especially esteemed and are labelled the Sahihān “the two reliable collections” which represent the highest degree of authority (in terms of transmission).\(^{61}\) The first is the Sahīḥ of al-Bukhārī (d. 256 A.H.)\(^{62}\) and the second, the Sahīḥ of Muslim (d. 261 A.H.).\(^{63}\)

The next in rank is called hasan. It is a report of fair authority when those who transmitted this hadīth do not reach the standard of those who transmit saḥīḥ traditions, being inferior to them either in

\(^{58}\) Al-Hafnawi, Dirāsat, p. 300.


\(^{60}\) Ibid.; Salisbury, "Contributions from original sources to our knowledge of the science of Muslim tradition", in JAOS, vol. 7, 1862, pp. 63-64 (cited after as "Muslim Tradition")


\(^{62}\) EI 2, vol. 1, p. 1296.

\(^{63}\) EI 1, vol. 3, p. 756.
their faculty of memory or their 'adālah.\textsuperscript{64} Da‘īf (sometimes called saqīm) is a weak report which comes at the end of the rank for it lacks one or more of the conditions mentioned above.\textsuperscript{65} The weak traditions have been sub-divided according to the degree of defect in their reporters or in the texts of the report themselves. These fall into categories such as shādh, munkar, muddarib, mursal, mu‘dal, etc., which need not be elaborated here.\textsuperscript{66} Distinguished totally from the above three classifications, the traditionists have also discussed the mauḍū‘ which is however, not considered a genuine tradition but rather fabricated and fictitious. From the isnād point of view, it is neither genuinely originated from the Prophet nor from the Companions. It was established in the later generations after the Companions and put into a complete isnād as if it came from the lips of the Prophet irrespective of what the purposes were.\textsuperscript{67} Obviously, it has no legal significance or even authority to compete with other genuine traditions.

\textsuperscript{64} Al-Tahhan, Taysir, p. 45 ; Guillaume, The Tradition, p. 88 ; Ibn Kathīr, al-Ba‘ith, p. 19.

There is another definition for hasan and it is originally attributed to al-Tirmidhī. He asserts that "every tradition which is transmitted whose isnād contains no one suspected or falsehood, which is not abnormal and is transmitted to the same effect by another line is in our opinion a good tradition". (cited from Robson, "Varieties of the hasan tradition", in JSS, vol. 6, 1961, p. 48.)


\textsuperscript{66} For further information, see ibid.

\textsuperscript{67} For an outline of the purpose behind the falsification on the hadīth, see al-Hakim, al-Madkhal, pp. 28-33 ; al-Tahhan, Taysir, pp. 89-91 ; al-Siba‘ī, al-Sunnah, pp. 78-89.
By these classifications, it is certain that a jurist can simply apply these degrees of authority whenever there appears to be a conflict between them. Though the process of tarjih in this way sounds far from complex, it remains a painstaking study. First of all, according to many traditionists, no one should imagine that sound traditions can be found only in the works of both al-Bukhari and Muslim. Not all sound traditions are recorded by both. Accordingly, the matter deserves a comprehensive knowledge of the so-called 'ilm al-rijal or tarajim (the biographical science of transmitters) and 'ilal al-hadith (causes of unsoundness in Prophetic tradition) so that jurists would accept only those traditions which come through reputable channels. Doubtless, these two disciplines demand great study from the jurists. Moreover, as noted by al-Hakim al-Nasaiburi, there may be a difference of opinion on many questions and among them, the problem of invalidating and declaring reliability (wounding and authenticating) for one imam perhaps declared someone reliable while someone else invalidated him. Apart from this, it is common that one tradition may be transmitted with two isnads, one being reliable and the other unreliable e.g. transmitted in both interrupted and uninterrupted isnad. These may add some difficulties in the course of distinguishing the reliable from unreliable traditions.

68 Al-Qasimi, Qawa'id, pp. 83-84.
Ibn al-Salah credits al-Bukhari with saying that he knew 100,000 sound traditions but the total said to be recorded in his Sahih is only 4,000 after excluding what is repeated under various headings and chapters. (see Muqaddimah, p. 10)
69 Ibid.
70 See al-Sibált, al-Sunnah, pp. 111-112.
72 See al-Risalah, p. 228, note no. 2.
Many examples may be presented to show that conflict of isnad is always removed by observing these grades of reliability. This means that sahīh always prevails over hasan and particularly over daʿīf and never vice versa. One brief example is as follows (however many others are available). It concerns the first chapter of the Qurʾān, the Fātīḥah. The jurists are divided here as to whether one is bound to recite this chapter in every ritual congregational prayer. The Hanafis have contended that every individual person who performs prayers in congregation is not required to do so. That is because the Prophet is reported to have said, “Whoever performs prayer in congregation, the recitation of the imām is credited also to the account of the followers (maʿmūm )”. The vast majority of the jurists, notwithstanding minor disagreements between them, have demanded the recitation of the Fātīḥah in order to make the prayer valid arguing on the basis of another tradition but with contrary effect. The hadīth reads “There is no prayer for whoever does not recite the Fātīḥah of the scripture”. The jumhūr argues that since the former hadīth is unreliable i.e. daʿīf, the preference should be granted to the hadīth that requires the recitation of the Fātīḥah.

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73 Aḥkām, vol. 1, p. 122.
75 Ibid., p. 122.

Mention should be made that a weak hadīth is not a valid legal proof except in the Hanbali and Zahirī schools of law. See al-Nawawī, al-Majmuʿ, vol. 1, p. 59; al-Qasimī, Qawaʿid, p. 113.
76 Ibid., p. 119.

Mention should be made that this conflict involves many pieces of evidence. Accordingly, a more comprehensive study should be carried out to determine what is "weightier" in this conflict. For details, see al-Bidāyah, vol. 1, pp. 125-128 and al-Bayhaqī, Kitāb al-Qirāʾah Khalf al-Imām, Dar al-Kutub ‘Ilmiyyah, Beirut, 1984.
Another relevant example that can be brought in is related to voluntary fasting. According to al-Shafi'i, a person who purposely breaks his voluntary fasting, is not obliged to make a substitute fast for it on another day. It has been reported through a reliable transmission that the Prophet often breaks his recommended fasting when informed by his wife that she had cooked something for him on that particular day.\(^77\) In addition, there is another reliable *hadith* reported by Umm Hanî, confirming this ruling.\(^78\)

The Hanafis hold a contrary legal ruling in the case concerned.\(^79\) They have based their argument on the *hadith* reported by al-Zuhrî from 'Urwah that 'A'ishah had said: "A lamb was given to Hafsah while we (I and Hafsah) were fasting. Hafsah persuaded me to break my fast. When the Prophet heard this, he ordered us to fast another day (as a substitute for what we did) ".\(^80\) As far as *tarjîh* is concerned, al-Shafi'i argues that the *hadith* employed by this group is *da'îf* owing to our ignorance of the biographical information of the person who transmitted the *hadith* from al-Zuhrî.\(^81\) Furthermore, this *hadith* is reported in Malik's *al-Muwatta* \(^82\) in the form of suspended transmission i.e. *mursal*.\(^82\) From the fore-going arguments, we can safely conclude that al-Shafi'i's opinion is better formulated, for the *saḥîh* always prevails over the *da'îf*.\(^83\)

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\(^77\) Al-Shafi'i, *al-Musnad*, p. 365.


\(^80\) Ibid. p. 108.


\(^82\) Al-Muwatta', (Y), vol. 1, p. 306.

With regard to the continuity of *isnād*, we have two basic divisions, namely the continuous and the discontinuous. The first division may fall into one of the aforementioned classifications i.e. *mutawatir*, *mashhur* or *ahad*, and at the same time may be entitled to be listed in one of the three categories called *sahih*, *hasan* or *da'īf*. All of these have been previously discussed. The remaining division therefore, to be discussed here is of the second viz. discontinued *isnād*. The *munqatī*, in general, is the report in which continuity of transmission is lacking. However, in relation to *usūl*, the *mursal* is more extensively discussed to the extent of enjoying a special discussion in al-Shafi'i's *al-Risalah*.

*Mursal* (literally, suspended) is an interrupted chain which is disconnected at the point between the Prophet and the one who transmitted from him, or at any point after the Companions. This *isnād* is obviously incomplete and inadequate. Nevertheless, the jurists...

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84 Al-Tahhan, al-Taysir, p. 31f.  
85 Salisbury, "Muslim Tradition", p. 120.  
86 Al-Risalah, paras. 1262-1308.  
88 Ibn Kathîr, al-Ba‘ith, p. 29.  
89 Al-Shawkānî has offered a considerable distinction between these two pictures of *mursal*. The first concerns the traditionists while the second is propounded by the jurists. He further asserts that the cause of the conflict is credited to the *mursal*'s definition held by the traditionists not by the jurists. (see Irshad, p. 64)
hold differing views. Al-Shâfi‘î accepts it conditionally. He restricts his acceptance to the mursal hadîth reported by leading Successors or supported by another mursal version or by the opinion of the Companion, etc.\(^{89}\) The traditionists have generally raised objections to such an acceptance, arguing that mursal is not authoritative.\(^{90}\) The Hanafis and the Malikis as well as some of the traditionists, on the contrary, have no objection whatsoever.\(^{91}\) Moreover, some of them are of the opinion that mursal hadîth is more accurate than the continuous isnâd owing to the fact that it is customary for those who are certain about the isnâd to link the tradition directly to the Prophet by omitting one or more link between themselves and the Prophet.\(^{92}\) Therefore it should be subsequently favoured in case of conflict.

Al-Āmidî has given great emphasis to marâsil (plural of mursal) reported by Successors, provided that they are ‘adl since it is impossible for those who are of the quality of ‘adâlah to transmit a report from the Prophet unless they did actually hear from the Companions that the Prophet said or did such and such.\(^{93}\) In other words, they did so only after

89 For details, see al-Risâlah, paras. 1265-1270; Badrân, Usûl, p. 100; al-Hafnawî, Dirasât, pp. 344-346.

Al-Bukhârî, the author of Kashf al-Asrâr criticises Al-Shâfi‘î for not accepting mursal as reliable since this refusal will naturally exclude many hadîths i.e. fifty volumes of hadîths. (Kashf, vol. 3, p. 5)
ascertaining its soundness. This point of view seems to me highly preferable and this is supported by al-Shafī‘ī's statement, “Every hadīth which I have recorded as munqatī’ (i.e. mursal), I have also heard in another uninterrupted version”.94 Similar to this is the common feature in the body of tradition that only the source of authority for a tradition is often given and the rest of the chain of transmitters is omitted, for a particular hadīth was so unanimously held to be authentic that further verification of its origin was superfluous.95

The problem of ikhtilāf was therefore not originally caused by traditions, rather by the conflicting views toward a particular type of tradition in terms of acceptance or otherwise. The conflicting view on accepting a mursal hadīth, for example, is capable of making legal rulings contradictory. Many cases of conflict in fiqh have been credited to this reason.96 To give an example of the conflict between a mursal and a continued sanad, we put forward the case of laughing (qahqahah) in the prayer. The Hanafis are reported to have opined that laughing in the prayer would render both the prayer and the ablution null and void. In other words, one who laughs in his prayer, must repeat not only his prayer but also his ablution because both are affected by laughing. They adhered to the hadīth which reports that the Prophet ordered a particular man who was laughing in his prayer to repeat both the ablution and prayer.97 Other jurists have held a contrary assertion: that laughing affects only the prayer but not the ablution. Ablution remains valid

94 Al-Risālah, para. 1184. See also Muslim, Sahīh, vol. 1, pp. 24-26.
96 Al-Khīn, Ikhtilāf, p. 403f.
97 Al-Hidayah, vol. 1, p. 16.
unless one can hear a sound or perceive a smell. The majority of the jurists did not consider the first report as having considerable weight and value, for it is mursal i.e. mursal Abī al-Āliyah, (as well as contradicting the general principle in terms of nullifying ablution). This clearly shows how a mursal is overruled when it conflicts with the musnad.

Before we proceed to undertake the problem of ṭarjīḥ on the basis of usūl considerations as propounded by the jurists, we have to say that the traditionists have divided sound traditions into seven grades which presented hierarchically are as follows: (1) those given by both al-Bukhārī and Muslim, called muttafaq `alayhi; (2) those by al-Bukhārī alone; (3) those by Muslim alone; (4) traditions not given by them but fulfilling the conditions of both; (5) traditions which fulfil al-Bukhārī's conditions; (6) traditions which fulfil Muslim's conditions and (7) traditions perfect in the opinion of other authorities. These grades, in fact, have been frequently taken into account and applied by those who wrote on sharḥ ahādīth al-ahkām particularly when there is a necessity to prefer one tradition over the other.

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100 Al-Mughnī, vol. 1, p. 178.
102 The process of collecting the traditions on this basis is called mustadrak and the work of al-Hakim's al-Mustadrak is a typical example of this. Throughout the book, he collected ahādīth which are not recorded by both al-Bukhārī and Muslim but fulfilling the conditions laid down by either or both. (see al-Tahhan, Tayṣīr, pp. 38-39)
103 See Nayl al-Awār, vol. 5, p. 331. See also Irshād, p. 278; al-Qāsimī, Qawa'id, p. 314.
In *usul* literature, however, one can find many methodologies of *taqīh* which are not dealt with or even sketched in classical 'ulum al-*hadīth*. Broadly, the jurists, unlike the traditionists, have pointed out that whenever there appears to be a conflict between two or more traditions, effort should be made to ascertain the more accurate transmission. The accuracy of transmission can be confirmed by a number of considerations that substantially vary from the tradition-oriented study to the jurist's. This is the task with which the jurists are primarily concerned.

From the viewpoint of the transmitter's character, many methods of preference have been identified. However we have to admit that they are not necessarily applicable to all cases of conflict. These are nothing other than several considerable features employed in order to evaluate the most accurate *īsnād* but from another point of consideration. Put differently, any means which leads the transmitters to be known precisely and acknowledged as trustworthy would presumably be a significant feature in selecting only the proper tradition in cases of conflict. To begin with, we may refer to the problem which concerns the cause of major ritual impurity (*janābah*). There are two traditions concerning the same question with different implications. One of the traditions reveals that the cause is *inzāl* (emission of sperm) and this tradition was reported by Ubayy b. Ka'b from the Prophet. The tradition reads as follows, "the water from the water"\(^{104}\) The other tradition shows that the cause is merely the meeting of two sexual organs (*iltīqa' al-khīṭānayn*) even if no *inzāl* takes place. The tradition, reported by 'Ā'ishah reads, "when the two sexual organs met, *ghusl* (performing bath

\(^{104}\) Muslim, *Sahīh*, vol. 1, pp. 185-186.
for major ritual impurity) becomes obligatory". Accordingly, conflict arises when some of the jurists inclined to follow the first tradition and the others preferred the second tradition.

This feature offers us two principles of tarjīḥ that deserves serious concern. First, it demonstrates that a person close to the Prophet should be taken as guarantor for the credibility of tradition in general cases and particularly in the Prophet's personal life. Thus, transmissions narrated through the Prophet's wives are superior, as noted elsewhere, to other contradictory transmissions in problems related to the Prophet's family and personal affairs or the day-to-day life of the Prophet. Secondly, it displays that the transmissions of those who actually participated with the Prophet in certain situations are given the priority regarding those particular situations over other transmissions which are not. As for this case, it is evident from 'Ā'ishah who is reported to have said, "I did it with the Prophet and we bathed (performed the ghusl) together". Leaving aside some external factors that are in line with this tarjīḥ (which will be discussed later), we can confidently conclude

105 Ibid., pp. 186-187.

It is obvious that these two hadīths are recorded in the Sahīḥ. Accordingly, an evaluation of both from a purely 'ulum al-hadīth consideration seems inapplicable. Other means are sought, however, to remove the conflict with which the jurists are particularly concerned.

106 Al-I'tibār, p. 31.


Other similar precedents and cases can be found in al-I’tibār, p. 13.
that these two aspects of transmission place the 'weight' of the second tradition beyond doubt.

Also, it is worthy of remark that a report transmitted by the nearest person to the Prophet i.e. in terms of where the saying or the doing of the Prophet takes place, is of considerable superiority over the one whose narrator is not in such a situation.\textsuperscript{110} For this, two traditions will be examined in the light of the above guideline. The first, reported by Ibn 'Umar, clearly contends that the Prophet performed \textit{hajj} exclusively in one journey, \textit{al-hajj bi al-\textit{i}fr\textit{d}} i.e. not associated with 'umrah in the same journey.\textsuperscript{111} Another version reported by Anas b. Mālik, asserts that the Prophet performed the \textit{hajj} in a manner called \textit{qirān} i.e. performing \textit{hajj} and 'umrah together in one journey.\textsuperscript{112} Bearing these two traditions in mind, the jurists are more inclined to adhere to the first tradition i.e. transmitted by Ibn 'Umar for the reason noted at the beginning of the paragraph. What makes this tradition actually prevail are the words of Ibn 'Umar himself that "he was under the camel of the Prophet when the Prophet pronounced his \textit{ihram} (and accordingly, he could hear clearly what type the \textit{ihram} of the Prophet was)".\textsuperscript{113} Hence, those who study these two transmissions carefully, would come to the conclusion that the transmission of Ibn 'Umar is worthier since he is the nearest person to the Prophet when the Prophet pronounced his \textit{ihram}.

\begin{itemize}
\item \textsuperscript{111} \textit{Al-\textit{I}ṭībār}, p. 14.
\item \textsuperscript{112} Ibid.
\item \textsuperscript{113} Ibid.
\end{itemize}

The saying of Ibn 'Umar can be found in \textit{Musnad}, vol. 4, p. 187. For another mode of preference for the same legal conclusion, see \textit{al-\textit{I}ṭībār}, pp. 13-14 and \textit{al-Bāji}, \textit{Iḥkām}, pp. 657-658.
On the other hand, the transmission of those who are unknown (mastur or majhul) are overruled. A narrator is unknown because of a lack of biographical information on his reliability as a narrator. In terms of proof, hadith with unknown narrators is considered unreliable and invalid.\textsuperscript{114} Included under this are the reports by those who are not endowed with complete understanding, as in the case of minors, the weak-minded (ma’tuh) the careless (mughafal) and heretics (sahib al-hawa).\textsuperscript{115} Their reports are overruled since they could have been subject to many uncertainties and falsifications.\textsuperscript{116} By this, only those traditions transmitted by people whose memory and precision are above serious controversy or void of excessive confusion will be credited with precedence over those transmitted by those who are not credited with the same degree of memory, integrity and precision.\textsuperscript{117} The only way to know these is to know precisely who the transmitters are. The unknown transmitters cannot be judged as to whether they are just or impious, etc., and consequently their reports are left aside particularly when they contradict the reports transmitted by known transmitters.

Let us examine one case of these problems. The case in point is concerned with two reports; one is reported by a reliable transmitter and the other by an unreliable transmitter who is suspect or who is believed to be innovator.\textsuperscript{118} For this, the question of fasting throughout a complete

\textsuperscript{114} Al-Qardawi, \textit{al-Madkhal}, p. 85.
\textsuperscript{116} Al-Qasimi, \textit{Qawa'id}, p. 314.
\textsuperscript{117} Muslim, \textit{ Sahih}, vol. 1, p. 4.
Ibrāhīm b. Abī Yaḥyā has reported that the Prophet said, "Whosoever fasts for a complete year (al-dahr) has (certainly) offered (wahaba) himself (as a gift) to God".\(^{119}\) No doubt, the hadīth encourages such fasting. Having said this, we also find another version in which the Prophet is reported to have prohibited continuous fasting (siyām al-dahr), "There will be no fast for those who fast for a complete year. The fasting for three days in every month is equivalent to a year's fasting".\(^{120}\)

Here, we have two traditions that are contradictory. Some of the jurists give preference to the latter owing to the fact that Ibrāhīm b. Abī Yaḥyā, one of the transmitters in the former isnād, though he is a reliable (thiqah) transmitter, is credited with innovations for he is a jahmi (i.e. a group of mu'tazilah who believe that a man has no freedom in his action, for he is majbur).\(^{121}\)

With regard to this problem i.e. innovators, al-Nawawī has this to say, "the transmission of him who holds an innovative opinion (mubtadi') and whose bid'ah makes him an unbeliever is not acceptable by unanimous agreement. About the transmission of that mubtadi' whose bid'ah does not lead him to unbelief there is difference of opinion. (1) Some reject it absolutely because of his being a sinner (fāsiq), while ta'wīl serves no purpose. (2) Others accept his transmission, as long as he does not declare mendacity permissible in order to support his doctrine nor

\(^{119}\) *Al-Ībā',* vol. 3, p. 220.

\(^{120}\) Ibid.

\(^{121}\) Ibid., p. 221.

Ibrāhīm b. Abī Yaḥyā, in fact, was one of the scholars from whom al-Shāfi‘ī acquired his legal knowledge in Madīnah. (see Abu Zahrah, *al-Shāfi‘ī*, p. 37)
condones mendacity in others who support his doctrine, regardless of whether or not he is a propagandist of his *bid'ah*. This opinion is also reported on the authority of al-Shafi'i who once said: "Accept the testimony of the *ahl al-hawa* (except that of the *Khattabīyah*) from among the *Rafidah*, because they have nothing against testifying falsely in favour of those who agree with them". (3) Still others say: Accept the transmission of the *mubtadi'* when he does not propagate his *bid'ah* and do not accept it when he does. This last opinion is upheld by many, indeed the majority, of the scholars and is the most balanced one......122 Ibn al-Anbari has contended that this attitude is approved by the consensus of the ummah. Therefore, the *ummah* accept and consider the two *Sahih* of al-Bukhari and Muslim (respectively) as reliable though the two contain transmission from innovators such as Ḍi‘amah al-Basri (tabi‘i) who is a qadrī; ‘Umran b. Haffān who is alleged to be one of the *Khawarij* and ‘Abd al-Razzaq b. Humām b. Nafl who is accused of following the *Rāfidah*.123 It seems that only the *Khattabīyah* suffered from their theological thought in the eye of the jurists.

After this lengthy explanation, we may safely conclude that the preference proposed earlier is fundamentally poorly defined. In other words, the reports of innovators are not necessarily liable to be rejected. Only transmission by those whose *bid'ah* makes them unbelievers is unanimously rejected. As in this case, some of the jurists, instead of

122 Al-Nawawi, *Sharh*, vol. 1, pp. 60f.
adhering to the second tradition, have recourse to the first tradition which is reported by 'Ibrāhīm b. Abī Yahya. They do this by interpreting the prohibition in the second tradition as referring to fasting on occasions not permitted by Shari'ah such as during the two days of celebration and three days of tashrīk i.e. 13th, 14th and 15th of the month of pilgrimage.¹²⁴

Likewise, the jurists declare that a report of a faqīh transmitter may be worth more than reports transmitted by the non-faqīh transmitter for the former is competent to comprehend what he relates.¹²⁵ By this, we understand that transmitters are divided not only into well-known and unknown (as elaborated before) but also the well-known transmitters are of two kinds; the one who is also a faqīh besides being a transmitter and the other who is only a transmitter. It was commonly known among the jurists to the extent that they know these two groups by name. Aghnides, for example says,¹²⁶ “those who are well-known transmitters who are also faqīhs are the first four Caliphs, 'Abd Allāh b. Mas'ūd, 'Abd Allāh b. 'Umar, 'Abd Allāh b. 'Abbas, Zayd b. Harithah, Mu'ādh b. Jabal, Abū Mūsā al-Ash'arī, 'Ā'ishah and others”. He further says that the traditions reported by those are accepted whether or not they are in accord with qiyās. On the contrary, he says, the transmission by those transmitters who are not faqīh like Abū Hurayrah are accepted only if in accord with qiyās because they may have taken a wrong record. This attitude is further evident from the following conversation between 'Alī b. Khashram and Wāki‘.

¹²⁶ Aghnides, Theories, p. 48.
'Ali b. Khashram said; Waki' said to us, "Of these two isnads, which is the one preferred by you; al-A'mash - Abī Wa'il - 'Abd Allah; or Sufyān - Ṭanāsīs - Ibrahīm - 'Alqamah - 'Abd Allah?" We replied; "al-A'mash - Abī Wa'il - 'Abd Allah". Waki' said, "Subhāna Allah! al-A'mash is a shaykh and Abū Wa'il is also a shaykh (but) Sufyān is a faqīh and Ṭanāsīs is a faqīh and Ibrahīm is a faqīh and 'Alqamah is a faqīh too. A tradition transmitted by the jurists is superior to one transmitted by shuyukh (pl. of shaykh)." 

A student of the history of early Islamic law may notice that the Islamic law, in its earliest period consisted of little else other than the legal traditions (ahadīth al-ahkām). Therefore it is not surprising that all such Companions as are reported to have related the largest number of hadith e.g. 'A'ishah, Ibn Mas'ud, Ibn 'Abbās etc., are described as faqīhs too.

Almost all the jurists who discuss the problem of tarjīḥ have noted this feature but unfortunately without giving any proper examples.

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127 "Shaykh " is the title given to a transmitter whose reliability is of the third grade i.e. his transmission should be examined carefully. (see Ibn al-Salāh, Muqaddimah, p. 59).


Another similar anecdote (i.e. between Abū Ḥanīfah and al-Awza'ī) can be found in al-Siba'i, al-Sunnah, p. 423 and Hitū, al-Wajīz, p. 78.

All the technical terms used in the isnad by which the transmission method is indicated are left aside without being translated. Instead, these technical terms such as hadathana, akhabarana, samī'tu, 'an, etc., are represented by a horizontal stroke (-) between the names of transmitters.

According to my opinion, this problem seems to be included under the disputation over *khabar wahid*. Broadly speaking, having considered the authority of *khabar wahid*, the jurists have laid down many conditions to be met before the reliability and trustworthiness of the transmitters involved in such a tradition is accepted.\textsuperscript{130} Exactly on this account, the tradition of the Prophet transmitted by only one narrator is subjected to severe checking particularly when they are conflicting. The Hanafis\textsuperscript{131}, for instance, have required, among others, that the narrator's action cannot contradict his narration. Otherwise, the transmission is left aside to clear the way for the practice of the narrator.\textsuperscript{132} It is on this ground that Abu Han\textsuperscript{f}ah, for example, does not rely on the following *hadith* narrated by Abu Hurayrah, "When a dog licks a dish, wash it seven times, one of which must be with clean sand".\textsuperscript{133} Abu Han\textsuperscript{f}ah explained this by saying that Abu Hurayrah has not acted upon it himself. Moreover, since the requirement of washing is normally three times, the report is considered weak, including its attribution to Abu Hurayrah for it contradicts the practice of the narrator and the *qiya\textsuperscript{s}*.\textsuperscript{134}

By this example, we may realise that the chain whose transmitters are also *faq\textsuperscript{h}is* has some strength. This is evident when some of the jurists do not consider Abu Hurayrah's action which runs contrary to the *hadith* requirement as having legal effect since he is not a

\textsuperscript{130} Al-Siba’\textsuperscript{i}, *al-Sunnah*, pp. 404-405.
\textsuperscript{131} Ibid., p. 440.
\textsuperscript{132} Badran, *Usul*, p. 95ff.
\textsuperscript{133} Muslim, *Sahih*, vol. 1, p. 119.
\textsuperscript{134} Abu Zahrah, *Usul*, p. 109; Badran, *Usul*, pp. 95, 97ff.
This example may throw some light on what has been established by the jurists in terms of conflict and *tarjīḥ*: that is, a tradition narrated by a *faqīḥ* transmitter enjoys more credibility when it contradicts a tradition transmitted through a non-*faqīḥ* transmitter.

Similarly, they also pointed out that the report that comes through the transmitter who is more knowledgeable or proficient in Arabic should be favoured simply for the same reason i.e. his report is more precise than the other's for the sake of both legal and language significance. An example of this, like before, finds no place in *usūl* books. On the other hand, the same justification of preference applies to that which is transmitted by those who are well acknowledged as those who had more memory power and precision (*ahfaz* and *atqan*). Al-Hamdhanī, after saying this, refers the reader to a comparison between two reliable transmitters namely Malik b. Anas and Shu'ayb b. Abī Hamzah. Though both are trustworthy, Malik is credited with having the greater memory and precision compared to Shu'ayb b. Abī Hamzah. In case of conflict between two traditions which come through these two transmitters respectively, the superiority goes to Malik for he is *ahfaz* and *atqan*. As in the above, this case records no actual example.

Having said that, the above principles i.e. preference by virtue of the proficiency in language and precision in the transmission of material,

135 See Badran, *Usūl*, p. 97.
138 *al-ʾIʿtibār*, p. 11. See also *al-Risālah*, paras. 771, 785; idem, *Ikhtilāf al-Ḥadīth*, p. 524.
are lacking in terms of satisfactory examples, we may refer to one case which might, in one way or another, link the problem discussed with the 'actual' case. The case in point deals with the problem of raising the hands at the inauguration of a prayer and before and after ruku’. Two versions of a tradition concerning the same subject have been recorded. The first, reported by Ibn ‘Umar, says that "the Prophet lifted his hand when he made takbīr (at the beginning of the prayer) and when he was about to bow for the ruku’ and when he stood erect after the ruku’". This version has been later transmitted in more than one manner. Among these, al-Zuhrī has reported this tradition from Sālim with the exact words which give the same legal implication.139 There is, however, another version from the Prophet, originally transmitted by another Companion, al-Barā’ b. ‘Āzib that "the Prophet, when he starts his prayer, raises his hand slightly up to his ear and did not repeat (i.e. the Prophet lifted his hands only at the commencement of his prayer)". This version has been transmitted through Yazīd b. Abī Ziyād whose transmission is disputed for it is mudtarib.140 Sufyān b. ‘Uyaynāh, one of the leading traditionists, has told us that Yazīd, did transmit this version with two different wordings. The first time, he did not mention the phrase, "and then the Prophet did not repeat (thumma lā ya’ūd)" but when he entered the city of Kūfah, he pronounced the tradition together with this phrase141 which subsequently gives two different impressions. Obviously, the first version is more accurate since its transmitters are

139 Al-‘tībar, p. 16.
140 Ibid.
141 Ibid.

For another method of removing this conflict, see al-‘ibḥāj, vol. 3, p. 219.
adbat and the words of the tradition, unlike in the second version, show no idtirab (i.e. inconsistency).\textsuperscript{142}

The problem of the transmitter whose conversion to Islam is earlier and whose companionship with the Prophet is longer is held to be one of the features of preference. Apparently, those transmitters who acquired such a high degree of knowledge, would be more familiar with the Prophet’s Sunnah. Precisely on this ground, some of the jurists suggest that the isnad by those whose conversion and companionship is earlier and longer gains superiority.\textsuperscript{143} It is exactly on this basis that one should take Malik’s assertion that “Umar knew the hadith of the Prophet better than Sa’d b. Abī Waqqās”.\textsuperscript{144} On the contrary, having acknowledged the advantage of long companionship with the Prophet, other jurists have declared that the reports of the transmitters whose conversion is later should be selected for it abrogates the earlier (naskh).\textsuperscript{145}

To illustrate this, I cite the problem inherent in the method of performing prayer at a time of fear in which al-Shafi’i prefers a hadith related by Khawwāt b. Jubajr to another related by Ibn ‘Umar.\textsuperscript{146} When asked for the reason for his preference, al-Shafi’i replies that Khawwāt

\textsuperscript{142} Al-Bukhari in his Sahih says that there is no isnad more accurate than the one which implies the raising of the hands in doing ruku’ in prayer. (Fath al-Bari, vol. 2, p. 362). See also al-Manhaj al-Islami, p. 119.
\textsuperscript{143} Al-Risalah, para. 722f; al-Āmidī, al-Ihkām, vol. 3, p. 260; Hitū, al-Wajīz, p. 479
\textsuperscript{144} Al-Shafi’i, Ikhtilaf Malik, p. 214. See also Origins, p. 25.
\textsuperscript{146} Al-Risalah, para. 721f.
was senior to Ibn 'Umar in age with regard to companionship with the Prophet and seniority.\textsuperscript{147}

The accuracy of this preference is subject to many objections. For it is possible for a senior or older Companion to have been ignorant of some of the traditions of the Prophet.\textsuperscript{148} Moreover, as is familiar to the scholars, it was Abu Hurayrah who stood at the top of the reporters of \textit{hadith} among the Companions though his conversion to Islam was very late i.e. in the seventh year of Hijrah on the occasion of the battle of Khaybar.\textsuperscript{149} Hence, we may not reasonably assume that seniority is a suitable condition to guarantee the accuracy of one of two conflicting \textit{isnāds}. Even al-Shafi'i himself did not strictly adhere to this theory where on other occasions e.g. performing prayer between the 'asr prayer and sunset and between the \textit{fajr} prayer and sunrise, he rejects the traditions related by 'Umar, the second Caliph and Ibn 'Umar, his son. Instead, he adheres to the traditions related by Companions like 'Imrān b. Husayn and Jubayr b. Mu'tam who were less reputed than 'Umar and Ibn 'Umar in terms of seniority.\textsuperscript{150}

The following issue concerns conflict and \textit{tarjīh} from the standpoint of forms of narration. Put in another way, words used in connection with \textit{hadith} transmission also play a considerable role in terms of \textit{tarjīh}. The first is the conflict between what is reported in a

\textsuperscript{147} Ibid., para. 722.

Apart from this reason, al-Shafi'i also produced other arguments for his preference (ibid). See also \textit{al-l'tībar}, pp. 119-120; \textit{al-Mankhūl}, pp. 432-433; \textit{al-Burhan}, vol. 2, pp. 1179-1182.

\textsuperscript{148} \textit{Raf' al-Mulām}, pp. 6-9.

\textsuperscript{149} \textit{Al-Tabaqāt al-Kubra}, vol. 4, p. 327.

\textsuperscript{150} \textit{Al-Umm}, vol. 1, p. 148f.
tradition according to the saying of the Prophet on one hand and what is understood by the transmitter on the other. In such a case, the preference goes to what is implied by the saying itself for this is more certain.\footnote{Al-Mustasfa, vol. 1, pp. 129-130 and vol. 2, p. 396 ; al-Hafnawi, Dirasat, p. 95.} It is on this ground, for example, that the majority of jurists have relied principally on the saying of the Prophet, narrated by Ibn 'Umar that the Prophet prohibited the selling of ummahat al-awlad, "They may neither be sold nor given as a gift where their lord can enjoy (make pleasure) with what is apparent from her. When her lord dies, she is free". On the contrary, Abu Sa'id al-Khudri has stated that "we used to sell ummahat al-awlad in the time of the Prophet".\footnote{Al-I'tibar, pp. 17-18.} Obviously, the latter is of no strength to stand against the former because Abu Sa'id al-Khudri's opinion is possibly based on his personal judgement without hearing the Prophetic saying which makes this action unlawful.\footnote{Ibid. See also al-Risalah, para. 1225.} Personal opinion, on many occasions, is doubtful.\footnote{Al-Hafnawi, Dirasat, p. 95.}

It is common also among the traditionists not only to be aware of but to appreciate what is technically known as "high and low isnad",\footnote{Ibn Taymiyyah, 'ilm al-Hadith, p. 97 ; Ibn Kathir, al-Ba'ith, p. 85 ; al-Ibhal, vol. 3, p. 219.} which has significantly contributed to the problem of conflict and tarjih. In short, high isnad may refer to the nearest chain to the Prophet or to that chain through whom a later traditionist has received one of the collections of traditions.\footnote{Robson, "Tradition : investigation and classification", in MW, vol. XLI, 1951, p. 107.} What is intended in our
discussion is of the first kind only because tarjīh is merely concerned with the number of transmitters between the last transmitter and the Prophet and not with the chain of transmission after the collections of the traditions.

Obviously, a high isnād brings the later transmitter into closer connection with the Prophet while a low isnād creates the contrary situation. In case of conflict between two traditions, the jurists unanimously professed that the one which carries fewer transmitters takes precedence over the other which contains more transmitters.\(^{157}\) The reason behind this is that the possibility of error is less in the high isnād for its transmitters are fewer than in the low isnād.\(^{158}\)

A case in point is related to the problem of the methods of how to perform adhān and iqāmah correctly. 'Āmir al-Ahwāl reported from Makhūl that Abu Muḥayriz told him that Abū Mahzūrah told him that the Prophet explained how to perform both adhān and iqāmah where the Prophet said that iqāmah is twice (i.e. every phrase of it must be pronounced twice).\(^{159}\) In another version, Khalīd al-Ḥadha' reported from Abī Qilābah from Anas b. Malik that he said, "Bilāl was told by the Prophet to make the adhān twice and the iqāmah once".\(^{160}\) It is clearly evident that the preference goes to the latter version for it has fewer transmitters because only two transmitters were involved between Khalīd


\(^{158}\) Ibid.


\(^{160}\) Ibid.
and the Prophet. In turn, unlike the latter, the former isnād comprises more transmitters since ‘Āmir and Khālid were contemporaneous.\textsuperscript{161}

Among others, the jurists also discuss the problem of acquiring a hadith by hearing on one hand and by writing on the other. Broadly speaking, the jurists contend that acquiring a hadith by writing is not equivalent but inferior to hearing.\textsuperscript{162} In other words, when a particular transmitter said that he heard from the Prophet such and such, his report is stronger than the report gained through the Prophet’s writing. The conflict can be illustrated here by pointing out two traditions concerning the consumption of carrion. Ibn ‘Abbās reported that the Prophet passed a dead sheep (carrion) and then said, “Why don’t you make use of her skin”.\textsuperscript{163} In contrast, Ibn Ḥakīm (or Ibn ‘Akīm) said that “the Prophet wrote to us saying “don’t make use of both her skin and nerve”. The majority of jurists have placed the tradition of Ibn ‘Abbās over the tradition of Ibn Ḥakīm simply because the possibility of error or falsification and miswriting (lahn wa tashīf) is greater or more facilitated by written documents.\textsuperscript{165}

\textsuperscript{161} Al-Ibāh, vol. 3, p. 219.
For a different argument of the same preferred tradition, see al-I’tibār, p. 71 and al-Bajī, Ḥikām, p. 657
\textsuperscript{162} Al-I’tibār, p. 13; al-Bajī, Ḥikām, pp. 653-654; Ghayat al-Ugul, p. 142; Tanqīḥ, p. 423; Ḥujjīyat al-Sunnah, p. 402.
The continuance of the hadith runs as follow: The Companion (question the Prophet) saying, “O Messenger of Allah, it is a carrion (that deserves to be forbidden)”. The Prophet replies, “Only eating is prohibited”. (ibid).
\textsuperscript{164} Ibid.
I do not think this is a clear-cut criterion on which a proper *tarjîh* could be based. Unfortunately, I myself have no adequate evidence with which to argue the accuracy of this preference. The only possibility open as it seems to me is to avoid making such a preference exclusively on this ground. Instead, a comprehensive study and consideration must be carried out to determine what is "weightier" in terms of preference in such cases of conflict. Regarding the above conflict, I am more inclined to the report of Ibn 'Abbas for a reason not as attempted before. It is rather due to the weakness that occurs in both the text and *isnād* of the report of Ibn Hakîm. I will mention only the weakness related to the *isnād*. The report of Ibn Hakîm is severely questioned, for the report is suspected for being *mudtarib* (uncertain) and also for being discontinued or at least suspended (*mursal*).\(^{166}\) Clearly, it re-emphasises that a comprehensive consideration of *tarjîh* is "safer" and more acceptable. In other words, to commit oneself solely to one single method of preference such as "hearing the *hadîth* is more accurate than acquiring the *hadîth* by writing" is not well placed for it might contain considerable room for error and uncertainty.

Similarly, when two traditions conflict, an attempt is made to ascertain how these two traditions were transmitted from the Prophet i.e. whether both are transmitted verbatim or only one of them is transmitted verbatim. As for the latter situation, the jurists have said that the literal transmission is to be preferred over the transmission of the sense alone,\(^{167}\) for two main reasons. First, the transmission by the sense alone, unlike the verbal, is disputed in terms of permissibility. The

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\(^{166}\) *Subul al-Salâm*, vol. 1, p. 31.

\(^{167}\) *Al-Āmidî, al-Ihlâm*, vol. 3, p. 264.
second reason lies in the fact that words may have several literal meanings or meanings hard to comprehend or may be liable to have another meaning which will make this transmission subject to many errors.\textsuperscript{168}

In the course of the transmission, many methods of transmitting have come to exist. In this regard, I will restrict myself only to eight methods of transmission as propounded by Ibn al-Ṣalāh. The capital aim is merely to show that in cases of conflict, these methods may sometimes be useful for they are of various degrees of ranking. Thus, the following illustration is made to meet the hierarchical order of these methods:\textsuperscript{169}

(1) "Transmission by words such as ḥaddathānā, akhbarānā, anba‘ānā, sami‘tu or qāl lānā fulān (so and so said to us) is of the highest form. This is done only when one receives the material by hearing from his shaykh.

(2) By reading over to a shaykh what one has heard. The one who recites may do so from memory or from a written copy. When the shaykh did not raise any objection, the transmission of a particular hadīth from him is officially approved for those who recite and those who heard the reading as well.

(3) Transmission may take place through the so-called ifāzah (licence). A licence given for a particular individual to transmit is of three categories; (a) it is given to a specific person to transmit

\textsuperscript{168} Al-Mustaṣja, vol. 1, p. 168; Ghayat al-Uṣūl, p. 143.

The transmission by the sense alone is highly disputed (see al-Khaḍīf, "Sunna", in IC, vol. 43, 1969, p. 64) from which ten contradictory views are recorded. (al-Ḥāfīz al-Ḥānawi, Dirāsāt, pp. 280-286)

\textsuperscript{169} Adopted with some modifications from Ibn al-Ṣalāh, Muqaddimah, pp. 62-87.

The translation is taken from Robson, "Tradition", pp. 27-29.
specified material, (b) it is given to a specific person to transmit something which is not specified and (c) it is given to unqualified persons such as "to everyone" or "to all who live in my time". The first of the three is unanimously accepted whereas the others are disputed.

(4) Munāwalah or handing over is the following rank of transmission. It is of two types. The first is associated with iḥāza while the second is not. The first takes place when the shaykh hands his pupil his own copy and says, "This is what I have heard, so transmit it from me". The pupil therefore must compare his personal copy with his shaykh's copy and then submit his personal copy to the shaykh for approval. When the shaykh says, "I have studied its contents and it contains what I transmit from my shaykhs, so transmit it from me", the pupil is given a licence to do so. In the second, however, the shaykh may hand his pupil the book but without giving him an explicit licence to transmit by simply saying, "This is from what I have heard". The licence is held to be implied.

(5) Another method of transmission is known as mukātabah (literally correspondence). This means that the pupil acquires the traditions from written copy of his shaykh.

(6) At this rank, the narrator may simply tell his pupil that a certain tradition is what he heard from so and so without saying anything about his transmitting it.

(7) Also, a transmission takes place when a traditionist may leave someone in his will a book containing what he transmitted.

(8) The last method is known as wijādah. It denotes that someone may find a book of traditions in the handwriting of a
shaykh. He may never have met him or he may have met him but not have heard from him what he has found in his handwriting and he has no explicit licence to transmit it".

There are further attempts in different other approaches to dissolve contradictions within the traditions by making one prevail over the other when they conflict. Some of these are totally baseless and others are convincing. To begin with, we may discuss the so-called "regional preference". What is meant by this is that some of the jurists, when excluding one of the conflicting traditions, simply say that this tradition originated from such and such a city, so it must be disregarded because it is overruled. The commonly overruled traditions are those of Iraqi or Syrian origin. Presented differently, we may say that traditions which are of "Medinan origin" are more likely to prevail over traditions of "non-Medinan origin".170 Those who support this preference argue on the grounds that Madīnah is the home of Sunnah and other localities, on the contrary, are not only new to the Sunnah but also well known for fabricated sunan.171 To this effect, it has been reported that al-Shafī'ī said that every hadīth which has no origin in the Hijāz is considered unreliable though it may be conveyed by reliable transmitters.172

As said before, this is not a concrete argument of preference. Therefore, Ibn Taymiyyah, for instance, has strongly disagreed with this, arguing that the main key for accepting or rejecting a particular tradition

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171 Ibid.
172 This viewpoint is recorded by al-Hamdānī in al-l'tibār, p. 15. See also al-Khaṭīb al-Baghdādī, al-Shafī'ī, p. 71, note no. 4.
should be not the provincial character but exclusively the conditions laid down by the traditionists. By these principles only, one can ascertain the sound tradition and accordingly, would take no other consideration whatsoever into account in order to select the proper traditions when they conflict. Moreover, al-Shafi'i is reported to have said to Ahmad b. Hanbal “you have more knowledge about hadith and its narrators than I. So if a hadith is authentic, then tell me. If it is authentic, I will accept it even if it is (reported by narrators) from Kufah, Bagrah or Damascus.

To illustrate another method of preference, two traditions which are held to be contradictory will be thoroughly examined. The first, transmitted by Busrah bt. Safwān records that the Prophet said, “Anyone who touches his sexual organ must retake a fresh ablution”. The second, transmitted by Qays b. Talq from his father shows that the Prophet was asked about touching sexual organs and he replied, “that organ is nothing other than part of you”. Ablution is nullified by touching the sexual organ according to the first and not to the second. The majority of jurists comply with the first tradition but argue - to remove this conflict - from different points of view. Al-Bajī, for instance, being himself Maliki, prefers Malik’s point of view i.e. the ablution is void, for the first tradition is reported by a larger number of transmitters than the second. He says that this tradition is handed down to the

174 Hilyat al-Awliya', vol. 9, p. 170.
176 Ibid. ; Musnad, vol. 4, p. 22.
Successors by a group of the Companions like Umm Ḥabībah, Abū Ayyūb, Abū Hurayrah, 'Arwah bt. Unays, ‘A‘ishah, Jabir, ‘Abd Allah b. ‘Umar, etc. The second tradition, on the contrary, has fewer transmitters with regard to the level of the Companions. This sort of preference is well known as the preference by virtue of "many".

Other scholars have come out with another basis of preference. They argue that the first tradition, unlike the second, received full recognition by a large number of mu‘addilūn. For this reason, it must take precedence. In this regard, al-Shāfī‘ī says, "We asked about (examined) Qays and the one who transmitted the tradition from his father (i.e. Talq) but we found no authorities who know him and his father". Slightly similar to al-Shāfī‘ī's argument, al-Hamdānī has argued in favour of what is indicated by the hadīth of Busrah by simply producing another version of transmission (i.e. Shu‘ayb - his father - his grandfather) saying, "all the transmitters involved in the chain are unanimously acknowledged as trustworthy". As for the hadīth of Busrah, he further elaborated the full isnād which contains all reliable transmitters as: "Mālik - ‘Abd Allah b. Abī Bakr b. Muhammad b. ‘Amr ibn Ḥazm - ‘Urwah b. Zubair - (Marwān) - Busrah - the Prophet". By

As stated elsewhere, the Hanafis did not take the first tradition into account for a special reason i.e. ‘umum al-balwa. (see page 78) Likewise, they do not adhere to this preference since the preference lies on "many". (al-I’tibār, p. 11)
For other Hanafis arguments, see al-Hidayah, vol. 1, pp. 71079; al-Zurqānī, Sharḥ, vol. 1, p. 130.
180 Al-I’tibār, pp. 12, 46.
Al-Shaf‘ī, in his Ikhtilaf Malik, described the hadīth of Qays as majhūl. (p. 192)
181 Ibid, pp. 43.
these, it seems that the first tradition gains superiority and not only that, this preference is further supported by the fact that all the reliable narrators in the first tradition are acknowledged and used (yuftajj) by both al-Bukhari and Muslim in their collections, which make this tradition ultimately more worthy.\textsuperscript{182}

As one can see, many methods of tarjih are relevant and applicable to the above case of conflict. In consequence, these relevant methods of tarjih are known by more than one title such as the preference by virtue of the large number of transmitters or by the well-known origin and 'adalah of individual transmitters or by other criteria which make the isnad more convincing as its transmitters are well-known. Al-Hamdhanī himself, as is evident from his al-I'tibār has put forward at least, in this conflict, three arguments on which the proper preference for the hadith of Busrah may be established. His first argument is exactly identical to al-Bājī's point of view and the second resembles al-Shāfi'ī's argument, while the third adopts some external factors to confirm and add weight to Busrah's transmission.\textsuperscript{183} Since tarjih by virtue of "many" is disputed between the jumhūr and the Hanafis and does not only involve the conflict of isnad but also other elements; it will be discussed further in chapter seven under the heading "Tarjih based on external factors".

Bearing in mind that more can be examined on this topic, we end the discussion of this chapter. As previously noted, only those methods which have immediate and obvious relevancy to tarjih on the

\textsuperscript{182} Ibid. pp. 46-47; Nayl al-Awār, vol. 1, p. 250.
\textsuperscript{183} Al-I'tibār, pp. 11, 12 and 43-47. See also Nayl al-Awār, vol. 1, p. 250ff; al-Zurqānī, Sharḥ, vol. 1, pp. 129-130.
basis of the isnad will be under review. The foregoing discussion has provided many impressions. First, as we may realize, most of the features pointed out throughout the study are more concerned with the authenticity of the hadith and not with its authority. It ought to be noted that the isnad is quoted only to prove the authenticity of the tradition and its correct attribution to the Prophet, not its authority. The direct impression from this is that the jurists, particularly the ancient jurists, were not men of knowledge on fiqh only but were also familiar with the isnad or 'ulum al-hadith in general. Further, it clearly shows that the isnad has received special emphasis from the jurists and was frequently used as the argument for excluding an opponent's contradictory traditions. Unfortunately, since the vast majority of legal traditions (or even the whole material of the traditions) are of aḥad, conflict is normal. This was mainly due, as explained in chapter two, to the various conditions laid down by the different schools of law for accepting a particular hadith or otherwise.

I have to say also that much "inaccuracy" and "inconsistency" in applying most of the methodology of preference, (not only in this area of conflict but also in other areas, as shown before or to be shown in the coming discussions), is about to confirm the proposal that the most effective way to apply tarjih lies in taking all the arguments surrounding any particular conflict into account in order to arrive at a more likely result. Otherwise, i.e. by restricting one's effort to a particular method only such as sahih prevails over hasan or mutawatir over aḥad and the like, one may probably arrive at unsatisfactory or unconvincing results, for the method is neither comprehensive nor consistent. We

have seen also that on many occasions, a particular case of conflict, instead of one, has been exposed to two or even more methods of preference. For one thing, it shows that preference is applicable from many standpoints; some of them are widely acknowledged and are in use by the vast majority of the jurists while others, to some extent, are not only disputable but also irregular and at times baseless. The foregoing discussion, for my part, is credited at least, with having successfully provided the theoretical foundations of *taqīh* in *isnād* conflict.
CHAPTER SIX
CHAPTER SIX

PART A

THE METHODOLOGY OF TARJĪH IN IJMA' CONFLICT

The reader is quite disappointed when he encounters the above headline which suggests a degree of divergence in ījma'. For the ījma' is, as is commonly known, a unanimous agreement while conflict is nothing other than differences of ruling applied to the same particular case. However, as we shall see, as conflict occurs in the text and in the chain of transmission, so in ījma' when two or more ījma' are recorded as indicating two contrary rulings having been applied to the same subject. For example, each of the validity and the prohibition of nikāh mut'ah (temporary marriage) has been claimed by the exponents respectively on the basis of ījma'.¹ In other words, both the validity and the prohibition of such marriages are approved by virtue of two contrary ījma'.

Theoretically, no conflict is allowed in or between ījma' since the major rule of ījma' is to unite the divergent opinions on a problem progressively.² Further, "ījma' guarantees the authenticity and correct interpretation of the Qur'ān, the faithful transmission of the Sunnah of the Prophet, the legitimate use of an analogy and its result; it covers, in short, every detail of the law, including the recognized differences of the various schools".³ Not only that, when ījma' is established, it makes a

² Bidayāh, vol. 1, p. 5; Origins, p. 42; Ahmad Hasan, The Early, pp. 54-55; Karnali, "Ray", p. 46.
³ Hurgronje, Selected Works, p. 157. See also Coulson, Conflicts, pp. 22-24; Gibb, Islam, p. 65.

In this context, Faruki has said, "Without ījma' all ījtihād would have been regarded as zann" (Jurisprudence, p. 153)
judgement irrevocable, not to be challenged or reinterpreted by later generations.⁴

In a practical sense, however, we often find that a particular ٍ咽 is confronted by another contemporary or subsequent ٍ咽. In one way or another, it clearly shows how confusing and complicated the discussion of ٍ咽 really is. To avoid such a complex theoretical discussion and at the same time, to undertake study of the problem of conflict and ٍتSuccessfully, one is obliged not to go into detail or to open up the entire argument behind the application of ٍ咽 in Islamic law. The following study must confine itself to the situations where conflict is reported to have occurred. Before that, some introductory remarks on the principle of ٍ咽 are believed to be of great importance for they can shed some light on causes of conflict in ٍ咽.

Broadly speaking, ٍ咽 is a unanimous doctrine and opinion of the recognized religious authorities at any given time.⁵ Literally, the word ٍ咽 is taken from the root ٍج which originally means to gather together.⁶ It also implies the meaning of determination⁷ as in the ٍذ "There will be no fasting for those who do not intend (ٍع) fasting from the night".⁸ An agreement is another literal meaning of ٍج.⁹ Although both differ from each other in that the agreement, unlike

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⁴ Hallaq, "On the authoritativeness of Sunni Consensus", in IJMES, vol. 18, 1986, p. 427. (cited after as "Consensus")
⁵ EI 2, vol. 3, p. 1023; Hurgronje, Selected Works, p. 278.
⁸ Irshad, p. 71.
determination, requires at least two sides to exist, one can see that both coincide with each other for an agreement requires also determination to exist.\(^\text{10}\) As for the technical meaning of \(\text{i}j\text{m}\tilde{\text{a}}\)', it records a critical disagreement among the jurists for each of the schools or even individual jurist has its or his own concept of \(\text{i}j\text{m}\tilde{\text{a}}\). The reasons behind this can be summarised as follows to the extent that only with this background can one fully appreciate this critical difference. Mention should be made that these factors would render \(\text{i}j\text{m}\tilde{\text{a}}\) not only doubtful in its technical meaning but also contradictory to each other. These reasons are as follows:

(1) Disagreement in giving the technical meaning of \(\text{i}j\text{m}\tilde{\text{a}}\). In short, three views are recorded. A group of the jurists led by al-Shafi'i accept only the consensus of the whole community or the universal \(\text{i}j\text{m}\tilde{\text{a}}\) for it is held impossible that the community as the whole would agree on something contrary to the Qur'anic injunctions and the Prophetic words.\(^\text{11}\) They do not consider the consensus of legal specialists for it is of a lower level because it is only parallel to a solitary tradition or \textit{khabar al-kh\text{"a}sah} which cannot lead to certain knowledge.\(^\text{12}\) Accordingly, the recognised \(\text{i}j\text{m}\tilde{\text{a}}\) is the one that carries the consensus of every single person in the Muslim community. Another group, on the contrary, accepts the consensus of legal experts even though it lacks the community agreement, for those legal experts are the mediators of the community to whom is

\(^{10}\) \textit{Irshad}, p. 71; \textit{al-Taqr\text{"ir}}, vol. 3, p. 80.

\(^{11}\) \textit{Al-Risalah}, paras. 1312, 1320. See also \textit{Ibt\text{"a}al al-Istih\text{"a}san}, p. 299; \textit{Origins}, p. 92; F. Rahman, "Concepts \textit{Sunna}, \textit{\text{"i}j\text{"a}h\text{"a}d} and \textit{\text{"i}j\text{m}\tilde{\text{a}}} in the early period", in \textit{IS}, vol. 1, 1962, p. 19 (cited after as "Concepts")

One scholar has noted that by 'taking this position, al-Shafi'i aimed at bringing about uniformity in rulings and doing away with local variations". See Bello Daura, "A brief account of the development of the four \textit{sunni} schools of law and some recent developments", in \textit{JICL}, vol. 2, 1968, p. 8.

\(^{12}\) \textit{Al-Risalah}, paras. 1328-1332. See also Ahmad Hasan, \textit{The Early}, p. 55f.
entrusted the task of taking the decisions in juridical matters. The last view tends to accord to local doctrines the status of consensus. In other words, these local legal opinions are provincial in origin but have eventually been claimed to have reached the status of consensus.

(2) Dispute over the actual subject matter of ijma'. Some of the jurists believed that ijma' covers only agreement on legal rulings. Agreement on other subject matter such as logic, custom, language, etc., falls outside the framework of legal consensus. On the contrary, others contended that ijma' covers legal as well as non legal affairs.

(3) Disagreement on the authoritativeness of ijma'. The question whether ijma' is qat'i or zanni is highly disputed among the classical jurists (of those who approved the doctrine of ijma') to the extent that ijma' took widely varying and conflicting forms and degrees of strength. Each school held a different point of view in the course of deciding what form of ijma' is superior and what is the less significant form of ijma' in terms of strength. It is clear that this, like the first two reasons, leads to the possibility of conflict.

(4) The question of those who are eligible to participate in forming ijma' is another reason that makes ijma' contradictory. The Zahiris and Ahmad b. Hanbal have confined the participants of jima' to the Companions of the Prophet only. The ijma' of all subsequent generations was devoid of

13 Al-Mustasfa, vol. 1, p. 181; Esposito, Islam, p. 84.

One contemporary scholar writes that this is the view of the majority of the jurists. (see Sha'ban, Dirasat, p. 33)


17 For details, see Sha'ban, Dirasat, p. 79.
authority accordingly.\textsuperscript{18} Other jurists, however, imposed no such restriction. To put it differently, any jurist, irrespective of his generation, is authorised to participate in \textit{\textit{ijmā}} on condition that he is competent to do so.\textsuperscript{19} Apart from these two views, the third contends that the question of those who are allowed to take part in \textit{\textit{ijmā}} should be decided according to the subject matter of \textit{\textit{ijmā}} i.e. the \textit{\textit{ijmā}} of the jurists is effective only on points of law and that of the theologians in matters of theology and so on.\textsuperscript{20}

(5) On the other hand, the jurists did not provide a clear cut form or manner of how \textit{\textit{ijmā}} would pose itself in Muslim communities. Does \textit{\textit{ijmā}} take the form of assembly or it does emerge by itself through a process of interpretation, and create for itself a position in the community?

These five problems constitute the major element that renders \textit{\textit{ijmā}} contradictory as well as confusing. For it is difficult, for example, to decide who are qualified jurists and who are not and to determine how many competent jurists there were at any given time and to be certain whether they had genuinely agreed or whether one of them had

\textsuperscript{18} Al-\textit{\textit{Amidī}}, \textit{al-Ihkām}, vol. 1, p. 170; Ibn \textit{\textit{Hazm}}, \textit{Maratib}, p. 11; \textit{al-\textit{Mustasfa}}, vol. 1, p. 189.
Ibn Taymiyyah is believed to held the same opinion. See \textit{Sirajul Haq}, "Ibn Taymiyya's conception of analogy and consensus", in \textit{IC}, vol. 17, 1943, pp. 80-81.

Abū Zahrah observes that the contention of Ahmad b. Hanbal and those who share his idea was mainly based on the problem of the possibility to know with certainty the occurrence of any agreement achieved after the period of the Companions. (\textit{Usul}, p. 202) See also \textit{Faruqī}, "The development of \textit{\textit{ijmā}}: the practices of the \textit{Khulafa' al-Rashidūn} and the views of the classical \textit{fuqaha} ", in \textit{AJISS}, vol. 9, 1992, p. 181 (cited after as "\textit{\textit{Ijmā}}")

\textsuperscript{19} \textit{al-\textit{Mustasfa}}, vol. 1, p. 189.

\textsuperscript{20} \textit{Al-Mahsul}, vol. 2, p. 93; \textit{Irshad}, p. 88; Sha'ban, \textit{Dirāsāt}, p. 107.
subsequently changed his mind, which would destroy the authority of $ijmā-'$ according to some jurists.\textsuperscript{21} Hence, it is not surprising when Ibn Hazm alleges that Ibn Hanbal contends that "whosoever claims $ijmā-', is a liar, for people may have differed without his knowing ".\textsuperscript{22}

In conclusion, though $ijmā-'$ in theory arises when all mujtahids of any age agree upon a certain matter, in reality, $ijmā-'$ takes place when the jurists look back to the generation that preceded them and find that a certain doctrine had gained full acceptance.\textsuperscript{23} Therefore, we can say that the only criterion to decide the existence of $ijmā-'$ is the absence of any dissenting voice regarding that opinion to which the term $inqirād\,\text{al-}\,'\text{asr}$ applies.\textsuperscript{24} This phenomenon is also quite parallel to what is known as $ijmā-'\,\text{sukūtī}$ (silent consensus). In my opinion, although this type of consensus is disputable (as we shall see), it is the common feature in the reported cases of $ijmā-'$. This has been persuasively argued by Ahmad Hasan. Among others, he writes, "Thus, $ijmā-'$ begins with the personal judgement of individuals (or $ijtiḥād$) and culminates in universal acceptance of a certain opinion by the community in the long-run. $ijmā-'$ emerges by itself and is not imposed upon the ummah ".\textsuperscript{25} Esposito agrees

\begin{itemize}
\item \textsuperscript{22} Ibn Hazm, \textit{al-Iḥkām}, vol. 4, p. 542. See also \textit{al-Muswaddah}, p. 315; \textit{Irshād}, p. 73.
\item For details, see Sha’bàn, \textit{Dirāsat}, pp. 40-42, note no. 17.
\item \textsuperscript{23} Farukī, \textit{Jurisprudence}, p. 71; Hallāq, \textit{Ijtiḥād}, p. 70.
\item \textsuperscript{24} $Inqirād\,\text{al-}\,'\text{asr}$ means that an agreement is not counted unless all of those who participated in $ijmā-'$ have died. This condition has been disputed amongst the jurists (see \textit{Fawātih}, vol. 2, pp. 224-225; \textit{al-Taqrīr}, vol. 3, p. 86; Zuhayr, \textit{Uṣūl}, vol. 3, p. 211)
\item \textsuperscript{25} Ahmad Hasan, \textit{The Early}, p. 157.
\end{itemize}
with this contention because, he argues, that should *ijma* survive the test of time and community experience, then its recognition will be established. Otherwise, no *ijma* took place which, in fact, is the common situation particularly after the period of the Companions. This was facilitated by the fact that the Companions were few and it was easy for them to agree amongst themselves. In the later stage, however, when *ijma* was claimed to have occurred by a scholar, it was met with objections from others.

To make our discussion straightforward, only genuine conflict will be discussed. But as long as the jurists themselves did not provide any example of this conflict, I am obliged to examine the problem far from practicality except in one or two cases which might be considered the best possible examples of *ijma* conflict. In consequence, whenever there appears to be a conflict between two or more *ijma*, an attempt is made to favour one over the other, regardless of whether they are really genuine instances or not.

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26 Esposito, *Islam*, p. 84. See also Calverly, *Islam*, p. 72.
For details and examples, see *Ibn Taymiyyah, Naqd*, passim; *al-Fikr al-Sami*, vol. 1, p. 65.
29 Generally speaking, to list down genuine cases of *ijma* is extremely difficult. *Ibn Hazm*, for example, declares in the introduction of his *Maratib al-Ijma* (p. 16) that he shall commit himself only to genuine cases of *ijma* such as an agreement that the *Ramadan* is between *Shabban* and *Shawwal*. However, in practical case, he failed to do so. Many cases that were recorded by him as genuine *ijma* were liable to dispute. (For example, see ibid, note no. 1 and *Ibn Taymiyyah, Naqd*, p. 3)
To begin with, we may state that in case of conflict, the universal ijma' or the consensus of the community takes precedence over the local ijma' which runs counter to universality.\(^{30}\) Having said that, we realize that this sounds unreasonable, for the universal ijma' cannot take place unless all the regions are in agreement. To give an example on this point is rather difficult. The case which comes to mind is that of khiyar al-majlis. Malik is believed to reject the legal doctrine of khiyar al-majlis which gives the parties to a contract duly completed by offer and acceptance, the right to repudiate it during the formal negotiation of the agreement. Malik simply said, "There is no specified limit nor any matter which is applied in this case according to us,"\(^{31}\) Other schools of law (except the Hanafis) accept it.\(^{32}\) Accordingly, though it is not appropriate, one can conclude that the universal ijma' is challenged by the local ijma' referred to by Malik since Malik is understood to have justified his legal opinion on the basis of the consensus of the community of Madīnah.\(^{33}\)

In accordance with the principle stated before, the universal ijma' is superior to the local ijma'. Supporting this, al-Jassās replies that the Medinites and non-Medinites are all alike in this respect and there is no

\(^{30}\) Malik has been alleged to grant the ijma' of the Medinese the same authority as the ijma' of the whole community. See EI, 2, vol. 3, p. 1024; Farūkī, "Disagreement", p. 134. Cf. al-Dawalibī, Uṣūl, p. 336. (He regards ijma' of the Medinese as the continuity of the method on which ijma' was achieved in the time of the Companions. Al-Dawalibī called this as (jma' waqi'i)

\(^{31}\) Al-Muwatta' (Y), vol. 2, p. 671.

The translation is taken from 'Ālīshah, al-Muwatta' Imam Malik, p. 303.


\(^{33}\) Al-Muwatta', (S), p. 277, note no. 750; al-Turkī, Ikhtilaf, p. 106.
reason why their \( \text{\textquotedblleft} \text{jma\text{"}} \text{\textquotedblright} \) should be considered as a binding rule.\textsuperscript{34} For an apparent tar\( \text{\textacutedd} \text{\textbackslash h}, \text{"} it is acceptable to adhere to this preference simply because what is agreed by the generality is worthier than what is confirmed by a \text{"} minority\text{"}. The correct view, however, is that owing to differences of opinion that are recorded on this matter, no \( \text{\textquotedblleft} \text{jma\text{"}} \text{\textquotedblright} \) could be claimed to have materialised.

More explanations are needed, since the \( \text{\textquotedblleft} \text{jma\text{"}} \text{\textquotedblright} \) of Mad\( \text{\text{"}nah \text{"}} \) constitutes the major conflict in this area of study. The problem is well known as \textquote{amal ah\( \text{\text{"}l \text{"} al-Madinah \text{"}} \) or the practice of the Medinese. It is disputed not only in terms of authoritativeness but also in the precise meaning of the first two words in the phrase \textquote{amal ah\( \text{\text{"}l \text{"} al-Madinah \text{"}} \). The first comes from outsiders i.e. non Malikis. Al-Shafi\( \text{\text{"}i, \text{"} for example, rejected the contention of consensus of the Medinese as expressed in \textquote{aml \text{"} arguing from two perspectives. On the one hand, he argues that an authoritative \( \text{\textquotedblleft} \text{jma\text{"}} \text{\textquotedblright} \) should be free from any objection and disagreement whether from inside or outside the city of Mad\( \text{\text{"}nah \text{"}} \). The other argument is that, on many occasions, the agreement of the Medinese is not genuine because this agreement (or practice) has an opposing view amongst the Medinese themselves.\textsuperscript{35}

The second question i.e. technical meaning of the phrase, is disputed among the Malikis themselves. \textquote{Amal \text{"} may imply the transmission or the consensus of the people of Mad\( \text{\text{"}nah \text{"}} \) or both i.e. their

\textsuperscript{34} The part of al-Jass\( \text{\text{"}as\text{"}} \) Us\( \text{\text{"}l \text{"} al-Fiqh \text{"} which deals with consensus is not available to me. This quotation is taken from Ahmad Hasan, \textquote{jma\text{"}} , p. 40ff. (Ahmad Hasan used MS228-229-Us\( \text{\text{"}l, \text{"} Dar al-Kutub al-Mig\( \text{\text{"}riyah, \text{"} Cairo)

\textsuperscript{35} Al-Ris\( \text{\text{"}alah, \text{"} para. 1559 ; idem, Ikhtilaf Malik, pp. 202-203. See also F. Rahman, Islam, p. 61.
transmission and consensus are superior over other transmissions of \textit{hadīth} and other provincial consensus.\footnote{Al-Āmdī, \textit{al-Iḥkām}, vol. 1, pp. 180-181; \textit{al-Luma'\textquoteright}; p. 53; al-Khin, \textit{Ikhtilāf}, p. 459.} As for the word \textit{ahl}, it has no single reference but refers to many categories of the people of Madīnah. In short, this word refers either to the Companions in Madīnah or to the seven distinguished jurists of Madīnah. It also refers to the people of Madīnah as a whole community.\footnote{Al-Khin, \textit{Ikhtilāf}, p. 459.}

As far as the authoritativeness of the \textit{ijmā\textquoteright} of the Medinese is concerned, non Malikis jurists are divided as to accepting this \textit{\'amal\textquoteright} as having legal significance. In general, they accepted this \textit{\'amal\textquoteright} provided that it was the practice before the assassination of 'Uthmān b. 'Affān, the third Caliph. Otherwise, it is highly disputed in terms of having a special legal import.\footnote{Ibn Taymiyyah, \textit{Fatāwā\textquoteright}; vol. 20, pp. 303-310 particularly p. 308.}

Mention should be made that there are a lot of interesting discussions on \textit{\'amal ahl al-Madīnah\textquoteright} related to the problem of conflict and \textit{tarjīh\textquoteright}. I tend however, to examine these cases in the following chapter which is concerned exclusively with \textit{tarjīh\textquoteright} based on external factors since these regional practices, sometimes known as \textit{ijmā\textquoteright}, are challenged by another element of evidence such as the tradition, \textit{qiyyās\textquoteright} and so on and not by another \textit{ijmā\textquoteright}. Nevertheless, some brief clarification of \textit{ijmā\textquoteright} ahl al-Madīnah might be necessary at this stage. As said by the jurists, the consensus coming from this part of the world is of two types. The first comes from transmission and the second is deduced through interpretative effort. As far as the transmission of the people of the Madīnah is
concerned, their transmission is relatively superior to another locality's transmission but not in the whole affairs of Islam. The jurists have restricted this superiority to two aspects, namely the reports related to the determination of specific measure and places and those reports that reflect the continuity of a particular act which is unchangeable. Accordingly, the jurists have shown special consideration to legal rulings which are concerned with matters that came under these two principles such as the size or the quantity of one sa', the position of the minbar of the Prophet, the validity of the contract of muzāra'ah, special adhān for sunrise prayer, etc. However, when the basis of such consensus is to rely merely on ijtihād and interpretative effort, jurists are not willing to accept this agreement, let alone to prefer it over "other" agreement when they conflict.

Another possibility of conflict, which is still theoretical rather than practical, is the conflict between the ijmā' of the Companions and that of the subsequent generations. The ijmā' of the Companions is to be preferred to that of the successors because the former is superior to the latter. In this case, we have no option but to implement this preference for at least, one fundamental reason. It is the fact that the only form of ijmā' which received a full acceptance by all the Sunni jurists is that of the Companions. It is not surprising, accordingly, that examples of the consensus which are given in works of usūl al-fiqh are typically drawn

41 Muntaha, p. 225.
from the period immediately following the death of the Prophet.⁴² *Ijma* was possible at that time since they were still a relatively small community, located principally in Madīnah. *Ijma*, in subsequent periods, however, was extremely difficult to achieve for the great body of the jurists had spread throughout the conquered Islamic territories.⁴³

As an example, we quote, among others, the *Ijma* of the Muslims in 'Umar's time, the second Caliph, regarding the *sawād* land. 'Umar is reported to have consulted the Companions on the problem. Having disagreed on this matter in a long and open discussion, they seemed eventually agreed on the opinion not to distributing this land to the fighters though the land was conquered by force.⁴⁴ It has been reported that 'Umar used to consult his companions on fresh cases and announced the decisions in public meetings.⁴⁵ This way of achieving *Ijma*, is nearly if not totally, impossible after the spread of Islam and its scholars to the new territories. However, in the event that another contrary *Ijma* is made by the later generations, the precedence is given to the former.

Regarding the subsequent *Ijma*, the jurists have this to say. The idea of the "first and subsequent *Ijma*" to some extent, makes *Ijma* contradictory. Accordingly, the problem of rejection of a particular *Ijma* has been extensively debated by the jurists. This is because the *Ijma*, according to some authorities amounts to certainty while for others, it carries only probability. To the former, rejection of *Ijma* amounts to

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⁴³ Hurgronje, Selected Works, p. 277.
⁴⁴ Faruqī, "Ijma", p. 175.

For details, see Abu Yusuf, Kitāb al-Kharaj, pp. 26-27.
⁴⁵ Ibid.; Khan, Islamic Jurisprudence, p. 82.
hersesy but not to the latter. 46 Leaving aside this particular discussion, we proceed to ascertain whether an *ijma'* can or cannot be repealed or changed by a subsequent *ijma'*. Bearing in mind that this discussion is also theoretical, we may say that the jurists are not of the same opinion regarding this issue. Those who held that *ijma'* is decisive (*qātī*) for it is tantamount to the *Qur'ān* and the *Sunnah* 47, opined that such *ijma'* cannot be repealed or changed by a subsequent *ijma'*. 48 An *ijma'* is decisive when it is transmitted by *tawātur*, based on a decisive text and verbally expressed. 49 Otherwise, the possibility of repealing remains.

As regards abrogation, it however, does not affect *ijma'*. Because the subsequent *ijma'* is either based on an evidence contrary to the evidence of the former or it has no evidence. The latter possibility would open the way to the previous agreement to prevail for the subsequent *ijma'* carries no authority. The former condition will however, lead the subsequent agreement to run contrary to the previous consensus where both have their respective bases. The basis of the subsequent *ijma'*, however, would be either the *Qur'ān* or the *Sunnah* or the *qiyyās* but this is impossible because *ijma'* cannot contradict the text on the one hand and *qiyyās* is always inferior to *ijma'*. on the other. In other words, no *ijma'* is valid if it contradicts the *Qur'ān* and the *Sunnah*. Similarly, *qiyyās* is unable to stand against *ijma'*. Hence the abrogation of *ijma'* by any other authority is unthinkable. 50 It is also said that the *ijma'* reached in a

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46 See *Irshad*, pp. 78-79.
48 Ibid.
49 Rawdah, p. 78.
generation which totally passed away cannot be changed by the agreement of the following jurists. In other words, if a group of scholars of a particular time have agreed on a certain matter and they all have passed away, where any opposition to their agreement is not reported to have arisen, their agreement is binding on the subsequent scholars. The opposite attitude is called in usūl study as kharq al-ijmāʿ which is unacceptable and illegal.

On the contrary, repeal and change can take place according to those who contended that ijmāʿ is merely speculative, such as ijmāʿ by silence or ijmāʿ preceded by disagreement or when the dissenters are in minority. Another point of view held that ijmāʿ, irrespective of whether it is decisive or probable, can be changed by a subsequent ijmāʿ provided that the first ijmāʿ is founded in consideration of public interest or maslahah mursalah. This ijmāʿ is allowed to be repealed with one which serves human welfare more. In short, some types of ijmāʿ are liable to "abrogation" and some are not.

At this stage, we may confine our consideration to three major conclusions which have been inspired by the fore-going discussion. They are as follows:
(1) Verbal ijmāʿ (lafzī) prevails over the ijmāʿ by silence (sukātī).

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51 Taqwīḥ, p. 326.
52 Ibid.
53 'Alī `Abd al-Rāzīq, al-Ijmāʿ fī al-Shariʿah al-Islāmiyyah, Cairo, 1947, pp. 96-97, as cited from Ahmad Hasan, Ijmāʿ, p. 150.
54 Al-Zuhaylī, Usūl, vol. 2, pp. 974-975.
See the weakness of this view in note 71.
Ijma' sukuti occurs when some of the jurists accept a particular legal opinion by verbal expression or acting upon it while the others keep silent, though the problem had gained wide publicity in the community and enough time for consideration has elapsed. When such an ijma' conflicts with a verbal ijma', the former is inferior to the latter. Although I cannot find a satisfactory explanation for this, I believe that this is simply because ijma' sukuti is highly disputed as presumptive. Al-Shawkani, for example, in surveying the opinions regarding the authoritativeness of the silent consensus, counts as many as twelve different opinions. Moreover, as stated by both al-Shafi'i and al-Ghazali, no statement or action can be attributed to a silent person and silent agreement is neither an ijma' nor an authority since silence is a doubtful indicator, for the silence of some of the jurists cannot necessarily be taken to indicate approval. This is merely a theoretical preference on the assumption that there was a conflict between verbal and silent ijma'. As stated earlier, no genuine example is available in this conflict because, I believe, most, if not all, the alleged consensus particularly after the period of the Companions, recorded on the basis of natural acceptance by the community and not on the basis of any assembly of Muslim jurists that took place to express verbal agreement on legal issues.

(2) *ijma* not preceded by disagreement takes precedence over the *ijma* which is preceded by disagreement. This conflict takes place when the qualified jurists agreed on two different opinions about a single disputed question. According to many authorities, the next subsequent *ijma* is not allowed to agree on a third opinion contrary to both contradictory views. A case in point is the problem of intention in different kinds of ritual purity. Some opine that intention is necessary in all kinds of ritual purity while others require such intention only in some forms of ritual purity. Accordingly, an agreement on a third opinion which would be that intention is not necessary in all kinds of ritual purity, would be not valid. The reason is that this agreement would nullify the agreement of the previous generation which presupposes that the community had previously agreed on an error which is not acceptable according to the classical theory of *ijma*.

From this, we know that *ijma* preceded by disagreement is of insufficient strength to stand against the one which is not such, for the former *ijma* is itself highly disputed amongst the jurists.

(3) *ijma* constructed on the basis of the purely *maslahah* consideration is liable to be challenged by another *ijma* which might carry a more significant degree of *maslahah*. Instances such as the second Caliph 'Umar's policy in not distributing the conquered land to the fighters and

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60 See al-Musuxzdah, p. 326; *Irshād*, p. 86.
64 *Badrān*, *Tarjīh*, p. 41.
the third Caliph 'Uthman's action in introducing the third call for Friday prayer and the collection of the Qur'an in a standard version are among the subsequent agreements of the Muslims to replace a previous consensus made exclusively on the basis of maslahah. This is a continuous practice necessary in the changing society such as to decide who is the most eligible to be the head of the Muslim state or to declare war or a cease-fire in certain circumstances which all are judged mainly to serve the best interests for the people for time being. It is true that in worldly affairs, what may appear "profitable" in one generation may be, say, "harmful" in a succeeding generation. Accordingly, the previous ījmā' may be left aside in favour of the new ījmā' for it serves the public interests most. Perhaps another example will clarify this issue. It has been reported that the first generation of the Muslims had agreed that a relative can give witness for his relative before the court. However, since the majority of the people are no longer just as they were in the early Islam, the previous agreement had to be repealed by subsequent agreement contrary to what had been widely accepted before. Relative, therefore, is not allowed to give witness for relative because he may falsely witness in the interest of his relative. This seems reasonable because the latter agreement could serve justice among the people more efficiently.

(4) In respect of transmission, various categories of ījmā' have been classified. The most authorised of them is the ījmā' of the Companions transmitted by themselves by verbal expression. It corresponds in status to a Qur'anic verse and a mutawatir tradition. The second category is the

66 Sha'ban, Dirasat, p. 105.
67 Ibid.
ijma' of the Companions transmitted in part by verbal expression and in part by silence. The third category is the ijma' of the Successors on questions not disputed among the Companions. This is like a mashhur tradition. The last category is the ijma' of subsequent generations on questions already disputed among the previous generations. This is like a solitary tradition. Should there be any conflict between various types in terms of transmission, these different grades of ijma' could be deployed to arrive at the preferable.

(5) In the course of the discussion of conflict of ijma', it appears that instead of tariqah, it is abrogation that enjoys more significant discussion. Accordingly, though naskh is basically confined to the text, the problem of abrogation in ijma' has been extensively debated. My point of view, however, is that what actually takes place in this problem is merely an alteration of the former agreement in the form of the subsequent ijma' rather than abrogation. For the people, after the death of the Prophet are of no capacity to determine the expiry of the term of a rule established by ijma'. Having said this, I shall discuss the relevant viewpoints regarding the above. In this regard, one can easily find in usul works the phrase that "ijma' neither abrogates nor can it be abrogated itself". Abrogation, in other words is generally not applicable to ijma'. Broadly speaking, most of the jurists adhere to this formulation that no abrogation can take place within two conflicting ijma' particularly when the ijma' is founded on the basis of the Qur'an, the Sunnah or qiyas. However, when

it is formulated on the basis of public interest, abrogation can take place.\footnote{Sha'ban, \textit{Dirasat}, p. 122. See also note 44.}

Others said that though the subsequent \textit{ijm\u0131\u0131\u0131} cannot normally abrogate the previous \textit{ijm\u0131\u0131\u0131}, abrogation is possible when the subsequent \textit{ijm\u0131\u0131\u0131} is of a similar class. In other words, \textit{ijm\u0131\u0131\u0131} of the Companions can be repealed only by another \textit{ijm\u0131\u0131\u0131} of the Companions; and likewise, the \textit{ijm\u0131\u0131\u0131} of the second generation may be abrogated by other \textit{ijm\u0131\u0131\u0131} of the same generation or of the following generations because the \textit{ijm\u0131\u0131\u0131} of the later generations are all considered of equal weight.\footnote{\textit{Kashf}, vol. 3, p. 262.}

Having mentioned almost all the relevant discussions of conflict and \textit{tarijih} in relation to \textit{ijm\u0131\u0131\u0131}, we still have no genuine cases to refer to. Apart from its being theoretical, this would suggest many interesting remarks. Among others, it clearly shows that when \textit{ijm\u0131\u0131\u0131} takes place genuinely, no conflict is expected to arise, for \textit{ijm\u0131\u0131\u0131} is a unanimous agreement. Secondly, many claims of \textit{ijm\u0131\u0131\u0131} are made solely on the basis of knowledge that no divergence of opinion has been recorded previously on a particular matter.\footnote{Ibn Hazm, \textit{Maratib}, pp. 9-10; Ibn Taymiyyah, \textit{Naqd}, p. 2.}

This type of \textit{ijm\u0131\u0131\u0131} has been clearly rejected by al-Shafi'i. His hypothesis is that it is not sufficient merely to claim that \textit{ijm\u0131\u0131\u0131} has been achieved on matters other than the essential elements of Islam such as the obligation of prayer, \textit{zak\u0131t} and the like.\footnote{\textit{Al-Risalah}, para. 1559.}

There should be solid evidence or knowledge of the occurrence of any single legal consensus. Presumption is not a sufficient and accepted basis for
The same idea was made clear by Ahmad b. Hanbal. After saying that "whosoever claims ḵīmāʾ is a liar, for people may have differed without his knowing", he further says that it is advised for those who do not know with certainty of agreement or otherwise that they should say "we do not know whether people have disagreed". Accordingly, when an opinion is later known to contrast with the 'previously agreed opinion', this was understood as conflict while in fact, no consensus was clearly proclaimed on that issue in the first place. Thirdly, some principles of preference viewed by the jurists are merely their immediate response to conflict caused by unreal conflicts for the ḵīmāʾ cannot contradict another ḵīmāʾ if both are really genuine except if one or both were achieved on the basis of maslaḥah consideration.

I am more inclined to believe as concluded by Abū Zahrah that ḵīmāʾ is quite impossible after the Companions. It seems to me that ḵīmāʾ in its strict technical meaning and legal requirement was only possible in the period of the Companions owing to certain factors that have been previously described. This has been acknowledged by every exponent of ḵīmāʾ. The controversy over ḵīmāʾ that has dominated the discussion in usūl al-fiqh actually originated in the period after the Companions when some of them were outside Madīnah. Khalīf has persuasively argued that, even in the period of the Companions, ḵīmāʾ as the agreement of the whole community of Muslims did not take place. What really happened is shūrā i.e. collective consultation followed by the majority agreement contributed to by only some of the Muslims, particularly those who were

75 ibid.
well-known to the Caliph as the cream of the Companions, not to mention other contemporary Muslims that were resident in localities other than Madīnah.\(^78\)

On the whole, these preferences in one way or another, are the most significant criteria to determine the strongest form of \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\). To some extent, they are useful for the jurist when he himself encounters a similar case of conflict as theoretically explained above. In other words, though they are highly doubted, one can adopt these methods to remove an apparent conflict which appears to arise between two \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\) (though the advised and preferred solution is to examine first the validity as well as the authenticity of both contradictory \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\) since it is impossible that a genuine \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\) would oppose another genuine \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\)). In this context, the majority agreement of specialists may however, be useful in terms of conflict and \(t\)ar\(f\)\(h\) in \(u\)\(s\)\(g\)\(ū\) study but not be viewed as \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\).\(^79\) With reference to the decision of 'Umar of not distributing the lands conquered by force, for example, Ibn Qudāmah notes that, though this decision was opposed by Bilāl, there was consensus among the Companions on this issue and that there is no way to achieve a stronger \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\) than this one.\(^80\)

The "majority agreement" will be further illustrated in the following chapter which aims to evaluate any conflict in Islamic law on the basis of

\(^{78}\)Khallaf, \(U\)\(g\)\(ū\), p. 50. See also al-Shalabī, al-\(M\)\(a\)dkhāl, p. 247; Ahmad Hasan, "The political role of \(i\)j\(m\)ā\(\textsuperscript{-}\)\(a\)", in IS, vol. 8, 1969, passim.

\(^{79}\)See al-\(I\)\(b\)hā\(j\), vol. 2, p. 369; al-Nawawi, al-\(M\)\(a\)j\(m\)ū\(\textsuperscript{-}\)\(a\), vol. 1, p. 58; Nadwi, "The Shari'\(a\) and exigencies of the time", in ICLQ, vol. 1, 1986, p. 15.

This is the view of the majority of the jurists. Both al-Rāzī and al-Ṭabarī however, thought that majority agreement constitutes a valid consensus (al-Taqrīr, vol. 3, pp. 94-95). Mention should also be made that those who reject this idea, do however, recognise it as a \(h\)u\(j\)\(h\)\(a\)h (Faruqi, "\(I\)j\(m\)ā\(\textsuperscript{-}\)\(a\)", pp. 183-184)

\(^{80}\)Al-\(M\)\(u\)ghnī, vol. 2, pp. 720-721 (as cited from Faruqi, "\(I\)j\(m\)ā\(\textsuperscript{-}\)\(a\)", p. 175)
external factors in which *tarjiḥ* by virtue of "many" may suit this line of preference.
CHAPTER SIX

PART B

THE METHODOLOGY OF TARJIH IN QIYĀS CONFLICT.¹

No doubt *qiyyās* is the primary method of legal reasoning in *usūl al-fiqh* to the extent that according to al-Shafi‘ī, it is the only authorized form of *ijtiḥād*.[²] Moreover, the jurists have affirmed that the great majority of the rulings are reached through the medium of *qiyyās*.³ In other words, we can note that except for a relatively limited number of cases where the Qur‘ān and the Sunnah offer already-formulated legal judgements, the great majority of *furū‘* cases are derived through *qiyyās*. This is justified simply because written texts are limited but the incidents of daily life are unlimited and therefore, it is impossible for something infinite to be enclosed by something finite.⁴

The discussion of the methodology of *tarjīḥ* in cases where two *qiyyās* are said to be contradictory is rather complex. Therefore this

¹ The methodology of *tarjīḥ* in qiyās conflict received special attention in *usūl* works. Al-Amīdī, for example, has listed more than 55 methods of *tarjīḥ*. (al-Ijkām, vol. 3, pp. 281-292) Mention should also be made that this conflict seems to dominate the Hanāfī *usūl* writings to the extent no devotion is equally given to treat conflict in other subjects such as the conflict of text, *isnād*, etc. See for example *Tāṣīr*, vol. 4, pp. 76-97.

² Al-Risālah, paras. 1324, 1326; idem, *Iḥāṣ al-Istiqāṣ*, p. 299f; Khaddūrī, *Islamic Jurisprudence*, p. 31; al-Fikr al-Samī‘, vol. 1, p. 67; El 2, vol. 5, p. 241. It seems to me that the most obvious justification that underlines al-Shafi‘ī’s thesis is that *qiyyās* is the most organised form of *ijtiḥād* that would eliminate what al-Shafi‘ī regards as the arbitrary nature of legal reasoning. (See Calverly, *Islam*, p. 71; Esposito, *Islam*, p. 79)


warrants a brief introduction to its nature, form, as well as its historical development. Broadly speaking, qiyās is a legal method for extending the law beyond what is stated in the authoritative legal sources or an extension of a precedent and not the establishment of a fresh ruling by itself. To do this, it is necessary to draw a parallel or find a similarity between what is mentioned in legal texts and a new problem. The common link between them i.e. similarity, is known as 'illah. Once it is known that both cases, the original (asl or maqīs 'alayhi) and the assimilated (far' or maqīs) share the same 'illah, the judgement (hukm) of the original case is extended to the assimilated. As a result, the new problem carries the same ruling as does the original.

A case in point is the purity of the saliva (su'r) of the cat which is explained by the Prophet through a hadīth; "(the left-over of a cat is not unclean) for they are usually around you in the homes (innahā min al-tawwafīn 'alaykum wa al-tawwafat). Their domesticity or in other words their frequent visits to the house is the 'illah why their saliva is pure and water they have lapped and left can be consumed by people. The jurists simply apply this rule i.e. purity, to the left-over of mice and other reptiles that frequently visit the house or reside there unless indicated otherwise. The prohibition of rum or other intoxicating objects is also a clear example of the nature of qiyās. Since wine (khamr) is prohibited for its intoxication, the same ruling applies to all objects that have similar 'illah such as rum, drugs, etc., for they intoxicate.

5 Irshād, p. 198; Amins, Ijtihād pp. 122-123; Khan, Islamic Jurisprudence, p. 30.
7 Ibid.
8 Sha'ban, Dirāsat, p. 156; Kerr, Reform, p. 60.
From the foregoing explanation, we understand why *qiyās* is legally established as "judicial reasoning by analogy". Literally, *qiyās* indicates measuring i.e. ascertaining the length, weight or quality of something. It also means comparison, as in the expression, "Zayd *yuqās lāa Khālid fī 'aqīthi wa nasabthi". Zayd is compared to Khalid in intelligence and descent. *Qiyās* thus suggests an equality or close similarity between two things one of which is taken as the criterion for evaluating the other.

Though *qiyās* as a matter of common sense, as argued by many jurists, already existed in the lifetime of the Prophet, the first to employ it systematically was Abu Hanīfah (d. 150 A.H.). It is argued also, however, that the semi-technical use of the term *qiyās* was found early in the letter of Umar, the second Caliph, to Abū Mūsā al-Ash'arī where in Umar is reported to have advised him to acquaint himself with the parallels and precedents of legal cases.

Of the four *ugul* of *fiqh*, *qiyās* was the last to gain general acceptance. In the early days, *qiyās* was not consistently applied, owing

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9 EI 2, vol. 5, p. 239.
10 Lane, *Lexicon*, vol. 7, p. 2577; al-Rāzī, *al-Sīyāh*, p. 558; al-Anbārī, *al-
Luna*, p. 42.
12 See *Mīzan*, pp. 562-563; Sa'īd Allah, *Introduction to al-Jassas' al-
14 Ahmad Hasan, *The Early*, p. 53; Sa'īd Allah, *Introduction to al-Jassas' al-
Fuşul*, p. 13.
to uncertainty in understanding the forms as well as the elements of qiyās.\(^{16}\) Not only that, but the later jurists, as we shall see soon, are divided among themselves in giving a strict definition of 'illah. It is noteworthy that the results after the application of qiyās would vary owing to the fact that 'illah is open to difference of opinion.\(^{17}\) This fact, of course, would cause the application of qiyās to contain some errors, for it is possibly applied to dissimilar cases or is based on an improper 'illah or qiyās has been pushed too far. These points make the qiyās non uniform and contradictory.

We may now discuss how the conflict exists in qiyās and what methodologies are to be followed in terms of tarjīh. Nevertheless, I realise that a further preliminary illustration remains necessary, since the discussion of the nature of qiyās itself is quite complicated, since it is purely analogical reasoning. To understand qiyās properly and in the meantime to avoid a lengthy discussion, we should commit ourselves to those subject matters which serve our study significantly i.e. how to make an adequate preference in qiyās conflict. Unrelated subjects are left aside such as the problem of the dispute over the validity of qiyās, the specific requirements of each element of arkan al-qiyās, etc.

\(^{16}\) Hallaq, "Consideration", p. 681; Aghnides, Theories, p. 67. According to one scholar, the application of qiyās not only caused diversity of opinion between different schools of law but even within the schools, as is shown by divergences within the Hanafī school. (Rayner, Contract, p. 21)

\(^{17}\) Hence, it is not surprising that 'illah has been variously defined. For details, see Ahmad Hasan, "The legal cause in Islamic jurisprudence : an analysis of 'illat al-hukm", in IS, vol. 19, 1980, p. 249 (cited after as "Legal Cause")
To begin with, I shall quote what has been said by al-Baṣrī¹⁸ in explaining the meaning of juridical qiyās (al-qiyās al-sharʿīyy). He says, "Qiyās is establishing the ruling (ḥukm) of the original case (aṣl) in the assimilated case (farʾ) because both cases possess the (same) cause (ʿillah) of the ruling. This definition does not include all types of qiyās but only the qiyās of analogy (al-ṭard). Jurists also call reductio ad absurdum (al-ʿaks) qiyās. In the latter, the judgement of the original case is not established in the assimilated case because they possess the same cause for the judgement but rather because it necessitates the establishment (of the converse) of the judgement of one thing in another.¹⁹ Therefore, if we wish to define qiyās so that both analogy and reductio ad absurdum are included, we must say: qiyās is establishing the quality of a thing by applying that thing to another owing to a cause".²⁰

By this definition, we come to know that for qiyās to be valid and effective, four elements are necessary i.e. the original case, the assimilated case, the ʿillah and the judgement.²¹ Accordingly, the following discussion must not go beyond these. Of these four, we shall, however, confine ourself primarily to the cause since it is more related and relevant to our discussion in terms of tarjīḥ. The remaining three

¹⁸ A special consideration is given to al-Baṣrī's al-Muʿtamad particularly in juridical qiyās since it represents one of the earliest extensive writings printed on juridical dialectic in Islam. See Hallaq, "Juridical Dialectic", p. 192.
¹⁹ To see a clear example of qiyās al-ʿaks, see al-Flkr al-Samī, vol. 1, p. 22.
elements namely the ruling, the original and the assimilated case are purposely omitted for a specific reason.  

Nevertheless, before examining the 'illah which has a significant role in making tarjih between two conflicting qiyyasat (pl. of qiyyas), I would like to note from the very beginning that qiyyas is applicable only to cases in which legal texts are not available. Otherwise, should there be any conflict between two qiyyas, the conflict does not exist between one qiyyas and another rather between qiyyas and the text (which is parallel to another qiyyas).

Hence, recourse to qiyyas is warranted only if the solution of a new case cannot be found in the Qur'an, the Sunnah or a definite ijma'. For it would be futile to resort to qiyyas if a new case can be resolved under a ruling of the existing law. Thus, a view that suggests the validity of salam contract i.e. the advance sale of an article to be delivered at a fixed date, on the ground of the preferred qiyyas (qiyyas mustahsari) or

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22 It is believed that the original ruling, the original and the assimilated cases are not closely related to the problem of qiyyas conflict. However, these three elements and their possible conflicts will be treated in chapter seven where appropriate.


24 Nour, "Qias", p. 29.

Although consensus cannot be considered as a revealed source of law, the great majority of jurists argued that once a consensus has been reached on a case of law, the case itself becomes an authoritative precedent upon which a further qiyyas can be based. (Hallaq, "Consensus", p. 427)

the hidden qiyas (qiyas khafi) known as istihsan\textsuperscript{25} is unacceptable. Here is the explanation. The qiyas in question seemed to be challenged by another qiyas i.e. (istihsan). Those who are in favour of the latter qiyas (i.e. istihsan) argued that their qiyas is superior because it is formulated on the basis of necessity while the former qiyas being regular, observes merely the general requirements of the validity of such a contract, like the existence of the property and the value at the time of contract. Owing to the stronger cause i.e. necessity, it is argued that salam contract is not only valid but also occupies preference over regular qiyas that would render that contract illegal.\textsuperscript{26} By examining the existing legal texts, we find however, that many traditions are available to show that this particular contract has been established since the Prophet's time.\textsuperscript{27} Therefore, the qiyas applied by the Hanafis in this case is void since the traditions already existed to establish the validity of salam contract. Naturally, no contradiction occurs here for no qiyas is allowed to operate independently of and contrary to the text.

Now we shall have an occasion to examine the 'illah more precisely. It is necessary to do so because in the course of considering conflict, a jurist usually attempts to invalidate another's qiyas by showing his opponent's qiyas to be unsound and based on an improper 'illah.\textsuperscript{28} Having said this, we have to admit that 'illah is not always explained and therefore, one may differ in its determination.

\textsuperscript{25} Al-Shalabi, al-Madkhal, p. 259 ; al-Dasuqi, "al-Ijtihad", p. 1112.
\textsuperscript{26} Al-Nasafi, Kashf, vol. 2, pp. 290-291.
\textsuperscript{27} See Nayl al-Awjar, vol. 5, pp. 342-344.
\textsuperscript{28} This feature is known as qawaditah al-'illah. As far as qawaditah al-'illah are concerned, the number of these qawaditah varies from one jurist to another.
The word 'illah in its original usage means sickness. As a technical term, 'illah is said to have been employed by Arab grammarians since the beginning of the second century. By the time of Abu Ḥanīfah, the element common to the original case and to the case to which a solution was required, was usually taken into account but, unfortunately, the jurists at that time had no name for it. The jurists were not familiar with the term 'illah as a technical term in legal reasoning even though they applied it in legal reasoning. Al-Shaftī who came after Abu Ḥanīfah, instead of 'illah, often uses the word ma’na and more technically asl to express the meaning of the 'illah in qiyās. This seems to be an earlier term for it. For instance, al-Shaftī argues that should a case arise for which there is no ruling, it must be decided in accordance with a case identical to it (in the texts) if both cases have the same meaning (ma’na).

The highest number reaches thirty qawādiḥ and the lowest does not go below four qawādiḥ. See Sha’ban, Dirasat, p. 247.

To be more accurate, 'illah is a factor which changes a particular state of affairs such as a disease which causes illness, etc. (see al-Jurjānī, Kitāb al-Ta’rifat, p. 134)

Hallaq, "The development of logical structure in sunni legal theory", in DI, vol. 63, 1986, p. 44. (cited after as "Logical Structure")

Again, it demonstrates that conceptual development in Islamic legal history preceded the verbal one. (see Ansārī, "Islamic Juristic", p. 292)

For details, see Al-Risalah, paras. 124, 1334 and 1495.

Ibid., p. 125.

Al-Risalah, para. 1481.
By the end of the third century of Hijrah and the beginning of the fourth, a sophisticated and detailed theory of 'illah had emerged and by the time of al-Ghazalī the theory had reached an advanced degree of maturity.  

11lāh began to be used as 'a common link' and an effective cause of qiyās. 'Illah, according to al-Bāṣrī, is "that which creates by its effects (ta'thur) a legal judgement". By effect is meant that the property (wasf) found in the 'illah must affect the judgement in the original case and subsequently in the assimilated. Any irrelevant effect may cause 'illah to be invalid. For al-Bāṣrī, then, 'illah must be efficient, for without efficiency qiyās is not possible.

Al-Karkhī, as quoted by al-Jassās, distinguished two types of 'illah shar'iyyah. Unlike the 'illah in theology, al-Karkhī says, the 'illah in legal theory has no causal relationship with the law i.e. the judgement does not necessarily follow the 'illah. To put it differently, when the 'illah exists, the judgement will not necessarily exist with it and similarly when it happens to be absent, the judgement does not necessarily cease to apply. For this reason i.e. no causal relationship between 'illah and judgement, the 'illah in legal theory is commonly called a sign (amārah, 'alāmah and sīmah). It is also alternatively referred to as manāf al-hukm and sabab. The most comprehensive definition of 'illah is al-

36 Hallaq, "Logical Structure", p. 44.
38 Ibid., vol. 2, pp. 789-790.
39 See Nabil Shehaby, "illa and qiyās", p. 34.
40 See ibid.
41 Irshad, p. 207.
Ghazālī’s, "a thing to which the Shari‘ah has attributed the rule or suspended (nafa) on it or appointed it a sign for the rule".42

Each of these two definitions represents a distinct notion of ‘illah in Islamic legal theory. The first considers ‘illah as an effective and efficient cause that affects the law by itself. The second however, contends that ‘illah is not causally connected with the ruling. It is merely a sign indicating the cause on which a judgement was formulated i.e. it does not necessitate the rule by itself. The problem of efficiency of ‘Utah, as a requirement of ‘illah, is disputable among the jurists.43 As a matter of fact, there are some other conditions attached to the ‘illah. I believe however, that the following six conditions are adequate to serve our purpose of tarjih in cases of qiyas conflict.44

(1) First of all, the jumhur says that the ‘Utah must be an evident attribute (wasf zahir).45 Hidden considerations such an intention, consent, good will, etc., are not to be considered as ‘Utah since they are not ascertainable. In other words, the ‘illah must be definite and perceptible. The ‘illah for a valid contract, for example, is the offer and acceptance (ijab wa qabul) rather than the buyer and seller’s actual consent, simply because consent

Other terms that denote the meaning of ‘illah can be found in Irshād (p. 207) and al-Mizan, (p. 574).


43 See al-Shalabi, Ta’līl al-Ahākām, pp. 198ff.

44 These conditions vary from one jurist to another. For example, Ibn al-Hajib has recorded twelve (Bayān Mukhtaṣār, vol. 3, pp. 25-34, 67-71) while al-Shawqānī has listed 24 conditions (Irshād, pp. 207-208).

45 Irshād, p. 207; Khallāf, Uṣūl, pp. 65, 68; Abū Zahrah, Uṣūl, p. 238; Sha’bān, Dirasat, pp. 210-211.
is imperceptible. Since the offer and acceptance are evident (zahir), they are more accurately considered as the ‘illah for the legitimacy of a contract. 46

(2) Next, the ‘illah must also be a constant and regular attribute (wasf dābiṭ) which is applicable to all cases without being affected by the differences of persons, times, places and circumstances. 47 In case of shuf ‘ah (pre-emption), it is unacceptable to base this particular ruling on its ḥikmah which is to protect against possible harmful action. In shuf ‘ah, a partner or a neighbour has priority to buy the property whenever his partner or neighbour wishes to sell it. The ‘illah, as asserted by the jurists, is the joint ownership itself and not the protection aspect which is not permanent but changeable i.e. variable according to circumstances, which would give difficulty in basing analogy on it. 48

(3) It is necessary also that the ‘illah should be transient or extensible (muta’ddiyah) and not inextensible i.e. not transferable to other cases (qāṣirah or waqifah). 49 The requirement of the transferability of ‘illah is argued by the majority of the jurists in contrast to the Hanafis. 50 Nonetheless, the dispute is insignificant because, in terms of applying qi’yās, all are in agreement that the ‘illah should be extensible. The dispute however, is directed only to the problem of ta’līl al-ahkām (causation) i.e.

46 Ibid.
47 Bayān Mukhtasar, vol. 3, p. 27; Abū Zahrah, Uṣūl, p. 239; Khallaf, Uṣūl, pp. 65-66.
48 Ibn Taymiyyah and Ibn Qayyim, al-Qiyās, pp. 154-160; Irshād, pp. 207-208; Khallaf, Uṣūl, p. 65; Amīnī, Ijtihād, p. 140.
whether such 'illah is valid as a basis of a hukm or not.\textsuperscript{51} An explanation of this is as follows. 'Illah, viewed from point of transferability, is of two types: namely, extensible and inextensible. Extensible causes are like intoxicating effect in wine drinking. This cause can be extended to other cases that share the same 'illah. Inextensible causes however, cannot be extended to other cases such as illness and travelling, the two causes that permit the action of breaking the fasting in the month of Ramadan.\textsuperscript{52} The dispute exists over the latter type of 'illah whether this kind of cause can be considered as the foundation of a particular ruling. The jurists however, never disagreed that this type of 'illah is inapplicable in qiyaṣ because to extend an original ruling contained in the original case to an assimilated case, the cause must be an extensible one.\textsuperscript{53}

(4) The 'illah should also be co-extensive (muttārid) in a way that whenever the 'illah exists, the rule of law will also exist.\textsuperscript{54} If not, it is called al-kasr\textsuperscript{55} or al-naqd.\textsuperscript{56} Both prevent the 'illah from resulting in a judgement.

\textsuperscript{51} Ahmad Hasun, "The conditions of legal cause", in IS, vol. 20, 1980, pp. 308, 322-324 (cited after as "Conditions")
\textsuperscript{52} Sha'ban, Dirasat, p. 213.
\textsuperscript{53} Ibid.
\textsuperscript{54} Irshad, p. 207; Hallaq, "The logic of legal reasoning in religious and non-religious cultures: the case of Islamic law and common law", in CSLR, vol. 34, 1985-1986, p. 89 (cited after as "Legal Reasoning")
\textsuperscript{55} and 56 "When one of the 'illa. h 's properties is cancelled due to inefficiencies, and it becomes clear that the remaining property cannot induce judgement, the 'illah is inflicted with kasr (breakage). The inability of 'illah to produce a judgement, on the other hand, leads to its refutation (naqd). See al-Mu'tamad, vol. 2, pp. 821-822. (The translation is taken from Hallaq, "Logical Structure", p. 55)
(5) The 'illah should also be co-exclusive (mun'akis)\(^{57}\) i.e. if the 'illah does not exist, the rule of law will also not exist. This condition, like the fourth, is disputed.\(^{58}\)

(6) If 'illah is a derivative, it should not apply to the original case i.e. text, by either nullifying it or part of it or by establishing a rule which was not originally established by the text.\(^{59}\) In other words, the 'illah in the assimilated case must enjoy the exact characteristics of the already established original 'illah. Otherwise, it is null. The examples of the last four conditions will be treated soon where appropriate i.e. in preferring one qiyas over the other by observing these conditions.

Next to the conditions, the methods of establishing the 'illah are believed also to play an immediate role in qiyas conflict. These two features should be deliberately discussed for tarjih in 'illah conflict, according to al-Āmidī, does not go beyond two modes namely through the methods of establishing the 'illah and by close examination of its conditions.\(^{60}\)

Regarding methods of establishing the 'illah, al-Jassās has maintained that extracting a cause from a basic case to be applied to the assimilated case is considered as the first rank of ihtilād.\(^{61}\) To ensure that only the true 'illah is extracted, one will be required to abide by certain prescribed methods. In this context, we often find that the jurists have classified the 'illah into two types - according to how it is extracted - 'illah

\(^{58}\) Ibid.; Ahmad Hasan, "Conditions", p. 310.
\(^{61}\) Al-Jassās, al-Fugul, p. 60. See also Irshad, p. 250.
mansūsah and ‘illah mustanbatah.\textsuperscript{62} In this regard, al-Jassās has said that only in very few cases can one find an explicit statement of the reason why a certain judgement was adopted while the large majority of cases are not as positive.\textsuperscript{63} To my knowledge, however, there is not even a single text that states explicitly that so and so is the ‘illah for a particular ruling. The text, in other words, never determines the properties (awsaf) which will lead directly to a hukm, known as ta’līl (causation).\textsuperscript{64} Accordingly, it is very hard to reach a true and indisputable ‘illah. For this reason, it is said that ‘illah if attained, is speculative.\textsuperscript{65}

An example of ‘illah mansūsah is the case of asking for permission when entering a private house as stated in a hadīth which provides that "permission is required on account of viewing (li ajli al- basr)".\textsuperscript{66} The ‘illah in this case, as claimed by the jurists is to protect the privacy of the home against unsolicited viewing.\textsuperscript{67} The question that comes to mind here is whether this is an unchallenged ‘illah or it is possible to assign another element as the ‘illah instead of protection. The jurists in fact, have merely based their opinion on the occurrence of certain Arabic expressions such as li ajli (on account of) that provide a considerable indication as to the

\textsuperscript{62} Al-Lumā', p. 62.

The jurists have added also another method which helps a jurist to find ‘illah that is īma' . (see Taysīr, vol. 4, p. 39 ; Irshād, p. 210 ; Sha'ban, Dirāsat, p. 224 )


\textsuperscript{63} Nabil Shehaby, "’Ilia and qiyās", p. 37.

\textsuperscript{64} See al-Sarakhsi, Uṣūl, vol. 2, p. 121.


\textsuperscript{66} Nihāyah, vol. 3, p. 54.

\textsuperscript{67} Al-Mustasfā, vol. 2, p. 288 ; Abū Zahrah, Uṣūl, p. 244 ; Nādiah, al-Qiyās, p. 92.
'illah of a given ruling. Even so, in my opinion, it is possible also to say that such protection is merely hikmah whereas the 'illah is something else for 'illah and hikmah may be overlapping. This possibility displays that qiyās can provide only a probable degree of knowledge (ghalīb al-zann).

On the whole, the rules laid down by the jurists for identifying and establishing the true 'illah, known as masālik al-'illah, do not go beyond the following three stages namely takhrīj al-manāt, tanqīḥ al-manāt and tahqīq al-manāt. Any miscalculation or deviation from these prescribed rules requires the 'illah to be abandoned. Takhrīj al-manāt (identifying the 'illah) is the starting point in the enquiry concerning the identification of 'illah. It is an attempt to anticipate the relevant 'illah that could be attributed to a particular case i.e. original case. When the Qurān (5:38) says; "As for the thief, both male and female, cut off their hands", one can imagine that the theft itself is the cause for the punishment. Similarly, when one reads the Qurān (5:90); "O Ye who believe! Strong drink and games of chance and idols and divining arrows are only infamy of satan's handiwork. Leave it aside in order that ye may succeed", the intoxicating effect of wine (khamr) will cross his mind to be

68 Irshād, p. 211. For further details, see ibid, pp. 211-213.
69 Ibid., p. 206

In addition, even if the 'illah is certain, its application to an assimilated case might be uncertain. (ibid)
70 These classifications were put forward by al-Ghazālī and according to Ahmad Hasan, al-Ghazālī seems to be the first to divide this reasoning into these three stages. (see al-Mustasfā, vol. 2, pp. 230-234 ; Ahmad Hasan, "Reasoning", p. 72)
the ‘illah of the prohibiting of wine drinking. Thus, it is said that *ikhālah*\(^{72}\) and *munāsabah*\(^{73}\) (imagination and suitability) are included under takhrīj al-manāt.\(^{74}\) Therefore, it is not surprising that other imaginative methods of finding the ‘illah such as *sabr*\(^{75}\), *taqṣīm*\(^{76}\), *tard*\(^{77}\), *dawrān*\(^{78}\), *shabah*\(^{79}\), etc. are all covered by takhrīj al-manāt.\(^{80}\)

The following step presupposes the possibility that more than one ‘illah could be imaginatively extracted from a single text. To select only the proper ‘illah, tanqīḥ al-manāt is employed. Literally, tanqīḥ means purifying\(^{81}\) whereas manāt is another word for ‘illah. Technically, tanqīḥ al-manāt means connecting the new case to the original case by eliminating the discrepancy between them (*ilḥaq al-far‘ bi al-asl bi ilgā‘ al-fāriq*).\(^{82}\) Determining the ‘illah by refining it from irrelevant qualities is

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\(^{72}\) Both indicate elimination of the improper ‘illah and assignment of the proper ‘illah to the ruling through suitability of equality itself and not by the text or any other thing such as an assignment of the intoxication and intentional murder as the causes of their judgements prescribed in the *Sharī‘ah* respectively. (see *Bayan Mukhtasar*, vol. 3, p. 110)

\(^{74}\) Ibid.

\(^{75}\) and \(^{76}\) They are designed to determine the ‘illah by indicating the real cause of the rule after classification (*taqṣīm*) and excluding (*sabr*) the irrelevant qualities. ( *al-Mustasfa*, vol. 2, p. 295; *Tanqīḥ*, pp. 397-398; *Irshād*, p. 213)

\(^{77}\) and \(^{78}\) They simply imply that every time the attribute was present or absent, the ruling also was present or absent accordingly, irrespective of whether there is an indication in the context to show that the attribute was meant as the cause or not. (See Aghnides, *Theories*, p. 86)

\(^{79}\) *Shabah* is an analogy by simple similarity i.e. to consider a thing in its similarity to others. (see *al-Risālah*, para. 1334 and for example of this, see *al-Mu‘tamad*, vol. 2, p. 692)

\(^{80}\) Ahmad Hasan, "Reasoning", p. 89.

\(^{81}\) *Lexicon*, vol. 8, pp. 2835-2836.

\(^{82}\) *Irshād*, pp. 221, 222; Abu Zahrah, *Uṣūl*, p. 246.
said to be another definition of *tanqīh al-manāt*.\(^{83}\) By this, only a true 'illah will be put forward.

For example, in a *hadīth*, the Prophet imposed the *kaffarah* on a bedouin who had sexual intercourse with his wife in the daytime of *Ramadān*.\(^{84}\) No doubt the cause of voidance of his fast was the intercourse he had. But the *hadīth* also points out many other elements that might be the 'illah for *kaffarah* such as a definite person i.e. a bedouin, a particular period and month, a woman who was cohabited with or anything else. By employing *tanqīh al-manāt*, a proper 'illah can be determined from these elements. Hence, it is concluded that deliberate daytime sexual relations in the month of *Ramadān* that lead to the violation of *Ramadān* is identified as *manāt* of such *kaffarah*. This basis should apply to all similar cases in future where it is found, regardless of whoever does it.\(^{85}\)

The last stage which always follows the two preceding stages is called *tahqīq al-manāt*. It means nothing other than to confirm that a particular selected element is the actual 'illah by applying this selected 'illah to cases that are thought to share the same 'illah.\(^{86}\) The main


\(^{84}\) *Muslim*, *Sahīh*, vol. 2, p. 54.

\(^{85}\) *Al-Mustasfa*, vol. 2, pp. 232-233, 284-285; *al-Fīkr al-Samī*, vol. 1, p. 73.

\(^{86}\) *Irshād*, p. 222; Khallāf, *Usul*, p. 79; Abū Zahrah,*Usul*, p. 246.
function of the jurists at this stage is to apply this manat to various cases where it applies and where it does not. As the jurists have affirmed that the theft itself is the cause of punishment in the Qur'an (5: 38), it is in the nature of tahqiq al-manat to be certain whether a pick-pocket or grave thief, for instance, fall under the same category of theft or not. To this extent, it is considered as an everlasting ijtihad for if it discontinues, the application of the rules of the Shari‘ah to human acts would be impossible. 87

After elucidation of the ‘illah whether in respect to its conditions or its ways of establishment, it is relevant now to discuss how tarjih is working in this area exclusively. In doing so, I shall begin with what al-Basri has adopted in his chapter concerning the conflict of qiyas. 88 For him, tarjih is merely a third way to deal with the opposition of causes (ta‘aruq). 89 The first is to prove the intransitiveness (ghayr mut‘addiyah) of one of the conflicting ‘ilal (plural. of ‘illah) and the second is through refutation (al-naqd). 90 These different ways, in my opinion are however, equivalent because in order to prefer one ‘illah over the other, one would naturally employ all the relevant methodologies such as refutation, deep examination of ‘illah conditions and ways of establishment, etc. In other

89 Ibid., p. 1045.
90 Ibid., pp. 1044-1045.
words, a murajjih would consider anything which is useful in determining the correct 'illah. This applies to the first and the second methods prescribed by al-Basri since both would potentially supply a murajjih with adequate means to arrive at the most accurate 'illah.

Al-Basri starts by saying, "if the cause of the original case is opposed by another, and the two causes (appear to be) equal, one must be made to prevail over the other".91 The 'illah are contradictory when one of them implies a rule against what is implied by another.92 If this happened, preference, according to al-Basri, can be achieved in two ways; "One is to examine the methods by which the cause was proved to be valid and the other is to examine the cause's transitiveness".93

The above statement by al-Basri is adopted here as a starting point for the following discussion. Like al-Basri, all other jurists have also emphasised the centrality of 'illah in conflict and tarjih.94 The 'illah that proved to be valid, as stated by al-Basri, should be upheld. Otherwise, it is disregarded. As far as a valid 'illah is concerned in tarjih, it is said that a cause which gained consensus prevails over the other cause which did not.95 When a 'illah is confirmed by such agreement, all other

91 Ibid., p. 1046.
92 Al-Jassas, al-Fusul, p. 165.
94 The importance of 'illah is best evident when the jurists have not only laid down certain regulations to detect true 'illah but also to distinguish it from improper 'illah. See al-Mustaafa, vol. 2, p. 306; 'Iwad, "Qawadih", passim.
95 Ghayat al-Usl, p. 146; Ibn Badran, al-Madkhal, p. 200.
contradictory 'ilal which were thought to be possible 'illah would be invalidated.

I could not find a proper case in fiqh wherein a confirmed cause is opposed by another which is not. However, the problem of guardianship for a girl is perhaps the most appropriate explanation of the above. The Shafi'is say that the girl needs to have her father as legal guardian before she marries if the girl is a virgin. Otherwise, she needs no such guardianship.96 For the Hanafis, the cause is the girl's being underage.97 The Hanafis, in fact, have relied on an ijma' that was earlier established on the problem of guardianship over the property of minors.98 Accordingly, the Hanafis contend that their cause should take precedence over the cause of the Shafi'is since the girl's age determines whether she needs legal guardianship or not when she sells or buys property as indicated by consensus. Similarly, it applies to marriage affairs. Virginity, on the contrary, they argue, is irrelevant in both cases, namely property and marriage affairs.99

As said before, this is not a precise example of what we are discussing. No doubt, disagreement is not allowed to exist in case of underage property with respect to legal guardianship, since it is constructed by the consensus of the scholars.100 Once ijma' has been

97 Ibid.
98 Sha'ban, Dirasat, p. 233 ; 'Iwad, "Qawadîh", p. 117.
99 Khallaf, Usul, p. 77 ; 'Iwad, "Qawadîh", p. 117; Kerr, Islamic Reform, p. 66.
   Cf. al-Zanjani, Takhrij, p. 257.
100 'Iwad, "Qawadîh", p. 17.
established, no disagreement would be permitted. However, in the case of underage marriage, we have seen the dispute among the jurists because it is not covered by the alleged consensus. Furthermore, there is an objection towards this alleged consensus concerning underage property itself. In any case, given that this *ijma* was true, there remains no point to link the problem of underage property to marriage affairs for both are different. My point of view in this case however, is to combine both virginity and minority as the *'illah* in this particular case since the judgement may have two or more *'ilal* that are compatible and we shall have an occasion to elaborate on this point later.

Then, if one cause is explicitly stated in the text while the other is merely inferred through textual indications, the former is upheld. When *nass* exists, *istinbat* is of no value. Explaining these two types of *'ilal*, al-Basri says, one is conspicuous (*mansuṣah*) and generally leads to certainty and the other needs to be inferred (*mustanbatah*). The latter, being vague and uncertain, according to Hallaq, is the major reason medieval jurists worked out an elaborate system of procedure for establishing and verifying the *'illah*. Hence, one is certain why preference is given to *'illah mansuṣah* and not to *'illah mustanbatah*. After *ijma*, the text, indeed, is the safest means to find a true *'illah*, for it may provide a more clear and undisputed *'illah*.

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101 Khallāf, *Uṣūl*, p. 76.
102 This assertion is well supported by the fact that no such guardianship is required when the daughter is not a virgin and has reached her majority. For more details, see Mas‘ud, "*Ijbar*", p. 221.
104 *Al-Mu’tamad*, vol. 2, pp. 774-775. See also Tānqīḥ, p. 425.
105 Hallaq, "Logical Structure", p. 53.
Al-Bājī has illustrated the above by employing the qiyās of the Malikis in contrast to the Hanafis'. Nabīdḥ i.e. made from other than grapes, is forbidden according to the Malikis, for nabīdḥ, though different from khamr which is made from grapes, could lead to intoxication as does khamr. Since khamr is explicitly forbidden in the Qur’an (5:90), the same applies to nabīdḥ. Having disapproved the drinking of khamr, the Hanafis have no objection to the consuming of nabīdḥ simply because nabīdḥ, like honey, is permissible to the people of paradise. While commenting on this conflict, al-Bājī has upheld the Malikis qiyās for the ‘illah of prohibition is clearly mentioned in a tradition; i.e. "if a larger amount intoxicate, then the small amount is prohibited". Nabīdḥ and khamr are alike for both have intoxicating effect. Clearly, the ‘illah of the Malikis is stated in the text while the ‘illah of the Hanafis is an interpretative one. Should there be any conflict between the two, the former prevails.

The third preferred ‘illah, according to al-Baṣrī, is the one known through textual indication as opposed to the ‘illah extracted from the text. Since al-Baṣrī himself did not give any specific example of textual indication (maḥfūm al-nass), we do not know what is actually intended by him. I suppose it would be da‘lalat al-nass or al-qiyās al-jālī which is considered as the strongest form of qiyās in the view of al-Shafī’ī. This type of ‘illah needs no inference since it is understood.

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106 Al-Bājī, Ilḥām, p. 674.
107 Ibid.
from the language of the scriptural statement itself (*min jihat dilālat al-lafz*). To know it, one is not constrained to master the reasoning forms rather than a simple knowledge of language. It can be illustrated by the following: when God or the Prophet forbids a small quantity of a particular thing, we can conclude that a larger quantity of the same matter is also forbidden. Similarly, if the consumption of a large quantity of a certain foodstuff is declared permissible, then a smaller amount of that foodstuff would also be permissible.  

The Hanafis did not consider this as a *qiyaṣ* simply because it is a textual interpretation i.e. purely linguistic and certainly outside the sphere of inferential reasoning. *Qiyaṣ*, however is an extension of the ruling of a given text to cases which may not fall within the terms of its language. A case in point is God saying (17:23), "say not to them *uff". The verse explicitly forbids saying *uff* to the parents. For al-Shafi′ī, the verse also forbids insulting parents, beating parents, killing parents, etc., on the ground of *qiyaṣ*. Any act which harms the parents is also forbidden in the Hanafi view but the ruling is known through the linguistic consideration instead of *qiyaṣ*. With regard to the result however, the disagreement seems to be a verbal one and of no significance. Although I could not find any accurate example of this type of conflict, it appears to me that ‘illah gained through *maḥṣum al-nass* or *dilālat al-nass*  

110 Al-Risalah, paras. 1482-1485.  
112 This has been called by al-Shafi′ī as *al-qiyaṣ al-jaflī*. The jurists who came after him, including the Shafi′is, named this as *maḥṣum muwafaqah* or *jahwa al-khilaf* (See Khalīs, *Tukhsīt*, p. 85)  
is relatively stronger than the one derived from the text. A derivation is always liable to many possibilities that make the conclusion uncertain. This does not apply to the establishing of ‘illah by means of mafhūm al-nasss since it needs no inference.

Some jurists like al-Qarāfī consider the ‘illah of munāsabah (suitability) to come immediately after the cause of text (‘illah mansūsah) hierarchically.114 Munāsabah comes to exist when the ‘illah which suits the original and the assimilated case displays promotion of benefit or prevention of evil and therefore must be accepted provided nothing in the text contradicts that ‘illah.115 To make our discussion more systematic and organised, I intend however, not to examine the degree of strength of each ‘illah hierarchically for it is too complicated and may lead us to an unresolved discussion. For one thing, munāsabah or the appropriateness of ‘illah to the original and the assimilated is hard to achieve. Moreover, munāsabah is merely one of several indications upon which a jurist can distinguish a true from an incorrect ‘illah. Besides, ta’thīr (effectiveness), ikhālah (probabality or imagination), etc., are said to have a significant role too for determining the more accurate ‘illah.116

After elaborating these three stages in tarjīh, al-Baṣrī proceeds to make a similar attempt but this time by considering the transitiveness of the ‘illah. The majority of jurists share al-Baṣrī’s point of view that

114 Tanqīḥ, pp. 427-428; Kerr, Islamic Reform, p. 69.
preference should be given to the one which has a transitive cause.\textsuperscript{117} In cases where there is a conflict between transitive and intransitive causes, the former supersedes owing to its effectiveness i.e. being acted upon in the law, that suggests the validity of ‘\textit{illah}.\textsuperscript{118} Accordingly, to the other extent, as a logical consequence, the one which encloses more assimilated cases is worthier than the other which does not.\textsuperscript{119} It shows again that the more effective the ‘\textit{illah} is, the more it is upheld.

One example is sufficient to illustrate these two methodologies of \textit{tarjih}. It concerns the prohibition of wine (\textit{khamr}) drinking. The \textit{jumhūr} have opined that intoxication is the ‘\textit{illah} of such a prohibition. The Hanafis or more precisely Abu Ha\textit{nīfah}\textsuperscript{120}, on the contrary, have contended that \textit{khamr} is forbidden for it is made from the grape. Accordingly, other intoxicating objects are permissible even though they do intoxicate provided that they are made from other than grape.\textsuperscript{121} Obviously, as stated earlier, the \textit{jumhūr} opinion must take precedence for two reasons ; their ‘\textit{illah} i.e. intoxication, is a transitive cause and accordingly, it has more assimilated cases because it is extensible to other intoxicating objects regardless of their sources.


This method, unlike the previous one, does not receive a full confirmation by all the jurists but by the majority of them. (see \textit{al-Mankhul}, p. 445; \textit{al-Tahsīl}, vol. 2, p. 276)

\textsuperscript{118} \textit{Ibid.}

\textsuperscript{119} \textit{Ibid.; Rawdah}, p. 211; \textit{Ghāyat al-Uṣūl}, p. 147.

\textsuperscript{120} Al-Zanjānī, \textit{Takhrij}, pp. 69-70.

\textsuperscript{121} \textit{Ibid.} See also \textit{Ibn Taymiyyah}, \textit{al-Qawā’id}, p. 24.
On the whole, al-Basri mentions only five sorts of preference in respect of ‘illah conflict. To continue our discussion, I shall refer to other relevant references that might suggest a proper methodology of tarjih in qiyyas conflict, if not a comprehensive one. Next, it is widely proposed that the ‘illah which is associated with or supported by many other elements of evidence shall gain superiority.\footnote{Irshad, p. 283.} The more the ‘illah is supported by external indications, the more it become certain and strong. In the case of apostasy, Abu Hanifah opines that a female apostate should not be executed,\footnote{Al-Tamhid, p. 413; al-Zanjani, Tahiri, p. 337; al-Hidayah, vol. 2, p. 458; al-Kawthari, Abu Yusuf, pp. 54-55.} arguing that the Prophet prohibited the killing of women in enemy territory.\footnote{Ibid.} Al-Shafi'i however, criticises this analogy by saying that the killing of a woman in enemy territory is not parallel to the killing of female apostates. He further argues that as a woman is killed in many other cases, such as adultery and homicide, likewise, she would be killed in case of apostasy.\footnote{Al-Hidayah, vol. 2, p. 458; al-Shafi'i, al-Umm, vol. 7, p. 147, as cited from Ahmad Hasan, The Early, p. 157.} Comparatively speaking, the qiyyas of Al-Shafi'i is more sound, simply because it is supported by many other cases which show that women are legally killed in Islam.\footnote{According to one scholar, this hadith is preferable to the hadith which prohibits the killing of the women because the former clarified the ‘illah of doing so i.e. apostasy. (see Khalfan, Ugul, p. 362)} In addition, the qiyyas of Abu Hanifah is too weak for it contradicts the hadith; “kill whoever
changes his religion". 127 These two factors make the qiyās of al-Shafi‘i unchallenged.

In the course of qiyās conflict, ‘illah is always confused with hikmah i.e. to gain profit and to disregard evil. If a jurist, instead of ‘illah, adopts hikmah as the cause for a particular ruling, the result of qiyās would vary and be contradictory to another qiyās which is based on a ‘illah. Given inconstancy of hikmah and its hidden quality, the jurists unanimously favoured the ‘illah over the hikmah. 128 Hence, as regards the permission granted to travellers to break the fast in Ramadān, the travelling itself is the ‘illah regardless of the degrees of hardship that it may cause to individual travellers. Obviously, to avoid hardship is the hikmah behind this permission. But to apply this permission analogically to all those who are in hardship is not approved, since hikmah is neither constant nor well-defined. 129

From another perspective, when two unrelated properties (awsaq) are found to be equally strong as the ‘illah, the one which proves to have immediate effect in terms of resulting in judgement must take precedence. Redness, for instance, and intoxication, are two unrelated properties found in wine. On the other hand, the prohibition is the judgement in

127 The conflict between qiyās and the text is one of the matters that invalidate ‘illah or qiyās itself, known as fasad al-ittibā‘. See ’Iwad, "Qawadīf", p. 100; Makdisi, "Istīḥsān", p. 460, para. 31.


this case. Since intoxication can be found in conjunction with prohibition rather than with redness, it must be concluded that the true 'illah is intoxication, not redness. As a matter of fact, redness could not be regarded as the valid 'illah for it is not co-extensive (muttari d) and co-exclusive (mun'akis) for wine is frequently white.

In discussing tarjih on the basis of 'illah, two types of 'illah are usually distinguished. The first is known as the simple and straightforward 'illah, while the second is the combined and mixed 'illah. Intoxication in case of wine drinking is the simple 'illah. The mixed 'illah, however, is formulated by two or more components or elements where each of them must relate to another. Otherwise, it is void. The intentional murder without any justification is said to be the 'illah for retaliation and of course, it contains more than one element i.e. killing, an intention to do so and killing illegally practised. As regards the simple 'illah, being simple, the possibility that it contains error is relatively small compared to the combined 'illah for it needs a larger scope of personal reasoning. Hence, when they are contradictory, the preference is given to the single and simple 'illah.

130 Hallaq, "Logical structure", pp. 52, 54. See also idem, "Legal Reasoning", pp. 88-89.
131 See al-Baji, Ihkam, p. 676.
133 Rawdah, p. 211 ; Ghayat al-Usl, p. 146 ; Hitu, al-Wajiz, p. 486.
This method of tarjih is liable to many objections (see al-Baji, Ihkam, pp. 681-682 ; al-Mankhul, p. 446) but al-Baji, in contrast to al-Ghazali, has argued in favour of the simple 'illah. (ibid).
Regarding the tradition which provides that "gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, must be equal, hand to hand....."\(^{135}\), the jurists (other than the Zahiris) have unanimously agreed that the above prohibition is not due to their particular species rather than to a specific cause.\(^{136}\) Therefore, regarding the four last articles, al-Shafi‘i\(^{1}\) maintains that such a transaction is unlawful because they are edible.\(^{137}\) The ‘illah for the Hanafis is the quality of such articles as being saleable by the measurement of weight (al-wazn) or capacity (al-kayl).\(^{138}\) According to the Malikis, the sale of such is unlawful because they are preservable and food which is the ‘Utah for usury in barter trading.\(^{139}\) Naturally, to apply these different ‘ilal to the assimilated case would lead to conflicting results because the ‘illah, as we have seen, is variable. The preference, however, is owed to al-Shafi‘i’s point of view since his ‘illah is more simple and uncombined.\(^{140}\)

Also significantly, in course of qiyas conflict, a jurist usually tends to overthrow his opponent’s qiyas by showing that his opponent’s qiyas is employed with a discrepancy i.e. qiyas ma‘a al-fariq. This is so crucial because even if the ‘illah is certain, it does not assure or guarantee that this particular ‘illah will be applied to a proper assimilated case. Applying the correct ‘illah to an incorrect case is known as

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135 \textit{Bidayah}, vol. 2, p. 129.
138 Ibid.
139 Ibid.
140 \textit{Al-Ibhafl}, vol. 3, p. 239.
discrepancy. Accordingly, such a qiyās is incapable of standing against the qiyās which has no discrepancy.

The point at issue is the qiyās of the Hanafis. A sane and adult woman, according to them, is competent and eligible to conclude a contract of marriage on her own behalf. They have opined so by basing it on the Qur'anic ruling (4:6): "Prove orphans till they reach the marriageable age; then, if ye find them of sound judgement, deliver over unto them their fortune....". The verse entitles her to enter into business transactions of her own free will. Other jurists, however, disagree, as they consider this analogy to be qiyās with a discrepancy i.e. marriage differs from other transactions whereas business is a personal matter, marriage concerns the family and the social status of the parents and guardians.

Still related to the 'illah, the jurists have proposed that preference can be achieved by looking in depth at every single 'illah on which the conflicting qiyāsat are based. By a genuine search and examination, one can reach a solution for tarjīh. To this purpose, the case of ablution will be examined. In the Hanafi opinion, an ablution is null whenever najāsah is found coming out from the human body irrespective of how it happens. The cause of nullifying the ablution is najāsah itself whether it comes out from the two known ways i.e. front and hind parts, or from elsewhere. In contrast, the Shafi'is maintain that najāsah itself is not the cause, rather how something comes out from the human body. For them, whether it is najāsah or not, whenever it comes out from the two

141 Tanqīḥ, p. 403.
142 See al-Shaftī, al-Umm, vol. 5, p. 13; Mas'ūd, "Ijbār", p. 206.
particular ways as mentioned above, the ablution is null and void. By depth observation, one is constrained to favour the Shafi'is qiyās simply because their 'illah is co-exclusive. Ṛiḥ (smell) and manī (sperm) as unanimously agreed, are capable of invalidating ablution even though they are not nājāsah. This makes the Hanafi 'illah not co-exclusive. In turn, it shows that the rule did exist i.e. nullifying of ablution, though the 'illah was absent. Thus, their 'illah is not co-exclusive which subsequently renders their qiyās void of authority particularly in the case of conflict.

From a different angle, it is said that the 'illah which is in line with the generality of the original ruling occupies the preference when it is contradicted by the 'illah which is a particularisation of the general. The jurists justify this order simply by saying that as the 'umūm is the criterion of every thing, it should be the basis of preference. The validity of tayammum with gypsum (al-jass) and lime (al-nūrah) was disputable owing to what we have said above. The Malikis have held that such things are permissible in terms of tayammum because the word saʿīd i.e. high clean soil (as mentioned in Q. 4: 43 and 5: 6) implies that whatever covers the surface of the earth may be said to be saʿīd. The Shafi'is, on the other side, have raised an objection to such tayammum because gypsum and lime are not soil but are equal to steel and copper. The latter qiyās however, is overruled for it conveys a departure from the generality of the original case i.e. saʿīd. For saʿīd, as confirmed by the

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144 Bidayāh, vol. 1, p. 34; al-Dimashqī, Ikhtilāf, p. 15; al-Zanjānī, Takhirīj, p. 48.
145 Rawḍah, p. 211; Ibn Badrān, al-Madkhal, p. 201.
146 A detailed account of the Hanafi's counter argument can be found in al-Asmandī's al-Khilāf, pp. 3-7.
148 Ibid.
linguists is the surface of the earth (\textit{wa}j\textit{h} \textit{a}l-\textit{a}r\textit{d}) irrespective of the kind or the name of such a surface.\textsuperscript{149}

In the chapter of \textit{qi\textacute{y}as} conflict, one also easily encounters the problem of the covering of the \textit{'illah}. This means that one \textit{'illah} might differ from others in respect of the scope of the covering of the elements it applies. When an \textit{'illah} is proved to cover its elements completely, the judgement immediately inclines towards it in case of conflict.\textsuperscript{150} Again, the tradition concerning usury in barter is exemplified. As previously mentioned, each of the schools of law has their own \textit{ta'\textacute{t}l} of the prohibition of the last four items. In short, being preservable and food according to the Malikis or being saleable by weight or capacity in the Hanaf\textsuperscript{i} view or being edible as in the Shafi\textquoteright{s} opinion are said to be the alleged \textit{'illah} of a usurious transaction. Judging from the method mentioned above, the preference, no doubt is in favour of the Shafi\textquoteright{s} \textit{'illah}.\textsuperscript{151} Only the edibility alone could be applied in all circumstances i.e. is found in all those articles whether the transaction involves a large quantity or not and whether they are generally used as food or not. Buying and selling one or two seeds of wheat or barley is not covered by the \textit{'illah} of the Hanafis because it cannot be measured by capacity or weight. Also, wheat or barley which are not used as food in certain localities are not covered by the \textit{'illah} proposed by the Malikis.\textsuperscript{152}

\textsuperscript{149} Ibid.; al-R\textacute{z}i, \textit{al-S\textacute{a}h\textacute{a}h}, p. 363; Ibn Man\textacute{g}ur, \textit{Li\textacute{s}\textacute{a}n}, vol. 3, p. 254.
\textsuperscript{150} Al-T\textacute{a}h\textsuperscript{s}\textsuperscript{i}, vol. 2, p. 277; al-B\textacute{a}j\textacute{i}, \textit{I\textacute{h}k\textacute{a}m}, p. 678; Kh\textacute{a}l\textacute{f}\textacute{a}n, \textit{U\textacute{s}\textacute{u}l}, p. 364.
\textsuperscript{151} Cf. al-Sarakhs\textsuperscript{i}, \textit{U\textacute{s}\textacute{u}l}, vol. 2, p. 265
\textsuperscript{152} Al-Mu\textacute{t}\textacute{a}m\textacute{a}d, vol. 2, p. 1039; Ahmad Hasan, "Reasoning", p. 75.

It is observed also that the \textit{'illah} of the Hanafis is not constant. (see Nabil Shehaby, "\textit{illa} and \textit{qi\textacute{y}as}", p. 37)
Certainly, we have no choice but to consider the 'illa of the Shafi'i's as the most comprehensive for it is applicable to all cases in which usury is involved.

Alongside these internal methods of tarjīh, there are many external considerations that might help us to determine what is preferable when two or more qiyās appear to be in conflict. These external factors are usually employed in a way that corresponds to what will be discussed in the following chapter under the heading of “tarjīh based on external factors”153 and to what has been already discussed in chapters four and five. Therefore, it is important to note that many methodologies of tarjīh which are sought from other elements of qiyās such as the original and the assimilated cases and the hukm are left aside simply because they do not have any immediate significance for that with which we are now concerned.

Also, I would like to conclude, as many jurists have done, that tarjīh is an everlasting procedure 154 especially in qiyās conflict, owing to the fact that qiyās is largely speculative and superficial to the extent that it amounts only to a probability. Added to this, qiyās is a purely logical reasoning which depends heavily on mental exercises. Hence, it is impossible to cover all the possibilities that demand tarjīh in whatever cases in which qiyās appears to be in conflict. As a conclusion, however, I believe that the propriety of qiyās must be measured by the degree of its proximity and harmony with the texts. The more the qiyās or the 'illa is

153 See pages 362-367.
in line with the scriptural statements, as we have already seen in some of the examples, the more they become certain and unchallenged.

A further conclusion lies in the fact that I am more inclined to combine or to reconcile all the conflicting 'ilal as long as this is possible. Hence, an original case will carry, instead of one, two or more 'ilal that are compatible. This point of view has, in fact, been established by many prominent jurists.\textsuperscript{155} As we already know, in conflict of legal texts, to combine all the conflicting texts is better than to neglect one of them. This also applies to 'illah conflict. By doing so, many cases which were claimed to be in conflict are no longer contradictory. The problem of legal guardianship for a girl in the marriage contract, as previously mentioned, is an excellent case to serve our purpose. It is therefore possible to consider both the virginity and minority as the intended 'illah in the legal guardianship in terms of marriage.\textsuperscript{156} Furthermore, in a controversy over the 'illah in a usurious transaction, the Hanbalis have held that the actual 'illah covers all the three points of view expressed by other schools of law because all these three 'ilal are applicable to the original case.\textsuperscript{157}


\textsuperscript{156} Even in the original case, namely the legal guardianship over the minors' property, it has two compatible 'ilal i.e. marriageable age and maturity of the mind. This is inspired from Q. 4 : 6. The Malikis, therefore, probably on this rationale, have considered both virginity and minority as the 'illah for legal guardianship. See Mas'ud, "Ijar", p. 218; al-Khin, Ikhtilaf, pp. 578-579.

\textsuperscript{157} Al-Mughni, vol. 4, pp. 5-8; al-Jassas, al-Fugul, pp. 165-166.
In addition, every respective 'illah as viewed by the jurists in the problem of usurious transaction, is supported by legal texts that suggest the validity of each of them that one cannot easily abandon or accept one instead of another.\textsuperscript{158} If combination fails, it is the work of the jurists to call these conflicting qiyāsat into serious scrutiny in order to reach the most acceptable one. Tarjīh made by a murajjīh, however, remains probable. In any case, when it is impossible to reconcile those conflicting 'ilal or to apply tarjīh systematically between them, a jurist has little choice but to adhere to a particular qiyās which is the more likely or most convincing to himself though it amounts only to a probability.

\textsuperscript{158} Ibid.
CHAPTER SEVEN
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TARJĪḤ BASED ON EXTERNAL FACTORS

This is the last chapter of our theoretical discussion of the methodology of tarjīḥ in the present work. Many methodologies of tarjīḥ have been studied throughout the previous chapters but on the other hand, many have been purposely omitted for they are more relevant for discussion within the present chapter. External factors are many and unlimited in number ranging from the consideration of language or grammar to the maslahah which is neither sharply defined nor constantly applied. The task of the present chapter is to cover as many of these external factors as possible, which in one way or another, might add weight to one of the conflicting pieces of evidence.

Bearing in mind that it is impossible to point out every single factor which helps in arriving at the most preferred view, we may start by committing ourselves to what is commonly dealt with in usul literature. The first and the most obvious feature is the so-called "preference by virtue of many". As a matter of fact, this is a controversial method of preference argued between two schools of law namely the Hanafis and the Shafis. The former refused to give consideration of any weight to an evidence which is supported by many elements of evidence to the effect that this method of preference had already been excluded even in their definition of tarjīḥ.2 The major argument used by them is that tarjīḥ is equivalent to legal testimony. Since the latter admits neither further

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1 As far as external considerations are concerned, al-Amidī has pointed out 15 means of preference. (al-Ihkām, vol. 3, p. 187)
2 See page 94.
strengthening nor supplementary evidence, so for \textit{tarjīh}, the same applies.\textsuperscript{3} 'Many', in other words, does not offer any value for the evaluation of each legal testimony and the same applies to \textit{tarjīh} for both are equivalent. With regard to this argument, we have mentioned before that it is baseless because \textit{tarjīh} differs from legal testimony in many respects\textsuperscript{4} and therefore, each of them must operate independently.

The Hanafis are also reported to have argued that "preference by virtue of many" may approve the preference of analogies over the \textit{Sunnah} when they conflict for the former are relatively more in number.\textsuperscript{5} Obviously, to prefer analogy over \textit{Sunnah} is unacceptable to all the jurists. Accordingly, this way of preference should be abandoned and regarded as illegal if applied.\textsuperscript{6} Al-Baydawī (d. 685 A.H.), one of the leading Shafis whose book \textit{Minhāj al-Usūlī Ilā 'Ilm al-Usūl}, has been the concern of later jurists, attempted to neutralise the argument adduced by the Hanafis. He says that many analogies may either be based on a single or more than one original case. If the former happens to occur, these analogies should be regarded as one, since they originate from one root, be it a Qur'anic verse or a portion of \textit{Sunnah}. In consequence, the text should prevail over analogies. However, if these analogies were derived from many different "\textit{asl}" or original cases, al-Baydawī insists that \textit{Sunnah} remains superior.\textsuperscript{7} Unfortunately, al-Baydawī did not give further satisfactory argument why he deviated from his hypothesis that


\textsuperscript{4} See page 105.

\textsuperscript{5} \textit{Kashf}, vol. 4, pp. 78-79.

\textsuperscript{6} Ibid.

\textsuperscript{7} \textit{Nihāyah}, vol. 3, pp. 223-224.
preference based on many elements of evidence should be observed in any case of conflict. He seems, in my opinion, to acknowledge that this method of preference is not applicable in all circumstances of conflict. In other words, should there be a conflict between a tradition and many analogies, the former is always superior. This is perhaps, if there is any, the only exceptional case for this mode of preference.

The Shafi'is on the contrary, are famous for their proposal that 'many' has a significant role in terms of *tarjīh*. In *hadīth* conflict, for example, they contend that it is possible to prefer a *hadīth* reported by many direct transmitters to one reported by a smaller number of such transmitters. To this effect, with the problem of the prohibition of certain kinds of usurious contract, al-Shafi'i says to his interlocutor, "Since it is undeniable that a *hadīth* reported by two transmitters is more likely to be accurate and free from mistakes than that reported by only one transmitter, so a *hadīth* reported by a greater number, for instance, five (the number of transmitters of the *hadīth* in question), possesses greater authenticity in this respect and should therefore be preferred to that reported by one transmitter". On another question, i.e. concerning the lifting of the hands (*takbīr*) in prayer, al-Shafi'i opines that one is recommended to do so arguing in favour of his own *ahadīth* against that adopted by his opponent by saying, "we accept these *ahadīth* and reject that which contradicts them because the isnād of our *ahadīth* is more

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This form of preference is also approved by other jurists except some of the Hanafis. (see *al-Muswaddah*, p. 305; *Rawḍah*, p. 208; *Taqwīl*, p. 420).

9 Al-Risālah, para. 773.
reliable; our hadīths are reported by many first-hand transmitters and many transmitters are believed to remember more reliably than one". He further argues that, "our hadīth is reported by al-Zuhrī who has the best isnad; he has the support of reports by many transmitters which guarantee the veracity of what he says".\textsuperscript{10} He continues to argue that al-Zuhrī’s report is supported by thirteen reports "and we mutually agree that thirteen hadīths are preferable to one".\textsuperscript{11}

Similarly, the consensus constructed by the majority is obviously superior to that of the minority even though the former does not constitute a valid consensus, for ijma’ proper demands a universal and unanimous agreement.\textsuperscript{12} Owing to the fact that no record on genuine consensus is available after the period of the Companions, it is reasonable to promote this majority agreement as having a considerable weight in terms of conflict and tarjīḥ. This method of preference is justifiable, at least by two means. Broadly speaking, the agreement of the majority of jurists at a particular time is more 'valid' than that of the unanimous agreement because it is too hard if not impossible, to prove the latter as having taken place after the Companion period.\textsuperscript{13} This is because an attempt to base consensus on a condition which cannot be achieved i.e. universal and unanimous agreement, is a denial of the

\textsuperscript{10} \textit{Ikhṭilaḥ al-Hadīth}, pp. 523-524.
\textsuperscript{11} Ibid.
\textsuperscript{12} See page 285.
\textsuperscript{13} Sha’ban, \textit{Dirasat}, pp. 56-57.
consensus itself\textsuperscript{14} for a unanimous agreement is hard to achieve since the subject matter of the consensus is nothing other than the details of some regulations which have already been prescribed by other sources such as the Qur'an and the Sunnah. Hence, though it does not constitute decisive consensus, it carries some authority since it is likely to be the more correct opinion which must be given precedence over the opinion of isolated individuals. In other words, though the majority agreement is not a solid proof, its impact on Shari'ah is relatively weightier than that of minority agreement or individual opinions.\textsuperscript{15} The ifma' of a majority has more authority simply since the group, because of its size, is considered as more immune to error caused by faulty consideration and contemplation.\textsuperscript{16} It is advisable therefore, to accept the majority agreement as one of the considerable bases for preference, but it should not be regarded as ifma' proper.

Also significantly, in qiyās conflict, al-Shāfī‘ī has adopted a similar proposal as in hadīth conflict. Thus, he stipulates that if a case has more than one parallel, that which has more aspects of similarity should prevail.\textsuperscript{17} This will be exemplified by the following case of conflict. In the case of compensation for an injury inflicted on a slave, al-Shāfī‘ī holds that it should be a fixed proportion of the value of the slave; for instance, half of the slave's value for an eye and one-tenth for

\textsuperscript{14} Faruki considers ifma' as an unworkable source of law for it requires a total (100\%) agreement of all Muslim. (See Esposito, Muslim Family Law, p. 297)


\textsuperscript{16} Madina, Consensus, p. 127.

\textsuperscript{17} Al-Risālah, para. 1334; idem, Iḥbal al-Iṣṭihṣān, p. 303. Cf. al-Sarakhsi, Uṣūl, vol. 2, pp. 264-265.
an injury which reveals the bone (muwaddihah). He bases this on analogy with a free man whose compensation should be a fixed proportion of his blood-money (half for an eye and one-tenth for muwaddihah).  

The Hanafis hold that there is no such fixed proportion and that compensation must be in proportion to the loss in value caused by the injury. They base this doctrine on qiyyas with property, animals and the like, because a slave is parallel to property in the sense that it is value which is taken into consideration. Furthermore, it is generally agreed that compensation for damage to property is the re-imbursement of the amount of reduction in its value caused by the damage. By this, we encounter a conflict caused by two different grounds of qiyyas (maqis 'alayhi) where al-Shafi‘i bases his analogy on a free man while the Hanafis base it on property. Al-Shafi‘i defends his opinion by saying that a slave is parallel to a free man in five aspects and parallel to property in one aspect only and it is, therefore, more appropriate to base the qiyyas on a free man.

The previous discussion makes one more inclined towards what is proposed by the Shafi‘is or the jumhur though ‘many’ is not an absolute criterion to determine the preferable view. Not only that, the Qur’an on many occasions, has warned the Muslims not to follow the majority for ‘they’ might lead the Muslims to stray into misguidance. In other words,

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18 Ibid. (As regards al-Risalah, see paras 1568ff, particularly para. 1597)
19 Ibid.
20 Ibid.
21 Ibid.; al-Zanjani, Tuhfiyy, p. 87.
22 See Q. 6: 116; Q. 13: 1, etc. See also al-Sarakhsi, Usul, vol. 2, pp. 24-25
the "truth" is not always found in majority opinion or majority's transmission or consensus, etc. This is evident from the dispute between Abu Bakr and the majority of the companions over the necessary action that should be taken against those who refused to pay *zakat* in which the most accurate view belongs initially to the minority eventually gaining the approval of the majority.\(^23\) However, we have to admit also that, on many other occasions, argument is more convincing when supported by many indications as evident in many incidents such as with the case of temporary marriage (*mut'ah*) and interest by excess (*riba al-fadlı*) where the overwhelming number of jurists prefer the opinion of the majority of the Companions which disapproves of these two contracts.\(^24\) In addition, many *ahādīth* can be found that urge the Muslims to commit themselves with the majority (*al-sawād al-a'zam*) or the group (*jama'ah*) and in turn, blame those who do not do so.\(^25\)

It is acceptable therefore to suggest that *tarjīḥ* by "many" consideration is of great help in deciding the more preferred piece of evidence when there appears to be a conflict. This is highly reasonable, for the purpose of *tarjīḥ* is merely to select what is most likely and more probable. To reflect this accuracy, I would like to re-examine the case which has been dealt with in chapter five namely the dispute over whether

\(^23\) See Faruqi, "*Ijmā*", p. 175.

\(^24\) *Nayl al-Awājī*, vol. 5, pp. 298-299 and vol. 6, pp. 270-271; *al-Mustaqfā*, vol. 1, p. 186; *Fuwaṭīḥ*, vol. 2, p. 222.

\(^25\) *Irshād*, p. 274.

Though each of these two approaches has its shortcomings, a jurist "must opt for the one which leaves the smallest number of exceptions and which covers most of the propositions related to preference". See Meron, "The development of legal thought in Hanafi texts", in *Sl*, vol. 30, 1969, p. 107.
the cause of major ritual impurity is inzāl (emission of sperm) or merely the meeting of two sexual organs. We have shown before that the hadīth which argues in favour of the meeting of sexual organs as causing janābah is more reliable on account of this hadīth being reported by one of the Prophet’s wives, which makes her narration more acceptable since the subject matter of the hadīth concerned the Prophet’s family affairs.26 In addition, we have produced the words of ‘Ā’ishah that, “I did it with the Prophet and we bathed together”.27 This report does nothing other than support the relevant hadīth in question since it is the report of ‘Ā’ishah, the closest person to the Prophet particularly in this personal matter.

Not only that, the hadīth has been supported by many external considerations. Among others, it is supported by the interpretation of Q. 4:43, “O ye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter, nor when ye are polluted, save when journeying upon the road, till ye have bathed....”. The verse obliges one who is in the state of major ritual impurity (junūb) not to perform a prayer until he performs a major ablution. In this context, al-Shafī‘ī asserts that the Arabs understand junūb to denote sexual intercourse alone and not necessarily inzāl.28 Furthermore, it is supported by what is well established in Islamic law that hadd must be implemented on one who committed unlawful sexual intercourse even if

26 See page 140.
27 See page 140.
inzal did not take place. Owing to these indications, I believe that it is absolutely clear that janabah comes to exist by mere sexual intercourse even if the inzal did not take place. More significantly, this discussion demonstrates that by considering other elements of evidence as support to original evidence, one can achieve the most reliable interpretation.

The second problem extensively debated by jurists is related to the question of what should be done if two pieces of evidence, say, two Qur'anic verses or two ahadith, etc., are found to contradict each other. This situation concerns the conflict of two elements of evidence of equal level e.g. Qur'an vs. Qur'an or hadith vs. hadith. As for the contrary opposition i.e. Qur'an vs. hadith or Qur'an or Sunnah vs. ijma' and the like, it will be examined only in the following discussion. When the Qur'an is found to contradict itself, the preference goes to what is supported or explained by another verse which is of very rare occurrence or by a reliable tradition since nobody was more knowledgeable in the interpretations of the words of Allah than the Prophet himself. I will cite one example to illustrate how the Sunnah can play a significant role in removing the conflict between two Qur'anic injunctions. This is not strange since the Sunnah is entrusted to explain the ultimate meaning of the Qur'an as clearly indicated by the Qur'an itself. The case in mind is related to the hukm of fasting in Ramadān as to whether it is optional or obligatory. As a matter of fact, these two rulings are respectively implied

29 Ibid.

30 The Hanafis did not approve this form of preference because it depends on "many". (see Kashf, vol. 4, p. 79)

31 Gibb, Islam, p. 63.

32 See Q. 16: 44.
by two Qur'anic verses. The optional ruling of fasting is taken from Q. 2:183-184, "O ye who believe! Fasting is prescribed for you, even as it was prescribed for those before you, that ye may ward off (evil). (Fast) a certain number of days; and (for) him who is sick among you or on a journey, (the same) number of other days; and for those who can afford it there is a ransom; the feeding of a man in need - But whoso doeth good of his own accord, it is better for him: and that ye fast is better for you if ye did but know"; while the obligatory ruling of fasting is derived from Q. 2:185, "...and whosoever of you is present, let him fast the month, and whosoever of you is sick or on a journey, (let him fast the same) number of the days". However, many traditions are available to explain that the first was abrogated by the second. In other words, in the first stage or before fasting became strictly imposed by the Shari'ah, it was only optional: those who do not fast even without a proper excuse can replace it by merely feeding the needy. At the later stage, the excuse is given only to those who are unable to fast.

With regard to conflict between two hadiths, the general criterion to be employed, as mentioned elsewhere, is an examination of the reliability of the isnad. However, where the isnads are equally reliable, the jurists are divided amongst themselves. Al-Shafi'i has his distinct method of preference. In such conflict, according to him, choice should be made of the hadith that has the support of (a) the Qur'an; (b) another hadith of the Prophet; (c) the doctrine of scholars and (d) the


34 Ibid.
opinion of the majority of the Companions or (e) and the one which is more consistent with *qiyaṣ*.\(^{35}\)

The problem of appropriate time for morning prayer could exemplify the above. Two *ḥadīths* are said to be the kernel of this problem. The first, reported by Ṭalḥ b. Khadij, tells us that the Prophet said, “Start your dawn prayer at day-break (*ṭfār*) for it is most pious that you do so at that time”.\(^{36}\) Another tradition with a contrary impression was reported by ‘Ā’sihah that “They, the Muslim women, used to perform the dawn prayer with the Prophet and then they dispersed to their homes wrapped up in their robes and unrecognized by anyone because of the darkness (*ghalas*)”.\(^{37}\) Al-Shāfi‘ī prefers the dawn prayer to be performed during the *ghalas* as advocated in the second *ḥadīth*. He bases his preference on the grounds that the *ḥadīth* which stipulates *ghalas* is more consistent with the meaning of the Qurʿān and with several other *aḥādīth* of the Prophet. To be more precise, he maintains that his *ḥadīth* is parallel with Q. 2: 238, “Carefully observe the prayers including the middle prayer” holding that the ‘middle prayer’ is the dawn prayer.\(^{38}\) To perform the prayers properly and carefully, one needs to perform them at the beginning of their scheduled time and this is supported by many other *ḥadīth* where among others, the Prophet is reported to have said “To pray at the beginning of the appointed time is to gain God’s approval; to pray late (i.e. when the time has expired) means that one must beg His

\(^{35}\) Al-*Risālah*, paras. 777-802; *idem*, *Ikhilāf al-Ḥadīth*, pp. 522-523.


\(^{37}\) *Ibid*.

\(^{38}\) *Ibid*. 
pardon". 39 Not only that, to show the accuracy of this preference, he further contends that the majority of Companions are reported to have agreed in theory and practice that dawn prayer should be performed at ghalas. 40

Al-Shafi`i has taken an external consideration to argue that his hadith is more reliable. To this effect, it resembles the first consideration discussed before i.e. preference by virtue of many. In spite of this, I believe this form of conflict should be examined here to clarify some cases and problems which affected two schools of law namely the Hanafis and the Malikis i.e. the allegations that both have abandoned one or both of the conflicting ahadith and confined themselves instead to other elements of evidence such as qiyas, istihsan or ‘amal (practice of the Medinese). 41 The claim however, demands a critical examination for it is not only related to our present discussion but also to the purpose of being certain of the actual attitude adopted by the ancient jurists who were also credited with having established schools of law in Islamic legal history. This discussion will lead us to another unavoidable related discussion which is the conflict between two pieces of evidence of unequal level such as the Qur'an vs. the Sunnah and the like. Both concerns therefore, can be treated jointly in one form of discussion as follows.

39 Ibid. See also Raoudah, p. 208.
40 Al-Risalah, paras. 799-801.
41 See pages 131, 272 and Origins, pp. 23, 64.

Ibn Hanbal, on the contrary, is famous for his personal inclination to remove any conflict within the framework of traditions. If he cannot do this, he prefers not to answer at all. For details, see Spector, "Ahmad Ibn Hanbal's fiqh", in JAOS, vol. 102, 1982, passim.
The Hanafis who are also called *ahl al-qiyyās* or *ahl al-naẓar,* have been alleged as considering *qiyyās* superior to *khabar al-wāḥid* when they conflict. However, this is not true for the following reason. As required by a genuine examination, we have to examine this allegation by looking solely into their own literature and not into their opponents' writings. Al-Shāfi‘ī, one of their opponents, on many occasions, has criticised the Hanafis (as well as the Malikis) because they did not adhere to the *ḥadīth* but to other evidence such as *qiyyās.* Al-Shāfi‘ī repeatedly says that no *qiyyās* is valid when a relevant *Sunnah* is available or “reasoning and questioning are irrelevant in the face of the tradition of the Prophet”. So, that which comes after a *Sunnah* (in the hierarchy of sources) constitutes a proof only if a *Sunnah* is lacking. In order to show his opponent’s tendency, Al-Shāfi‘ī, among others, has brought forward the case of a slave belonging to many masters who has been manumitted by one of them. Both Al-Shāfi‘ī and the Hanafis held that this master should pay the other masters for their share in the slave and the slave becomes a totally free man.

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42 Ikhtilāf al-Ḥadīth, p. 563.

G. Makdisi has pointed out that sources are contradictory with reference to the understanding of the terms *ahl al-ḥadīth* and its atonym; *ahl al-ra‘y* or *ahl al-qiyyās* or *ahl al-naẓar.* See Makdisi, "The significance of the sunnī schools of law in Islamic religious history", in *IJMES*, vol. 10, 1979, pp. 3-4.


44 *Origins*, pp. 23, 110.

45 *Al-Risalah*, para. 1817; idem, *Ikhtilāf al-Ḥadīth*, p. 563.

46 *Ikhtilāf al-Ḥadīth*, pp. 479, 484-485.
However, if the master cannot afford to pay, the slave, according to the Hanafis, must be given the opportunity to earn so that he can buy his freedom from the other masters. According to al-Shāfi‘ī, the Hanafis, in this legal view have rejected the concept of partial freedom contained in the tradition which was the view of al-Shāfi‘ī himself i.e. (faqad 'utīqa minhu mā 'ataqa). Al-Shāfi‘ī further argues that they (the Hanafis) formulated this conclusion on the basis of analogy with the problem of inheritance. In the case of three slaves whose master had died, they became partially free, for only one third of every slave is considered 'free' from slavery. This is so because, in terms of inheritance, more than one third of a property (i.e. the slaves as in this case) of a deceased cannot be distributed to outsiders namely the slaves. Accordingly, each of them should work to earn some money to buy his freedom of the amount of the remaining two-thirds of the value. In this, the Hanafis were said by al-Shāfi‘ī to prefer qiyās over the Sunnah which is reliable and should be adhered to.47

I think this is an inappropriate example from which to argue that qiyās is superior to khabar al-wahid in the Hanafi school of law. As far as the case of partial freedom of a slave is concerned, it should be noted that arguments put forward by those who do not accept the concept of partial freedom were not solely based on qiyās. Apart from this, there are some reports which assert that that particular slave should be allowed to work and to buy his freedom from the other masters. Moreover, on the last sentence of al-Shāfi‘ī's hadīth, that is “faqad 'utīqa minhu mā 'ataqa”, there has been dispute as to whether it is originally from the

47 Ibid., pp. 562-564.
tongue of the Prophet or from one of the hadīth’s transmitters.48 This shows that those who disagree with al-Shāfi’ī’s opinion cannot be considered as those who put the qiyaṣ over the Sunnah, as alleged by al-Shāfi’ī. As we shall see, al-Shāfi’ī and the Hanafis are alike in this regard; the former, on many occasions has himself rejected one of two conflicting hadīths by adopting qiyaṣ. It is quite clear that al-Shāfi’ī who is credited to have been the first jurist to put legal sources in a proper hierarchical order,49 opines that qiyaṣ should not contradict the text since al-Shāfi’ī does not consider qiyaṣ to be one of the usūl but merely far‘. In other words, the result of qiyaṣ should be derived solely from the usūl called khabar lazim that is the Qur’an, the Sunnah and ijmā‘.50 Any contradiction between qiyaṣ and these sources is valueless for the former is not independent by itself in terms of authority, let alone able to contradict these usūl. In practice, however, al-Shaфи‘ī himself uses qiyaṣ to judge between contradictory hadīth and to suppress the one which he rejects, arguing that the one which is adopted by him is more consistent with qiyaṣ.51 For example, there are two conflicting ahadīth of the Prophet on tayammum reported by ‘Ammar b. Yasir and the other by Ibn al-Sammah. Rejecting the former hadīth, al-Shaфи‘ī argues that Ibn al-Sammah’s hadīth is more consistent and in agreement with the Qur’an and qiyaṣ.52

48 Ibid.; idem, Ikhtilaf Malik, pp. 197-198. See also Nayl al-Ausf, vol. 6, pp. 208-209.
51 Idem, Ikhtilaf al-Hadīth, p. 487.
52 Ibid, pp. 496-497.
As mentioned elsewhere, it is a natural and common practice in legal study that every jurist must provide an argument for his opinion. Otherwise, it is baseless and worthless. This applies also to the case in question in which the Hanafis have based their interpretation of the hadīth on an analogical approach. The case therefore does not genuinely link to the so-called "abandonment of khabar al-wāḥid" rather than to different jiṣḥāds and arguments in determining the precise meaning of the hadīth in question (particularly of the last part of it). Leaving aside the polemical writing by al-Shāfī‘ī, we should confine ourselves to what is actually proposed by the Hanafis. One example may be sufficient. Holding that a burst of laughter (qahqahah) in prayer renders both the prayer and the ablution void, the Hanafis remark that if there was no tradition on this point in question, qiyyās requires what is implied by other schools of law that only the prayer becomes void and not the ablution. This shows that the Hanafis are concerned with the hadīth which is heavier than qiyyās in this particular case. Al-Sarakhsī adds that it is exactly on this ground that Abū Hanīfah has opined that nabīdāh

Calder writes that "the problem of conflicting khabar al-wāḥid emerges in al-Risālah (para. 1250) where it is confused with the problem of a single khabar permitting two possible meanings (para 1251). A rudimentary scheme of preference has been brought forward (para 1251) but whether it would be sufficient to ensure that all jurists would always prefer the same hadīth (or the same interpretation of an ambiguous hadith) might well be doubted". (Calder "Ikhtilaf", p. 60)

53 For the hadīth, see page 237.

54 Al-Sarakhsī, Usūl, vol. 2, p. 153. See also Ibn Badran's al-Madkhal, p. 43
of dates is permissible though it is intoxicant because Abu Hanifah has relied on the *hadīth* instead of *qiyās*.\(^{55}\)

We are not concerned now with whether or not these are the correct legal consequences, rather to show that these arguments have clearly displayed the overriding authority attached by the Hanafis to the *Sunnah* of the Prophet. Moreover, they contend that there is no extension of analogy in the presence of a tradition and adherence must be shown to the tradition.\(^{56}\) Al-Sarakhsi, for example, said that *qiyās* is always inferior to *khabar waḥīd* when conflicting.\(^{57}\) To end the discussion concerning the Hanafis, I would like to quote Hurgronje who says, "Again I should like to emphasise that it is unjustifiable to regard Abu Hanifah as a despiser of traditions. The *Waraqāt* and its commentaries state explicitly that, whereas Ibn Hanbal is inclined to accept weak traditions (*aḥad*) as arguments and Shafi‘i relies only upon those with complete *isnāds* (*mutawatīr* or *musnad*), Abu Hanifah and Malik regard a whole class of traditions (*mursal*) which al-Shafi‘i had considered unreliable, as valid arguments (*ḥujjah*).\(^ {58}\) 

\(^{55}\) Ibid. See also *Kashf*, vol. 1, p. 309; Ibn Taymiyyah, *Fatawā*, vol. 20, pp. 304-305.

For more details, see "*al-Sunnah in the School of Opinion*" in al-Qardjawi, *al-Madkhal*, pp. 47-50.

\(^{56}\) Abū Yusuf, *Kitāb al-Āthār*, p. 28, as cited in Ahmad Hasan’s *The Early*, p. 143.


\(^{58}\) Hurgronje, *Selected Works*, pp. 286-287 (note no. 4)

Mention should be made that even al-Shafi‘i, who is according to many scholars, the champion of the *Sunnah*, has been charged by Ibn ‘Abd al-Hakam of neglecting the *Qur‘ān* and the *Sunnah* of the Prophet in a work
On the other hand, of the Malikis, it has also been alleged, particularly in the writings of al-Shafi‘i that ‘amal or the practice of the Medinese prevails over khabar al-wāhiḍ when they conflict. Let us take the case of khiyār al-majlis as a way of testing the soundness of this allegation. As far as the hadīth “parties to sale are entitled to retract until they separate (mā lam yatafaraqa)”, is concerned, Malik b. Anas is charged with rejecting the hadīth arguing that the hadīth implication is ‘contrary’ to what is established or practised by the people of Madīnah. Again, it is not appropriate to conclude from this that Malik, in his legal thought, gives precedence to ‘amal over khabar al-wāhiḍ if they conflict. Regarding khiyār al-majlis, the Malikis (as well the Hanafis) are of the opinion that when a contract is completed by offer and acceptance, both the buyer and the seller are bound to all legal consequences arising from that contract. Both have no right to repudiate that contract. To support this interpretation, probably, we find Malik in his al-Muwatta arguing in favour of this, by saying simply “Here in Medina we have no such known limit and no established practice (hadd ma‘ruţ) for this matter”.

entitled “al-Radd ʻala al-Shafi‘ī fima Khalafa fīhi al-Kitāb wa al-Sunnah”. Al-A‘zami further asserts that “if we were to believe every scholar’s accusation against his fellows, few would be found who were total adherents of the Qur‘ān and the Sunnah of the Prophet. (On Schacht, p. 90)


60 Al-Shafi‘ī, Ikhtilaf Malik, pp. 219-220; al-Hafnawi, Dirasat, p. 276.


However, this is not an adequate proof from which to suggest that Mālik gives priority and precedence to ‘amal over the hadīth. The Malik quotation that no established practice was found in Madīnah in favour of khiyār al-majlis is merely, as is evident throughout his argument, to support one of two possible interpretations implied by a particular hadīth or to select one of two conflicting aḥadīth.63 There is a disagreement in giving the precise meaning of two words in the hadīth namely the meaning of separation (tafarruq) and two parties (al-mutabāyi‘ayn). Mālik thought that what was meant by separation in this case is only separation by word. Hence, he did not permit any party to a sale contract to change his mind after acceptance, even if both parties were still at the place of contract.64 As regards ‘two parties’, it was meant by Mālik as two bargaining parties (mutasawimayn) and not two parties of buyer and seller (mutabāyi‘ayn).65 It is only to support his doctrine, according to my opinion, that Mālik resorted to the practice of the Medinese for it reflects the continuous practice by the early Muslims starting from the Prophet’s time. It seems that ‘amal is nothing other than a means to confirm and to support a particular argument and not to be put over the Sunnah when they conflict.66

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65 Ibid.
It appears to me also that the 'rejection' of khyyar al-majlis by Malik might be grounded on one of his principles that is, khabar al-wahid should not be taken into consideration as bearing legal impact when it contradicts a particular legal principle which is certain and definite in character. In another case, he did not rely on the hadith that "when a dog licks a dish, wash it seven times, one of which must be with clean sand", arguing that the hadith, being solitary, contradicts a definite legal principle stated clearly in the Qur'an that one is permitted to consume what has been hunted by a trained hunting dog (mukallabin). Likewise, it is a principle in Islam that one cannot change his mind after giving his acceptance in any transaction. This attitude, relatively speaking, corresponds to what has been reported that both 'A'ishah and Ibn 'Abbas had ignored the hadith that requires a Muslim who just woke up from sleep to wash his hand three times before putting his hand in the basin for any other purposes such as ablution simply because this hadith was understood as standing against the principle of lifting hardship in Islam.

On the other hand, the details of the manner in which Malik applied his doctrine of 'amal have been the subject of a major study by

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An illustrative explanation of ikhtilaf between the Shafi'is and the Malikis on the question of cleanliness and uncleanness of the dog can be found in Ebied and Young's "An unpublished legal work on a difference between the Shafi'ites and Malikites", in OH, vol. 8, 1977, passim.
68 Al-Thaqaqf, "al-Ziyadah", p. 258.
one scholar\textsuperscript{69} which might offer a more detailed exposition of \textit{`amal} in Maliki legal thought. For example, he has brought forward two distinct cases to show the manner in which \textit{`amal} was adopted by Malik. In the question of judgement on the basis of the oath of the plaintiff supported by a single witness; Malik cites hadith and athar to support the continuity of this precept. None of these texts, however, provides fundamental information such as the limitation that this procedure is to be applied only to money matters and not in cases of libel, criminal cases, punishments and so forth. All of which Malik provides from Madinan \textit{`amal}. Similarly, Malik cites texts which report that the Prophet and his Companions performed mash occasionally when performing ritual ablutions. None of these texts, however, describes how mash was performed, the information for which Malik provides from \textit{`amal}.\textsuperscript{70}

As regards the practice of the Medinese, relatively speaking, it receives a considerable account from other schools of law for it may add weight to a particular argument particularly in cases of conflict. Without any hesitation, al-Ghazali who belongs to a school of law which strongly criticised the \textit{`amal}, has propounded that a tradition which is supported by the practice of the Medinese should be preferred for Madinah is the city of the hijrah and the city of the revealed abrogating verses.\textsuperscript{71} Likewise, Abu Yusuf has changed a number of his opinions when he learned that the

\textsuperscript{69} U.F. `Abdullah, "Malik's concept of \textit{`amal} in the light of Maliki legal theory", Ph.D dissertation, University of Chicago, 1978 (particularly chapters 3-8) (cited after as \textit{`Amal})

\textsuperscript{70} Ibid., pp. 398-399. See also F. Rahman, "Concepts", p. 17.

\textsuperscript{71} Al-Mustasfa, vol. 2, p. 396.
practices of the Medinese were contrary to what he had been holding as valid.\textsuperscript{72}

We can note that the Sunnah as the second material source of Islam is undoubtedly upheld by every school of law\textsuperscript{73} in all cases of conflict provided it is reliable. This is an agreed notion among them but problems occur when the authenticity of a particular hadith in question is suspected for one reason or another or it is susceptible to many possible interpretations. In cases in which conflict takes place either between two possible interpretations of one hadith or between two hadiths, the jurists must resort to means that they thought to be the most accurate way of preferring one over the other after the failure of reconciliation. The jurists, as ordinary people, were not bound to follow a standard scheme of preference. If Malik is charged with resorting to 'amal in selecting the most preferred view, likewise, other jurists should be equally criticised for they also have resorted to their own criteria of judging between two contradictory ahadith or interpretations. We have already pointed out in chapter five that al-Shaf\'i\textsuperscript{7} does accept the authority of hadith mursal conditionally. Among others, he is willing to accept the interrupted isnad which comes from leading tabi\textsuperscript{in} only. Interrupted isnad from other tabi\textsuperscript{in}, al-Shaf\'i\textsuperscript{7} argues, might carry greater room for uncertainty.\textsuperscript{74} This reveals that the attitude held by al-Shaf\'i\textsuperscript{7} is only a matter of personal consideration. It becomes obvious when al-Shaf\'i\textsuperscript{7} did not accept all the mar\textsupersil (plural of mursal) reported by leading tabi\textsuperscript{in}. He accepts

\textsuperscript{72} Ibn Taymiyyah, Fatawa, vol. 20, p. 304 ; al-A\textsuperscript{z}ami, On Schacht, p. 56.

\textsuperscript{73} Al-Taqr\textsuperscript{ir}, vol. 2, p. 225 ; Musallam, vol. 1, p. 17 ; al-Zuhayl\textsuperscript{i}, al-Fiqh, vol. 1, p. 9 ; Hujjiyat al-Sunnah, p. 21.

\textsuperscript{74} Al-Risalah, paras. 1277, 1286.
the *marāsil* of Ibn al-Musayyib but he does not accept the *marāsil* of al-Zuhrī though both are the leading *tabi‘in*.75

Supposing that it was true that Malik did ignore some solitary traditions in favour of the contrary existing practice of the Medinese, one should understand this controversial problem in a manner that was perceived by Malik. Only on this condition, can one appreciate the legal thought of Malik. This has led Abu Zahrah to note that the practice was upheld by Malik, not solely on account of the practice of a group of people but rather on the basis of a pre-dominant and widely accepted tradition (called practice) over solitary traditions when they conflict.76 As far as Malik’s contention that ‘*amal* prevails over tradition is concerned, mention should be made that from nine hundred or so traditions from the Prophet quoted by Malik, no more than ten are neglected in favour of practice or for other reasons.77 Accordingly, this is not an adequate basis from which to argue that Malik and the Malikis considered practice more authoritative than the traditions of the Prophet.78 Although Malik frequently quotes many authorities which reflect, to some extent, the

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75 Al-Bayhaqī, *Ma‘rifat al-Sunan wa al-Athār*, vol. 1, p. 82. (cited from Ahmad Yusuf, *al-Shaf‘ī*, p. 79)


Shah Wali Allah noted that "when Imam Malik uses the word al-*Sunnah* in the *Muwattā* he means the established fundamental principles". (al-Musawwa *min Ahadith al-Muwattā*, Mekkah, 1315 A.H., pp. 15-16, cited from Guraya, *Origin*, p. 13)


78 Ibid. See also Doi, "The *Muwattā* of Imam Malik on the genesis of the *Shari‘ah* law: a western confusion", in *HI*, vol. 4, 1981, p. 39.
practices of the Medinese, he may or may not follow these authorities. 79 Yet, if we examine the contentions made by al-Shafi'i against Malik in *Ikhtilaf al-Hadith*, "these contentions pertain almost exclusively to *hadith* which Malik himself has transmitted in the *Muwatta* on the authority of the most highly regarded Madinan transmitters. The difference between al-Shafi'i and Malik, therefore, is one of theory. Malik studies *hadith* against the background of Madinan *‘amal* and al-Shafi'i studies Madinan *‘amal* against the background of *hadith*. If a legal text is ambiguous, Malik removes its ambiguity by placing it within the semantic context of *‘amal* whereas for al-Shafi'i, it is the apparent (*zahir*) or literal meaning of the text itself which one is to follow. He no longer regards Madinan *‘amal* to be a valid semantic context to the *hadith*. 80

By this, we have seen that external consideration may play an important role in achieving a proper legal judgement. The Sunnah of the Prophet, the practice of the Companions or rather the practice of the Medinese, the result of or the consistency with *qiyas* and so forth are extremely useful in this regard. In other words, we can also say that the more a particular evidence is supported by many other acceptable arguments, the stronger it becomes in terms of preferring one over the other.

In concluding remarks, I have this to say. Relatively speaking, al-Shafi'i did not impose many pre-conditions on acceptance of a

80 Ibid.
particular *khabar al-wāḥid* as did the other opposing schools of law.\(^81\) As for al-Shafi‘ī, "a *hadīth* from the Prophet is self-validating, requiring confirmation from no other quarter. It is neither reinforced nor weakened by a report from any source. Should it be reported that one of the Companions acted otherwise, it is incumbent upon people to follow the report from the Prophet, ignoring all other reports. It is possible that one of his oldest associates, well - versed in the Prophet’s way, may yet have been unaware of some element of his practice known to another".\(^82\) Others, however, have set particular conditions to confirm the reliability of traditions\(^83\) and on many occasions, these conditions are believed to bear a significant strength in case of conflict and preference, for which, this matter has been included within the present discussion.

At this stage, we should devote time to a separate re-examination of the conflict between two unequal pieces of evidence more carefully. In the previous discussion, we have hinted that *hadīth* from the Prophet, even a solitary *hadīth*, must take priority over other elements of evidence such as the opinion of the Companions, the practice of the community, *qiyaṣ*, etc. However, in the absence of a *hadīth* from the Prophet, the jurists undoubtedly followed the precedent of the Companions.\(^84\) The opinions and practices of the Companions were taken into consideration.

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As far as the condition of al-Shafi‘ī is concerned, see *al-Risālah*, paras. 1000ff.

\(^82\) *Ikhtilaf al-Hadīth*, p. 479. See also idem *Ikhtilaf Malik*, p. 191ff.


\(^83\) See page 78ff.

\(^84\) *Hujjat Allah*, vol. 1, p. 145.
owing to the fact that they participated with the Prophet in applying divine orders and were intimately acquainted with the Qur'ān, its spirit and its promulgation by the Prophet. In other words, they were better informed than those who came later because they had known the Prophet and were thus capable of interpreting what he had said. 85 In cases where they themselves differed, the subsequent jurists might differ from the Companions’ opinions and practices. 86 In order to prefer one opinion over the other, many means are taken into consideration. Al-Shāfi‘ī, for example, preferred the opinion of the first four Caliphs over others. 87 Some of the jurists, to a certain extent, have placed the preference according to the subject matter of dispute. If dispute falls in the so-called “hārm and hālāt”, the opinion of Mu‘ādh should be given more adherence. 88 Similarly, the fatwas or the opinions of Zayd b. Thābit in cases of inheritance should be upheld for he was the person among the Companions to best comprehend the law of inheritance. 89 Although many other considerations can be added to this discussion, I will devote no further study to them for they have either been discussed or are of no significance in terms of an accurate tarjīḥ.

85 Rauḍah, p. 84; al-A‘zamī, On Schacht, pp. 9, 83.

Other jurists are holding the same way of preference. See al-Musəwaddah, pp. 85, 86-87, 314.
89 Ibid.

For the basis of this preference, see al-Bayhaqī’s Sunan al-Kuḥra, (vol. 6, p. 210) in which the Prophet is reported to have said, “The best among you (in terms of knowledge) in inheritance, hālāt and hārm and legal judgement are Zayd, Mu‘ādh and ‘Alī (respectively)”.
The most difficult aspect one confronts throughout the foregoing discussion is the problem of setting up a proper hierarchical order of legal sources. As previously mentioned, the absence of this order would create many points of ikhtilaf in fiqh.\(^90\) The intention of the present discussion is to ensure that every jurist has the same priority of sources in his mind. Though it is not an easy task and a painstaking study, we should, at least, try to open up the relevant arguments in order to lay down a proper order of hierarchy of sources, if possible.

Al-Sháfí‘ī has been credited by al-Rāzī, as the first to put the so-called "marātib al-adillah" in a proper scheme that could be useful reference to the jurists.\(^91\) It was clear that al-Sháfí‘ī has placed al-Qur‘ān together with the Sunnah and ijmā‘ as the usūl (roots) leaving qiyyās to be considered as merely a branch of these usūl.\(^92\) At the same time, he has argued that the order, as put by himself, must be observed in terms of supplying evidence in legal arguments for the sake of marātib al-adillah i.e. the one that should come first is the first in the list.\(^93\)

After al-Sháfí‘ī, al-Ghazālī seems to be the first jurist to have put legal sources in a proper list of priority. He says, “a mujtahid should look first into ijmā‘, followed by the Qur‘ān and the Sunnah mutawātirah where both are equal. Then, he should observe the generality of the Qur‘ān and its ‘apparent’ meaning. The following stage is to investigate among

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\(^90\) See page 24.

\(^91\) Al-Rāzī, Manaqib al-Sháfí‘ī, p. 57, cited from al-Mansūr, Usūl, p. 25.

\(^92\) Al-Sháfí‘ī, Iḥbāl al-Īstīḥsān, p. 302.

\(^93\) Al-Risālah, paras. 1815-1818. See also Ahmad Yusuf, al-Sháfí‘ī, p. 46.
khabar al-wāḥid, the relevant traditions that could specify the 'umūm of al-Qur'ān. The last stage is to consider qiyyās .... if two qiyyās or two umūm or two traditions are conflicting, he must resort to tarjīḥ. 94 Al-Ghazāli and some of the jurists have exaggerated the value of ijmāʿ so much so that they consider it prior to the Qur'ān and the Sunnah. In favour of this view it is argued that both the Qur'ān and the Sunnah are liable to abrogation and interpretation whereas ijmāʿ is infallible and decisive. 95 There is no room for doubt if a rule is supported by ijmāʿ. It is also prior to qiyyās because the latter is always liable to error. It is worthy of remark that the ijmāʿ which is considered prior to the Qur'ān and the Sunnah is the kind which is decisive, verbal, visible (mushāhād) and reported by tawātūr. As regards speculative ijmāʿ, the Qur'ān and the Sunnah are prior to it. 96 Supporting this viewpoint, al-İsfahāni remarks that ijmāʿ is superior to all sources of law (adillah) and no authority can be basically compared with it. He ascribes this view to a large number of scholars. 97

96 Ahmad Hasan, Ijmāʿ, pp. 149-150.

Al-Shafiʿi, on the contrary, places ijmāʿ after the Qur'ān and the Sunnah i.e. ijmāʿ cannot be placed on an equal footing with the Qur'ān. (al-Risalah, para. 1815f.)

It appears to me that al-ijmāʿ which is not equal to both the Qur'ān and the Sunnah is the consensus of legal specialists which is not accepted by al-Shafiʿi. This is so because al-Shafiʿi, on other occasions, has placed ijmāʿ as equal to both the Qur'ān and the Sunnah provided it is the agreement of the whole ummah, both specialists and non-specialists. (see al-Risalah, p. 599 note no. 10 ; Ahmad Yusuf, al-Shafiʿi, p. 91)

97 Irshād, p. 78.
This method of preference however, is theoretical rather than practical. No single genuine example has been produced to confirm this particular conflict which could be followed by a genuine tarjīḥ simply because no genuine ʿijmāʿ would contradict the Qurʾān. The famous example given in this area of conflict is related to the prohibition of marrying one's wife's maternal or paternal aunt concurrently.98 It is true that the Qurʾān did not prohibit such a marriage whereas in turn, through implied meaning of the phrase “wa uhilla lakum mā warā’ dhālikum”, the Qurʾān has no objection to such a marriage. The prohibition is merely established through a tradition of the Prophet which notes that such a marriage would break the ties of good relationship between one's wife and her relatives.99 The ʿijmāʿ has been alleged to have taken place in terms of including such a marriage in the prohibitory list of marriages as prescribed by the Qurʾān.100 Therefore, it is unacceptable to regard this conflict as a conflict between ʿijmāʿ and the Qurʾān. It is rather the conflict between the Qurʾān and the hadīth that can be successfully removed by takhṣīṣ.101

Likewise, in the controversy over the status of the Sunnah compared to the Qurʾān, at least three contrary orders can be found. Al-Shāfiʿī holds that the (reliable) Sunnah and the Qurʾān are equal, arguing that both are divinely revealed.102 By contrast, the Hanafis

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98 Al-Fiṣr al-Samī, vol. 1, p. 45.
99 Muslim, Sahīh, vol. 4, p. 135.
100 Shaʿbān, Dirāsāt, pp. 51-52.
101 Al-Risālah, para. 629; al-Sībāʿī, al-Sunnah, p. 378.
assert that the Qur'an is superior to the Sunnah. Among others, they argue on the basis of the tradition of Mu'adh on the eve of his departure to Yemen as a qādi and a teacher. The tradition clearly organises the order of sources into a proper manner in which the Qur'an was given the first priority. This order was then confirmed by the Prophet's approval. It is not strange, therefore, when one finds two terms used by the Hanafis, unlike the jumhūr, to indicate two contrary implications namely fard and wajib. This is due to their notion that obligatory order instituted by the Qur'an is considered as fully obliged known as fard, whereas it is called wajib if it is constructed through the Sunnah.

Ahmad b. Hanbal, on the contrary, prefers the Sunnah over the Qur'an when they conflict, for the Sunnah always explains the Qur'an.

As mentioned earlier, no definite solution is available on this dispute. Moreover, this attitude is not explicitly stated by each imām; rather it is a conclusion or observation made by the subsequent jurists which is further attributed to a particular imām. This observation, as a matter of fact, was personal in consideration. It is evident when the imāms themselves were not consistent with this attitude in their procedures in passing fatāwā e.g. the Qur'an or the Sunnah having been interchangeably put at the top of the rank of evidence. Furthermore, both


104 Ibid.


106 Al-Muswaddah, p. 311.
are, in fact, inseparable as the Sunnah explains and clarifies the Qur'ān and—most importantly—applies its teachings and methodology. I believe however, this dispute and the like should be comprehensively and not partially judged. For a partial attempt at examination and judging would lead the whole legal sources in terms of a proper hierarchical order into an extreme and unsolvable conflict.

On the other hand, some of the jurists attempt to give the first priority in a contrary order. Neither the text nor the ījmāʿ should be regarded at the top of this order. Al-Tūfī, for example, stipulates and defends the view that regard for human welfare has or must have priority of consideration above all forms of religious texts (that is, above all texts considered as legal or semi-legal, whether in the Qur'ān or in the Sunnah) or other sources regarded as legal by the jurists such as ījmāʿ and qiyās when they conflict. He argues that the Qur'anic texts and the Sunnah are divergent and contradictory to each other and that the latter is self-contradictory in its texts and sources of transmission. This does not apply to maslahah. In short, maslahah or regard for human welfare, is, according to him, the highest and strongest legal source or principle, which constitutes the very aim and objective of religion. He further argues that sources other than maslahah are not valid unless they display promotion of benefit or prevention of evil. In other words,

109 Ibid.
110 Ibid.
maslahah is the aim while other legal sources, be it the Qur’ān, the Sunnah or ījmā‘, are merely the methods. Should there be any conflict between them, maslahah takes precedence.\textsuperscript{111}

Again, we are not able to provide a final and clear-cut answer to this proposal for many reasons. First of all, as repeatedly stated, a comprehensive judgement is more acceptable than a narrowed and partial judgement for cases are variable according to subject-matter, times, places, customs, circumstances, persons, etc. A correct legal view in a particular case does not necessarily prove applicable to the same case in another time, place and circumstance. As regards maslahah, though Islam strongly recognised human welfare, it was left to the scholars and specialists to offer the details where Islam provides only fundamental principles of maslahah.\textsuperscript{112} As a logical consequence and more importantly, maslahah itself would give rise to a variety of views for it is not sharply defined. The second reason is that maslahah is strictly directed to matters of human relationships, that is, in legal, social or political matters. This is acknowledged even by al-Tūfī himself.\textsuperscript{113} Hence, to prefer what is only in conformity or harmony with the regard for human welfare is not appreciated for the maslahah is not only highly

\textsuperscript{111} Kerr, Islamic Reform, p. 100; ‘Abd al-‘Azīz, "al-Maslahah ", p. 114.

However, it should be noted that the priority of maslahah over both texts and ījmā‘ (as argued by al-Tūfī ) is constructed on the ground of bayān and takhfsīs; not by abandoning both. See Mustafa Zayd, al-Maslahah fi al-Tashri‘ al-Islāmi . (p. 289) as cited in al-Zuhayli, Uṣūl , vol. 1, pp. 803, note no. 3; Mahmaṣānī, Falsafah, pp. 16-117.

\textsuperscript{112} See Bannerman, Islam, pp. 196-197.

variable, as previously said, but also because of its limitation to those laws that are concerned with transactions only. Since other parts of law, although contradictory such as personal worship are not applicable to maslahah, this consideration of tarjih ought not to be generally adopted. Moreover, al-Tuff himself did not give further details on how to achieve a valid maslahah and accordingly to prefer it over other sources when they conflict. This gives the impression that his theory does not fit the practical case for the maslahah, as previously said, is unfixed and flexible as well as variable according to unlimited considerations.115

As a conclusion of this discussion, I would like to re-assert that a general attempt to organise the order of the hierarchy or priority of sources e.g. the Qur’ān always prevails over the Sunnah or vice-versa, is neither an accurate nor a consistent way of preference, for every single case of conflict should be treated exclusively on its own background and problems. To apply this order to every single case of conflict may render legal consequences more conflicting for legal sources, indeed, are substantially concurrent and complement each other.116 To put, say, the Qur’ān or the Sunnah or ijma’ or maslahah or other sources and considerations always at the top of the list is inaccurate. Nevertheless, the question remains as to what is the proper solution of this?

However, if a comprehensive order of legal sources remains necessary, I would like to suggest what has been propounded by Sobhi Mahmassani, a modern Muslim lawyer. He says, "Effort must be made to reconcile all hearts and unite the various schools. This, in my opinion,

can be achieved by a return to the same and only original sources of law. Such a return should take into consideration the following bases:

(a) To adopt the provisions of the Qur'ān as the first basis for Islamic teachings and jurisprudence; to distinguish in this respect between compulsory and voluntary or directive provisions on the lines already attempted by interpreters of the Qur'ān and scholars of the science of legal sources; and then apply these provisions in accordance with their respective significance.

(b) To adopt the Sunnah in all obligatory religious provisions, provided that this Sunnah is authentic and acceptable in the various Muslim schools and that it is consistent with the text of the Qur'ān.

(c) To adopt the rest of the Sunnah, that is to say the traditional teachings and precepts whose authenticity had been disputed by reliable leaders of the schools, provided they are consistent with reason and acceptable to jurists and scholars of the science of legal sources (ʿilm al-ugūl) on the basis of the principle mentioned above, namely the truly traditional is always consistent with the truly rational.

(d) To choose from the legal rules based on the interpretations of jurists those which are most suitable for the needs of modern society, public interest and principles of justice and equity.117

Although this proposal remains doubtful, it at least, offers a significant principle in terms of the hierarchical order of sources where legal texts still occupy the first priority. Maslahah or human welfare must therefore be constructed in the sphere of legal texts for 'the truly

117 Mahmūdī, "Renassaince", pp. 196-197.
traditional is always consistent with the truly rational'.\textsuperscript{118} In short, this proposal is indicative of the primacy of revelation over reason and yet it is, in the meantime, an embodiment of the significant role that reason must play side by side with revelation for both are complementary to each other.

A \textit{murajjih} may also employ language or linguistic principles to arrive at the most preferred view. It is not strange to do so since both the Qur\textsuperscript{ā}n and the Sunnah are totally Arabic in character. A significant example of this lies in Q. 6:122, "And eat not of that whereon Allah's name hath not been mentioned, for lo! it is abomination (\textit{wa innahu lafīṣq})". Basing themselves on this verse, Abu Hanīfah and Mālik contend that Muslims are forbidden to consume flesh of animals slaughtered by a Muslim who has not mentioned the name of Allāh purposely.\textsuperscript{119} By contrast, al-Shāfī‘ī sees no objection to that provided that it is slaughtered by a Muslim; whether he pronounces the name of Allāh or not, purposely or unconsciously for the reciting of the name of Allāh is merely recommended.\textsuperscript{120}

What makes al-Shāfī‘ī permit the absolute slaughtering by a Muslim is his interpretation of the verse in question. The verse, according to al-Shāfī‘ī, prohibits merely what is immolated in the name of


\textsuperscript{119} \textit{Bidayah}, vol. 1, p. 448.

\textsuperscript{120} Ibid.
idols. 121 Among others, the Shafi'is as well as the Hanafis have defended their legal views respectively by considering the phrase 'wa innahu lafisq' for it is believed to be the 'illah of that prohibition. The Hanafis regard the 'waw' (and) in the verse to denote new meaning (lit al-istīnaf) i.e. the consuming of that slaughtered animal is considered as abomination. The Shafi'is on the contrary, understand 'waw' to imply an adverb (ḥaliyyah) which would make the meaning of the verse 'do not eat a slaughtered animal which is an abomination'. 122 The Shafi'is continue to argue that if one wants to know exactly what is intended by the word fisq, one should do this by looking at another verse in the Qur'an which might clarify its exact meaning. Q. 6.146, "Say: I find not in that which is revealed unto me aught prohibited to an eater that he eat thereof, except it be carrion, or blood poured forth, or swineflesh - for that verily is foul - or the abomination which was immolated in the name of other than Allah ..." is said to offer a considerable explanation to the former verse. By matching these two verses, it is clear that the flesh prohibited to the Muslims is merely of those animals immolated in the name of other than Allah. 123

We can safely conclude therefore, that linguistic principles may play a significant role in tarjīḥ as shown. This feature is related to what is known as qarīnah for the qarīnah might be constructed on the basis of the language as well as on other grounds of indication as previously

121 Al-Qurṭūbī, al-Jamī', vol. 7, p. 75.
122 Badran, Bayān, p. 101.
Al-Darūnī considers "waw" to be a mushtarak. (See al-Manāhīj, p. 91)
123 Ibid. ; al-Darūnī, al-Manāhīj, pp. 91-92.
shown. Accordingly, precedence should be given to al-Shafi'i's view for it is not only supported by qar'nah that is language considerations, but also by a hadith which points out that a believer slaughters in the name of Allah whether he actually pronounces the name of Allah or not.

Another method of preference in conflict between two ahadith by considering external factors, is to prefer the one whose content exceeds that of the others. We have already pointed out in the first chapter that in conflict concerning different forms of tashahhud, al-Shafi' declares his preference for the one reported on the authority of Ibn 'Abbas, saying that it contains more words than the other versions, which implied that it is the most complete one. According to the Shafi'is and the majority of the jurists, additional matter by a reliable transmitter is accepted. In case of conflict, the one whose content or ruling exceeds that of the others would prevail. On the other hand, the Hanafis provide a detailed explanation of this problem. If the additional matter is found in another transmission, it is accepted, provided that the second report is

124 Badran, Bayan, pp. 102-105.
125 See page 140.
126 Ifatik p. 489.
127 See page 33.
transmitted by the same person who transmitted the first. 129 Nevertheless, if the additional detail comes from another transmitter in another report, both should be jointly applied if possible. The reason behind this is the possibility that the Prophet might have regulated two matters at two different times. 130

Al-Shafi'i's main argument in this conflict is to the effect that "when two ahadith contradict each other and one of them contains additional detail, it should be preferred for it requires what is not required by the other (report)"). 131 It is precisely on this justification, that al-Shafi'i holds that prayer on the occasion of the eclipse of the sun or the moon should be two raka'at, each of which comprised two ruku'; he bases this requirement on a hadith of the Prophet reported by many authorities such as Ibn 'Abbas, 'A'ishah and 'Uthman b. 'Affan. 132 Some of the jurists hold that the prayer should be performed in two raka'at, each has one ruku' like ordinary prayers. They argue that the transmitter of the report i.e. Nu'mān b. Bashīr, reported that the Prophet performed the prayer without mentioning these two ruku' for each raka'ah. 133

It is relevant also to study the conflict between two ahadith, one of them providing an affirmation of a particular ruling and the other its negation. Al-Shafi'i and some of the Hanafis such as al-Karkhī, prefer the former on the grounds that the affirmative implies that its

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131 Ikhtilaf al-Hadith, p. 527.
132 Ibid.
133 Ibid.
transmitter had a more reliable memory and suggests that the first reporter of the *hadīth* himself witnessed the incident which occasioned it whereas the negating *hadīth* carried the contrary impression.\(^{134}\) Al-Juwaynī has ascribed this view to the majority of the jurists.\(^{135}\) Al-Amīdī, however, tends to give a contrary priority\(^ {136}\) while other jurists such as al-Ghazālī and 'Īsā b. Abban consider both as equally strong whereby preference between them should not be sought from this point but from other standpoints of consideration.\(^ {137}\)

An example of this occurs over the question of the manner of lifting the hands in prayer. There are two conflicting *ahadīth*; one states that the Prophet lifted his hands parallel to his shoulder when he commenced his prayer, when he was about to bow for the *ruku* and when he stood erect after the *ruku*, whereas the other reports the Prophet as having lifted his hands only at the commencement of his prayer. Adopting the first *hadīth*, al-Shāfi‘ī says to his interlocutor, “The *hadīth* which is affirmative (about lifting the hands on two other occasions) is preferable to that which is negative”.\(^ {138}\)


\(^{135}\) *Al-Burḥan*, vol. 1, p. 1200.


\(^{138}\) *Ikhtilaf al-Hadīth*, p. 524. For other examples, see *idem*, *Ikhtilaf Malik*, p. 193.

Al-Shāfi‘ī also considers many narrations of this *hadīth* as one of the *murājjīyat*. (ibid)
Theoretically, the *jumhūr*’s opinion seems to be more reasonable. However, as repeatedly proposed in cases of conflict, a *murājīḥ* is strongly advised to consider all relevant arguments from all standpoints of *taṣāḥīḥ* before giving any preference. Other factors such as the word’s classification, the reliability of *iṣnād*, etc., might offer a considerable balance of weight in favour of one of these two methods of preference.

To presume that two texts happen to be genuinely in conflict and can in no way be distinguished by any previous means of preference, then, the prohibitory text is to be given priority over the permissive, this seems to be a philosophical rather than a legal point of argument. Accordingly, it is not surprising when the jurists are in disagreement upon the accuracy of this mode of preference. One group of the jurists hold that precedence should be given to the prohibitory text or ruling, while another group of the jurists contend the contrary. The third group however, differ from both arguing that this type of conflict has no possible solution for both conflicting principles are equal and admit no possibility of preference. As a result, both texts are abandoned when they conflict.

The first group produces two main arguments in favour of their opinion. First, they quote what is believed to be the saying of the Prophet,

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141 Ibid.
142 Ibid.

This view is attributed to Abū Ḥāshim, ‘Īsā b. Abān and al-Ghazālī. See *‘Iwād, Dirāsāt*, p. 486.
reported by Ibn Mas'ūd, which reads as "whenever halāl and harām clash with one another, it is the latter that should take precedence". Although this report receives many severe criticisms by the traditionists which subsequently makes it doubtful whether it is a reliable report or not, it gained popularity among the jurists to the extent that it has become one of the legal maxims known as 'where prohibitions conflict with an obligation, the prohibition shall take precedence'. They add to this, saying that to follow what is prohibited instead of what is permissive is in conformity with the so-called precaution. In other words, it is preferable or more advisable to abstain from doing what seems to be forbidden though the case, in fact (but unknown), is actually permissive because to avoid mafsadah (evil) embodied in harām is better than to gain maslahah preserved in halāl. This is also supported by a legal maxim, 'repelling an evil is preferable to securing a benefit'. In short, though the case has two possible rulings, as a matter of precaution, one should avoid anything that is prohibited.

The second group appears to justify its opinion by similar adherence to the consideration of legal maxims. In short, they argue that to prefer the permissive over the prohibitory ruling is nothing other than to confirm what is widely established in the Shari'ah that everything is

143 Al-Suyūṭī, al-Ashbah, pp. 105-106.
145 Al-Suyūṭī, al-Ashbah, pp. 105-106.
147 Al-Zarqa', Sharḥ al-Qawa'id al-Fiqhīyyah, p. 205.
originally permissible unless a contrary condition is proven.\textsuperscript{148} In fact, this has become one of the legal maxims i.e. "it is a fundamental principle that a thing shall remain as it was originally" known as \textit{al-iba-hah al-asliyyah}.\textsuperscript{149} Obviously, if one is uncertain of the prohibition, he should confine himself to this principle which renders everything permissible as long as a particular act or thing is not found to be prohibited by a clear evidence.\textsuperscript{150}

The previous arguments offer an easy conclusion to the third group of the jurists who said that since both arguments are equal in strength, the two should be discarded for it is impossible to prefer one over the other in the absence of any convincing justification.\textsuperscript{151} As far as \textit{tarjih} is concerned, we can conclude that a \textit{mura\'jih} must take all the relevant considerations into account. But if both conflicting pieces of evidence happen to be equal on all these relevant points of \textit{tarjih}, then, he should search for any other considerable indication outside the relevant discussions which might add weight to one of the conflicting arguments. To adopt the superiority of permissibility over its antonym, namely prohibition or vice-versa, once and for all, is quite irrelevant and inaccurate. In turn, I believe, to consider a broader basis of preference seems to be more reasonable and 'safe' in terms of arriving at the most preferred view.

\textsuperscript{148} `Iwad, "al-Ta'\textsuperscript{an}ud ", p.p. 306-307.
\textsuperscript{149} Al-Suy\textsuperscript{\textcircled{u}}\textsuperscript{\textcircled{i}}, \textit{al-Ashbah}, p. 60.
\textsuperscript{150} Ibid.
\textsuperscript{151} \textit{Kashf}, vol. 3, p. 95.
One example of fiqh will be presented here to examine the accuracy of what has been said above. Two hadith are found to contradict each other. In the first, the Prophet is reported to have said (concerning approaching a menstrual wife) that one can do so provided it is not between navel and knee (laka min al-ha'id ma fauqa al-izarj). The second hadith narrates that one can do everything except sexual intercourse (insa' u kull a shay'i illa al-nikah). Those who give the precedence to the prohibitive ruling such as Abu Hanifah, Malik and al-Shafi'i adhere to the first tradition for it is more 'precautionary'. Sufyan al-Thawri and Dawud al-Zahiri, on the contrary, follow the second hadith arguing that the permissive ruling should prevail over the prohibited ruling.

Although these two hadith are apparently contradicting each other, there should be a way to remove that conflict. An external evidence might be of help in doing so. It is exactly on this ground that the later jurists have accepted the opinion that one can approach his menstrual wife as he wishes as long as he abstains from having sexual intercourse with her. For it is clearly implied by Q. 2:222, "They question thee (O Muhammad) concerning menstruation, Say: It is an illness, so let women alone as such time and go not in unto them (fi al-mahid) till they are cleansed.....". Many jurists have argued that al-mahid, literally the name of menstruation place and time, refers to the vagina alone i.e. the place from which menstruation comes. As a legal consequence, what

154 Ibid.
155 Al-Zurqani, Sharh, vol. 1, p. 69.
is prohibited in terms of approaching a menstrual wife is merely to have sexual intercourse with menstrual wife for the “illness” is restricted to the place of the blood. Obviously, no consideration to either prohibitive or permissive ruling has been made to arrive at this preference since this line of consideration is not reliable.

On the other hand, an attempt is also made by the jurists to examine a conflict between two rulings; one in favour of al-ibāḥah al-aṣliyyah and the other is an alteration to the original status of permissibility. Some scholars hold that the evidence which suggests the continuance of the original status of everything should be preferred whereas the majority of the jurists contend that the evidence which alters this original status is more to be favoured.

Two aḥādīth which have already been mentioned earlier are cited here again to illustrate the conflict in question. The first is the Prophet’s saying that “whoever touches his penis, must retake a fresh ablution” and the second is the Prophet’s response to a question asked by one of the Companions regarding touching the sexual organ, where the Prophet is reported to have said that “this sexual organ is nothing other than part of your body” which gives a clear impression that to touch one’s penis, does not render ablution void. It is obvious that the first tradition, unlike

158 ‘Īwad, Dirāsāt, p. 490.
159 See page 150.
160 See page 259.
the second, requires something which is not originally established. In other words, the first tradition enjoins a liability after one is free from such obligation.

Those who adhere to the principle of *al-ibāhah al-asliyyah*, consider the second tradition as superior for it is in line with the fundamental principle acknowledged by the *Shari`ah*. On the contrary, other jurists refused to consider *al-ibāhah al-asliyyah* as more accurate when it conflicts with another ruling which obliges an action. Their argument, like that of their opponent, is rather philosophical. They argue that *al-ibāhah al-asliyyah* would give no significant import to the *Shari`ah* because its implication is already known to the people even without the occurrence of the second tradition. What deserves to be taken into consideration, they argue, is the one which offers new meaning or ruling for the *Shari`ah*'s task is to clarify the relevant ruling in every individual case. Therefore, to oblige one to renew his ablution after touching his penis is preferable in this regard.

Now it is relevant to embark on a discussion of the so-called Islamic legal maxims and their significant contribution in terms of *taqfīl*. These legal maxims represent the most accepted principles, if not absolutely agreed upon among the jurists, on which individual cases of *fiqh* can be cross-examined. On many occasions, every single one of these maxims is originally derived either from the *Qur`ān* or the *Sunnah* or both. Maxims such as 'necessity renders prohibited things permissible',

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'certainty cannot be dispelled by doubt', etc., are obviously rooted in both the Qur'an and the Sunnah. As regards the first maxim mentioned above, this includes many derivative rulings such as the permissibility to eat carrion, blood or to drink alcohol whenever one is forced to do so, i.e., to avoid death. Similarly, one is allowed to take another's property without the latter's permission on the latter's refusal to pay a debt. Also, to injure or even to kill another in order to defend oneself from the other's violence is permissible according to the said maxim.

For legal maxims are so significant, it is not surprising that they are codified in the so-called Ottoman Majalla, as an immediate reference and guideline for the judges throughout the Ottoman empire for executing justice in the courts. It is a fact worthy of remark that these legal maxims may contribute in selecting what is more appropriate between two conflicting pieces of evidence and argument. For instance, the maxim 'it is a fundamental principle that words shall be construed literally' may be employed in conflict between haqiqah and majaz. As previously shown, haqiqah always prevails unless the contrary is proved. Similarly, the maxim "freedom from liability is a fundamental principle" can offer a clear cut basis for some conflicts in fiqh. According to this

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163 See al-Burni, al-Waiiz, p. 23.
164 Ibid., pp. 143-146.
165 See Onar, "The Majalla", in Law in the Middle East, p. 296.
166 Al-Suyuti, al-Ashbah, p. 63.
167 See page 193.
maxim, "if one person destroys the property of another, and a dispute arises as to the amount thereof, the statement of the person causing such destruction shall be heard, and the onus of proof as to any amount in excess thereof is upon the owner of such property". 168

The aim of the present part of the discussion is merely to show how legal maxims can be adequately deployed to determine what is more consistent with the spirit of the Shari‘ah and accordingly enjoys superiority in cases of conflict. 169 Any conflict of law in the Shari‘ah, according to my opinion, should be examined in the light of these maxims for they constitute the comprehensive contents of the texts and the spirit as well as the objectives of the Shari‘ah. 170 It is very rare, however, to find that a particular ruling in fiqh is against these maxims. If this happens, it would be included under the so-called 'exceptional ruling of the maxim'. The occurrence of some exceptional rulings does not affect the general accuracy of these maxims, however.

An example of this is that when a wife and a husband claim the ownership of the furniture in their house, and no evidence is available, the case should be settled according to ‘urf for it is stated in Islamic legal maxim that 'custom ranks as stipulation'. Thus, if what is usually brought to the house by the woman is by ‘urf considered hers and vice-versa, that is the rule to be applied. 171 By this, we can see how legal

168 Hooper, The Civil Law, p. 17.
169 Mahmasani, Falsafah, pp. 149, 151.
171 Ibid.
maxims represent the 'true' spirit and objective of the Shari‘ah which should be seriously considered by a murajjih. Although legal maxims offer no clear cut basis of preference, they might make an attempt at tarjih easier and to some extent, safer.

As we already know, maslahah is something strongly maintained by the Shari‘ah and therefore, there is no need to argue its validity or even its priority in Islamic law. Nevertheless, we have seen also that maslahah which differs according to time and place always brings the jurists into opposition. Briefly, maslahah is an expression for seeking something useful or removing something harmful. In other words, maslahah is the preservation of the maqāsid (objectives) of the law which consists of five safeguards for human beings; their faith, their life, their intellect, their posterity and their property. What assures the preservation of these five principles is maslahah and whatever fails to preserve them is mafsadah.

Accordingly, in the course of conflict and tarjih, a murajjih should consider the one which most serves the maslahah as preferable. A simple example will explain this. Although the following case produced by al-Shafi‘i is not directly used to show a strict preference by virtue of maslahah, it remains relevant to that with which we are now concerned. Faced with different transmissions regarding the performing of prayer in time of fear, al-Shafi‘i prefers the tradition reported by Khawwat b.

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172 See page 85.


174 Ibid.
Jubayr, for this form of performing prayer in such times is more capable of protecting the fighting believers from a sudden attack which may destroy the life as well as the property of those fighters. Khawwat's transmission seems to be more appropriate to follow for it serves *maslahah* most i.e. in terms of protection and precaution.\(^{175}\)

To give preference to a particular ruling on the consideration of *maslahah* is highly regarded in *Shari‘ah*. An example that comes to mind is concerned with collective murder i.e. a person murdered by a group of people. The majority of the jurists contend that all of those who participated in that crime irrespective of the number involved, must be punished according to the law of *qiṣās*.\(^{176}\) By contrast, Darūd and his followers, the Zahiris, did not approve this form of punishment arguing that, since several hands cannot be cut as a retaliation of one hand, the same applies to the case of murder by a group.\(^{177}\) In terms of *tarjīh*, apart from the reported judgement that ‘Umar had carried out *qiṣās* on a group of seven that murdered a single man\(^{178}\), the contention of the *jumhūr* should be favoured for it serves the *maslahah* more. As already stated in the Qur’an (2:178), *qiṣās* is deliberately enjoined on mankind for the sake of life i.e. to protect people's lives by enjoining severe and equal punishment on those who purposely violated another's life. The reverse

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\(^{175}\) *Al-Risalah*, para. 728. See also *al-Darārī*, vol. 1, p. 164.

\(^{176}\) *Bidayah*, vol. 2, p. 399; *al-Ītīsām*, vol. 2, p. 361.

\(^{177}\) Ibid.


The author asserts that the judgement of ‘Umar received no objection from the contemporary Muslims at his time, and therefore it deserves to be considered as *iḥma’*. (Ibid)
contention, however, is nothing other than to encourage the people to commit collective murder for they will be excused from *qisas*.179 From this explanation, one would not hesitate to attach more weight to the *jumhūr*’s opinion in order to maintain justice and equal treatment; whosoever kills, should be punished by *qisas*.180

There is, however, another tendency in removing legal conflict which was first established by Ibn al-Muqaffa’ and followed by many jurists and contemporary scholars. This attempt is not exclusively related to Islamic legal theory rather than to the so-called *siyāsah shar’īyyah*. Ibn al-al-Muqaffa’ who was dissatisfied with the divergent views of the lawyers, insisted upon assigning full authority to the Caliph.181 On the grounds of much confusion even within one city - Kūfah - where the judgements were not unanimous, he advised that: “Thus if the Commander of the Believers should see fit to decree that these cases and different norms (*siyar*) be brought before him in a book together with the explanation and argument of every scholar on the basis of the *Sunnah* or *qiyās*, the Commander of the Believers could examine them and give his decision in each case according to the inspiration”.182

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See also *al-ʾItīsām*, vol. 2, pp. 125-126; *al-Buṭṭi, al-Mašlahah*, pp. 141-142.
Forty years after Ibn al-Muqaffa' wrote his *Risālāt al-Sahābah*, Abū Yūsuf, Chief Qādī, came with a similar proposal.\textsuperscript{183} He suggests that the Caliph may adopt any opinion out of the different opinions on a problem which he thinks best in the interest of the Muslims and in harmony with Islam. In his *Kitāb al-Kharāj*, he recounts in several places the views of different jurists on a problem, then concludes with the following remarks: "Adopt O Commander of the Faithful any of the two (or more) opinions which you like and follow the one that you think better for the Muslims. This is because you are allowed to do so in this respect".\textsuperscript{184}

Relatively speaking, more pages in this chapter should be devoted to the proposal raised by Ibn al-Muqaffa' for it could offer an immediate solution to legal conflict because the Caliph is the most powerful authority in giving a final decision in cases of conflict for he has a right to enact legislation even though his right is not absolute in terms that that legislation is valid only if it falls into one of two categories:

1. Execute legislation intended to guarantee the implementation of the provisions of *Sharī'ah*.

2. Organisational legislation intended to organise the society, protect it and meet its need in accordance with *Sharī'ah*.\textsuperscript{185}

Jurists like Ibn al-Muqaffa', Abū Yūsuf and many others were promoting an authority that should be given to the highest authority in the state in order to unify the law or in other words, to achieve a


\textsuperscript{184} Abū Yūsuf, *Kitāb al-Kharāj*, pp. 19, 58, etc. See also Onar, "The majalla", p. 295.

\textsuperscript{185} Doh, *Sharī'ah*, p. 468. See also Schacht, "Legislation", p. 111.
unification of the law in place of the existing diversity. In doing so, public welfare i.e. in securing the interests of the people and ensuring justice, would be the principal consideration in the enactment of such a code which would respond to reason not only in the absence of any appropriate text from both the Qur’an and the Sunnah but also in the case of two contrary interpretations caused by both the Qur’an and the Sunnah. However, it should be noted that, since the present work has no interest or concern with this political and administrative method of preference, it will be left without a proper treatment and readers are referred to other typical works that deal exclusively with this issue.186 The reason is that, though the Caliph is allowed to select what is apparently preferable to him, he should consult an expert in this task. Even Ibn al-Muqaffa’ himself, as already quoted, suggested that a Caliph should be presented with a book along with the explanation and argument of every respective jurist. Again, the task is more directed to usul al-fiqh - oriented study to comply with this suggestion. For this reason, the present study might offer valuable guidelines in the contemporary endeavour to codify Islamic law throughout the Muslim countries. Nevertheless, we should return to this discussion in the last chapter in order to relate the findings or the results of the study with the practical purposes in the contemporary administrations and judicial institutions of justice and fatwa.

186 Among the profound books on sisayah shar‘iyah are:
I admit that more are available for inclusion under the present discussion. Even so, I believe that the foregoing discussion, to some extent, has sufficiently laid down most of the common and capital methods of tarjih by considering external factors. It is relevant now to summarise or more precisely to suggest what deserves to be exclusively concluded particularly for practical purposes.

It appears throughout the previous discussion that the most influential methodology of tarjih is to consider 'many' or other supporting elements of evidence. It is highly reasonable and acceptable since the purpose of tarjih is to strengthen the accuracy of a particular argument. The more it is supported by or consistent with other elements or pieces of evidence, the more it gives the impression that a particular argument is stronger and more relevant to the intention of the Lawgiver. There seems no reason not to accept this method of preference as valid. Moreover, the resistance of the Hanafis to accept this way of strengthening eventually became insignificant. In other words, the accuracy of 'many' in terms of tarjih has influenced some of the leading Hanafi jurists to adhere to this consideration irrespective of whether it is explicitly or implicitly acknowledged by them.187

To give an example, Abu Yusuf, finding contradictions in some of the ahadith, has chosen one which has more weight than the other.

187 Mention should be made that it was not the opinion of the entire Hanafi school of law in refusing preference by virtue of "many". Only Abu Hanifah and Abu Yusuf are reported to stand against this mode of preference. (See al-Sarakhsi, Usul, vol. 2, p. 24)
Speaking about the partnership in farming (musaqat), he says, "The best we have heard in this case - and Allah knows best - is that it is allowed and right (to do so). We have followed the traditions which came down from the Prophet regarding the partnership of the Land of Khaybar. For these traditions are more trustworthy and akthar (more in number) and general (in rules) than the traditions which have been related against these (traditions)".188 This quotation shows that among the bases of preference adopted by Abu Yusuf was a consideration of many supporting ahadith. Moreover, it also appears to me that the dispute between these two major schools of law is merely verbal and far from practical. It is evident from the statement of each of Abu Hanifah and al-Karkhi that no preference is permitted by virtue of "many" unless they are widespread (ma lam tablugh hadd al-shuhrah).189 To put it differently, when a particular argument is supported by many pieces of evidence: to the effect that it gained considerable strength, this argument, according to them, should be preferred, not because of the account of many supporting elements of evidence but because of the strength gained by that argument. In short, the only acceptable element that can favour one piece of evidence over the other, according to the Hanafis, is strength and not virtue of many pieces of evidence.190 Hence, the reluctance to accept this preference is baseless and no genuine dispute exists between the Shafi'is and the Hanafis for strength can be known through several indications where many pieces of evidence is one of them. It is clearly expressed by al-Shaybani who contends that a report transmitted by two is more reliable.

188 Abu Yusuf, Kitab al-Kharaj, p. 89.
and acceptable in terms of confidence compared to a report transmitted by one. Moreover, the disagreement between the Hanafis and other jurists seems to be increasingly superficial by the statement of Ṣadr al-Shari'ah. He says that preference on the basis of many pieces of evidence is acceptable to some of the Hanafis, contrary to the contention of both Abū Ḥanīfah and Abū Yusuf.192

Therefore, consideration of many elements of evidence should be seriously consulted in an attempt to give preference to one over the other when they conflict.193 The clarity of word, the reliability of isnād, maslaha influence and the like should be jointly examined in every single case of conflict in the Shari'ah. Also, an attempt to interpret the passage within the context of the entire body of sacred texts and its objectives is necessary to ensure that the “final” decisions will accord with the whole content of legal texts as well as with the spirit of the law.194 Other methods, though they are highly disputable, remain useful in order to support and to complement one another in terms of gaining what is more convincing to a murājjih when he confronts any conflict in Islamic law.

193 As far as Abū Yusuf is concerned, we have pointed earlier that even he himself tend to rely on “many” for preference purposes. See page 376.
194 The rationale behind this is most evident when the usulists concluded that the very aim of tarjih is arriving at the most probable conclusion. Any principle leading to this purpose should be seriously considered. See Ghayat al-Uṣul, p. 147 and Irshad, p. 284.
CHAPTER EIGHT
CHAPTER EIGHT
SUMMARY, CONCLUSION AND SUGGESTIONS

Of all the pages in this work, this is the easiest and in many ways the most important part to be completed. To begin with, I can say that an attempt has been made to give a comprehensive exposition of certain logical and methodological approaches taken by the usulists in respect to conflict of law with special emphasis when possible on the authenticity of certain arguments leading to preference. Although I cannot pretend to have discovered all the methodologies of tarjīḥ, it is my hope that I have succeeded in presenting a comprehensive picture relying heavily upon a careful study of the primary as well as the secondary sources.

Since the discussion of conflict and preference is viewed from an usūl al-fiqh perception, some preliminary considerations of usūl al-fiqh were deemed necessary. Moreover, tarjīḥ is an integral part of usūl al-fiqh from which tarjīḥ originated. To this end, the first part of chapter one is devoted to a brief account of usūl al-fiqh which covers most of the essential foundations of usūl. In a limited number of pages, I have been able to introduce usūl al-fiqh in a brief but comprehensive description. Topics like the emergence and the development of usūl al-fiqh have been elaborated followed by the explanation of the definition, the subject matter, the functions, the contents and structure as well as the methodological approaches to documenting usūl al-fiqh. Each of these topics pertains to the problem of conflict and preference in one way or another and this relation has been revealed clearly in some of the chapters whenever appropriate.
The first part of chapter one also discusses the historical treatment of both ta'arud and tarjih in the hope that the reader would be able to know when and more importantly how these two different but related issues have been dealt with by the jurists. It is, as a matter of fact, a necessary introduction to the topic of the thesis. Through this section, we are able to state that tarjih existed not only in law study proper or its usul, but also in other fields of study where conflict may take place. However, the treatment of tarjih in those fields is carried out differently. In tafsir, for example, a mufassir, after citing various opinions pertaining to a particular interpretation, will go further and try to show that one of the opinions should be given more credence than the others. However, as far as tafsir is concerned, a mufassir usually expresses his own preferred opinion in the form of a paraphrase of the whole or part of the verse in question although he does not always give systematic reasons for his preference.\(^1\) Although this is not the case in usul study or in legal study proper where ta'arud and tarjih are treated more systematically, tafsir, particularly the tafsir of legal verses\(^2\) will provide considerable information from which preference should be sought. The same applies to other disciplines in Islam such as the study of the hadith and related matters, the study of legal works or even the study of modern codifications in more recent times.\(^3\)

The second part of chapter one i.e. part b, consists of three major tasks, namely to explain the purpose and the scope of the present study,

\(^{1}\)Cooper, Introduction to al-Tabari's Jami' al-Bayan (translation), p. xiv.

\(^{2}\)This type of tafsir is known as al-tafsir al-fiqhi, which from historical point of view, existed after the formative period of madhab in Islam. See Introduction to al-Kaya al-Harrasi's Ahkam al-Qur'an, p. 1.

\(^{3}\)See al-Zuhayli, Taqin, passim.
the need for the work and the sources and methodology of the study. These three elements I considered as crucial in order to lay down a framework in which the discussion of conflict and preference should take place.

As said elsewhere, if there is no conflict there is no question of devising methods to remove such conflict. As far as *tarjih* in concerned, the problem of conflict should first be understood. Therefore, chapter two was designed to highlight the meaning of the conflict with which the usulists are concerned. Not only that, the *hukm* of conflict is also discussed to see whether the disagreement is or is not approved in the *Shari'ah*. We have seen that the varying opinions on this issue are rather theoretical because the condemnation of disagreement and conflict by some jurists is directed towards a conflict that cannot be removed that is, *tanāqud* i.e. mutual cancellation, an opinion shared by other jurists who approved the existence of conflict in the *Shari'ah* in the first place. In other words, *ta'arud* is permissible in the *Shari'ah* while *tanāqud* is not approved since *ta'arud* is merely apparent while *tanāqud* leads to genuine conflict not only in the eyes of the jurists but also in reality.4

The chapter also discusses the causes of legal conflict which are of two types, namely those which inevitably exist and those which are relatively "man-made". Five causes from each type have been elaborated to reveal that conflict did not come from nowhere but was actually caused by certain factors, some of which were beyond human will while others were "man-made". Regarding the latter, the jurists are not to be blamed for this, since their aim was to provide the *Shari'ah* with a reliable way of interpretation. As humans, they vary from each other in legal

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4 See page 60.
interpretation. In addition, the provisions of Islamic law are based less on the texts than on interpretations by the usulists. The texts form the bases of the principles and universal rules; whereas most details and particulars are based on the interpretation by way of *ijtihad* thus through human involvement.

Therefore, if there appears to be conflict, one or the other piece of evidence has been incorrectly understood or applied, for the conflict is largely caused by our very human inability to estimate correctly the precise implications of legal texts and their attendant problems. The principles laid down by the jurists should be viewed from the point that every jurist is required to base his argument on a proper foundation acceptable in Islamic legal theory. Whether these principles actually lead to something more accurate is another question the point is that great efforts were made to work out methods of interpretation which were presumed suitable for application to Islamic law and its sources. This is very common, as said elsewhere, not only in *fiqh* but also in modern law, for both assume, though on different grounds, that men are capable of learning the true nature of right and wrong and that having done so, they can elaborate their knowledge rationally and apply it to concrete situations.

In chapter three, I have made a substantial elaboration of the meaning of *tarjih* by dividing the chapter into three parts. The first part discusses the meaning of *tarjih* in both literal and legal senses. *Tarjih*, broadly speaking, indicates preponderance which made the balance of one thing heavier than the other. The first part of the chapter is completed by the discussion of the *hukm* as well as the conditions of *tarjih*. From these three elements, I suppose that the reader will be certain of what *tarjih* is. However, I did not end the discussion of *tarjih* at this stage but instead, I
introduced another discussion of *tarjīḥ* from another angle to draw a
distinction between *tarjīḥ* and some terms similar to it in order not to
confuse the word *tarjīḥ* with others bearing the same concept of
preference. The discussion of each of *ta'wīl/tafsīr, tafiq, istiḥsān/istislah* and
*naskh* has been carried out to detect not only the dissimilarity
between them and *tarjīḥ* but also, to some extent, the similarity. Through
this brief comparison, *tarjīḥ*, as a term in *usūl al-fiqh*, is clearly
distinguished from other confusing terms. In the last part of chapter three,
both the position and the significance of *tarjīḥ* in *usūl al-fiqh*, particularly
in the conflict problem, have been studied. Both discussions have clearly
displayed that the issue of *tarjīḥ* deserves a proper detailed study to which
the present work aspires. Generally speaking, this part of the study has
shown that although *tarjīḥ* has been treated for centuries (like other legal
solutions mentioned above), it remains an important subject of study not
only for abstract reasons connected with academic investigations but also
for practical purposes. More significantly, it has also shown that *tarjīḥ*, in
the practical sense, already existed in the formative period because in most
cases, great jurists had to resort to *tarjīḥ* to prefer one piece of evidence
over the other when they conflict.

As one knows, both *Qurʾān* and *Sunnah* are written in Arabic
since they were revealed in the language of the Arab. The written part of
these two sources is known either as *nass* or *matn*. This textual part
stands side by side with the transmission of both *Qurʾān* and *Sunnah*. In
the study of conflict and preference, it is necessary to look at both to
ensure that conflict is tackled from the same angle i.e. text conflict will be
removed through study of the text and similarly, *isnād* conflict will be
examined through *isnād* consideration. To meet this logical requirement, I
have devoted two separate chapters to deal with the problem, namely chapters four and five.

Regarding textual conflict, the nature of the text and its interpretation in Arabic has been studied in relation to conflict and preference. The results of this extensive study will be displayed in the following tables. Mention should be made that since the study has explored four aspects of wording conflict, each of them will be presented in a separate table. (A - D)

**Table A: Conflict in the Wording; Scope of Cover**

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Amm vs. Khass</td>
<td>Khass</td>
<td>More specific and qat'i</td>
</tr>
<tr>
<td>'Amm makhsug vs. 'Amm ghayr makhsug</td>
<td>'Amm makhsug</td>
<td>Less speculative</td>
</tr>
<tr>
<td>Mu'tlaq and Muqayyad</td>
<td>Muqayyad (when it is appropriate)</td>
<td>More qualified and more specific</td>
</tr>
<tr>
<td>Mushtarak</td>
<td>Determined according to the qari'nah attached.</td>
<td>All the meanings are possible whereby the determining key is the qari'nah.</td>
</tr>
</tbody>
</table>
Table B: Conflict in Wording Usage

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Haqiqah vs. Majaz</td>
<td>Haqiqah (except when majaz is dominant)</td>
<td>Original and more probable</td>
</tr>
<tr>
<td>Majaz vs. Majaz</td>
<td>Majaz that is closer to the original meaning</td>
<td>More parallel to the original meaning</td>
</tr>
<tr>
<td>Sarth vs. Kinayah</td>
<td>Sarth (unless kinayah is associated with qari nah)</td>
<td>More direct statement</td>
</tr>
</tbody>
</table>

Table C: Conflict Between Clear and Unclear words

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zahir vs. Nass</td>
<td>Nass</td>
<td>More likely</td>
</tr>
<tr>
<td>Nass vs. Mufassar</td>
<td>Mufassar</td>
<td>More explained/clarified</td>
</tr>
<tr>
<td>Mufassar vs. Muhkam</td>
<td>Muhkam</td>
<td>More certain/permanent</td>
</tr>
</tbody>
</table>

Table D: Conflict in Textual Implications (Dilalat)

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manjuq vs. Mafhum (both muwafaqah and mukhalafah)</td>
<td>Manjuq</td>
<td>Mafhum particularly mafhum mukhalafah is neither certain nor accurate</td>
</tr>
</tbody>
</table>
Mention should be made that this attempt is merely a tentative order of the text proposed by the present researcher. Should there be a conflict between two texts either in Qur‘an-Sunnah conflict or Sunnah-Sunnah conflict, the ultimate decision, at this stage, goes to the selected text as shown in the list for it is more clear, precise, direct, specific, accurate, etc. according to the nature of the texts in which conflict has taken place. A summary of a more comprehensive framework of tarjīh, however, will be made later after giving all the details of tarjīh in each respective area of conflict.

The transmission of the Sunnah and its conflict has been dealt with in chapter five. Conflict regarding the transmission of the Qur‘an is omitted because all scholars agreed that Qur‘an was transmitted in the form ‘mutawatir’ which is beyond any dispute. In the Sunnah, however, conflicts of isnād resulting from many different considerations, have been identified and given serious examination. The same procedure as in conflict of text would apply to isnād conflict since the study has revealed that the isnād is of different grades. Should there be a conflict between two hadīths, their respective isnāds would provide proof on which a proper preference could be achieved. That is, the credence should be given to the more reliable of the two isnāds involved in a particular conflict. The finding of this chapter is also displayed in the following tables (E - H)
### Table E: Tarjīḥ Based Exclusively on 'Ulūm al-Hadīth

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tawātur vs. Āḥad</td>
<td>Tawātur</td>
<td>More reliable in terms of isnad</td>
</tr>
<tr>
<td>Mashhūr vs. Āḥad</td>
<td>Mashhūr (according to the Hanafis whereas the jumhūr attached no superiority to it since both are alike)</td>
<td>Mashhūr in the opinion of the Hanafis stands higher than āḥad and below tawātur.</td>
</tr>
<tr>
<td>Sahīḥ vs. Hasan / Dā'īf</td>
<td>Sahīḥ</td>
<td>More reliable.</td>
</tr>
<tr>
<td>Musnad vs. Mursal</td>
<td>Musnad = Mursal</td>
<td>Though theoretically, musnad prevails over mursal, the latter on some occasions is as reliable as the former.</td>
</tr>
</tbody>
</table>

General rules of preference in relation to hadīth such as muttafaq ‘alayhi always prevails followed by the second rank, namely hadīth reported by al-Bukhārī alone and so forth.
Table F: *Tarjīḥ* by considering Narrators' Personal Characteristics

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Narrator participated (or was close to the Prophet) vs. narrator who did not participate (or was far or absent from) the reported action.</td>
<td><em>Hadīth</em> transmitted by those who participated in or were close to the reported action.</td>
<td>Transmissions are more reliable since they participated or were the nearest person to the Prophet in the action reported.</td>
</tr>
<tr>
<td>Well-known vs. unkown narrator</td>
<td>Transmission of well-known narrator</td>
<td>The lack of biographical information for a narrator will make his transmission suspect. This includes the transmission of weak minded, the careless and heretics.</td>
</tr>
<tr>
<td><em>Faqīḥ</em> narrator vs. non-<em>faqīḥ</em> narrator</td>
<td>The transmission of <em>faqīḥ</em> narrator</td>
<td>No accurate reason is available since this preference is doubtful.</td>
</tr>
<tr>
<td>Knowledgeable narrator in Arabic vs. unknowledgeable narrator</td>
<td>The transmission of those who are more knowledgeable in Arabic</td>
<td>No accurate example is available and this conflict found no example in <em>ṣajīl</em> book.</td>
</tr>
<tr>
<td>Accurate memory vs. inaccurate memory</td>
<td>The transmission of those whose memorisation is more accurate (<em>ahfaz wa atqan</em>)</td>
<td>The possibility of <em>ṣajīr</em> does not occur in accurate memorisation.</td>
</tr>
<tr>
<td>Senior narrator vs. junior narrator</td>
<td>The transmission of senior narrator</td>
<td>Subjected to many objections: forgetfulness and ignorance afflicted both transmitters.</td>
</tr>
</tbody>
</table>
### Table G: Tarīḥ Within Forms of Narration

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>The word of the Prophet vs. what is understood by the narrator</td>
<td>The original wording of the Prophet</td>
<td>More certain</td>
</tr>
<tr>
<td>High isnād vs. low isnād</td>
<td>High isnād</td>
<td>Subject to less possibility of error.</td>
</tr>
<tr>
<td>Verbal narration vs. written narration</td>
<td>Verbal narration</td>
<td>Laḥn and tāṣhīf said to be greater in written documents?</td>
</tr>
<tr>
<td>Verbally transmitted vs. nonverbal transmission</td>
<td>Verbally transmitted</td>
<td>Nonverbal transmission is disputed as well as open to errors</td>
</tr>
<tr>
<td>Other forms of narration with different degrees of strength that could be appealed to in settlement of conflict such as qala, samīṭu, 'an, etc.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Table H: Tarīḥ on the Basis of Regional Preference and "Many" Narrations

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madīnah-origin vs. non-Madīnah origin</td>
<td>No accurate preference</td>
<td>The authenticity of the hadīth does not rely on region x or y.</td>
</tr>
<tr>
<td>Many vs. few narrators or ways of narration</td>
<td>&quot;Many &quot;</td>
<td>More convincing</td>
</tr>
</tbody>
</table>
At this stage, two sources of Islamic law have been discussed in relation to the problem of conflict and preference. Naturally, the remaining two sources of Islamic law deserve the same treatment. Therefore, after a lengthy discussion of both Qur’an and Sunnah, I have attempted to examine closely the problem of conflict and preference in both ījma‘ and qiyās. Broadly speaking, one can easily understand why conflict should take place in qiyās since this form of legal deduction is rather speculative and doubtful. As far as ījma‘ is concerned which is reckoned third in importance, the problem of conflict seems to be unfounded because ījma‘ is a unanimous agreement while conflict reveals a degree of divergence in ījma‘. Nevertheless, the study has shown that the conflict in ījma‘ was commonly due to the fact that ījma‘ was frequently reported to exist solely on the basis of knowledge of a particular or a group of jurists that no divergence of opinion has been found on the case in question. Therefore, when an opinion is later known to contrast with this alleged ījma‘, this was understood as conflict while in fact, no consensus was clearly proclaimed on that issue. The various degrees of ījma‘, as shown by the study, will be displayed as below (table I)
### Table I: Conflict and Preference in *Ijma‘* Conflict

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Universal <em>Ijma‘</em> vs. local <em>Ijma‘</em> (particularly the <em>Ijma‘</em> of the Medinese)</td>
<td>Universal <em>Ijma‘</em> (acceptable merely in theory)</td>
<td>Obviously, no <em>Ijma‘</em> can exist if one jurist disagreed (let alone the jurists of the Madīnah).</td>
</tr>
<tr>
<td><em>Ijma‘</em> of the Companions vs. <em>Ijma‘</em> of the subsequent jurists.</td>
<td><em>Ijma‘</em> of the Companions</td>
<td>Relatively more facilitated to exist</td>
</tr>
<tr>
<td><em>Ijma‘</em> lafzi vs. <em>Ijma‘</em> sukūti</td>
<td><em>Ijma‘</em> lafzi (although in reality, most of the reported cases on <em>Ijma‘</em> originated from <em>Ijma‘</em> sukūti).</td>
<td>Free from any dispute regarding its validity (even though <em>Ijma‘</em> sukūti is more common in practice)</td>
</tr>
<tr>
<td><em>Ijma‘</em> preceded by disagreement vs. <em>Ijma‘</em> not preceded.</td>
<td><em>Ijma‘</em> not preceded by disagreement</td>
<td><em>Ijma‘</em> preceded by disagreement is disputed amongst the jurists.</td>
</tr>
<tr>
<td><em>Ijma‘</em> based on maslahah vs. <em>Ijma‘</em> based on the same consideration</td>
<td>Determined according to what serves maslahah more</td>
<td>It is liable to alteration since the basis of <em>Ijma‘</em> was human welfare which is changing in character.</td>
</tr>
</tbody>
</table>

As hinted above, the conflict in *qiyyās* is relatively acceptable since its application is somewhat vague and doubtful. To treat the problem of conflict successfully, I have devoted some pages to illustrate what *qiyyās* is. On this occasion, I have explained the general concept of *qiyyās*, the
historical development followed by the definition of al-qiyās al-sharī'. This introductory discussion of qiyās has been completed by a lengthy explanation of the conditions and the methods of establishing 'illah, upon which most of the methodologies of tarjīḥ in qiyās conflict rely. In examining how tarjīḥ is operating in qiyās conflict, I have come to identify certain methodologies of tarjīḥ as will be shown in the following table (J).

**Table J: Tarjīḥ in Qiyās Conflict**

<table>
<thead>
<tr>
<th>Conflict</th>
<th>Preference</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>'illah confirmed by ijmā' vs. 'illah which is not</td>
<td>'illah confirmed by ijmā'</td>
<td>More certain (although no actual case of conflict has been found)</td>
</tr>
<tr>
<td>'illah mansūkah vs. 'illah mustanbājah</td>
<td>'illah mansūkah</td>
<td>More certain</td>
</tr>
<tr>
<td>'illah known through textual indication vs. 'illah extracted from text</td>
<td>'illah known through textual indication (maḥfūm al-nass)</td>
<td>More obvious (although no accurate example is found)</td>
</tr>
<tr>
<td>Transitive 'illah vs. intransitive 'illah</td>
<td>Transitive 'illah</td>
<td>More effective and has more assimilated cases</td>
</tr>
<tr>
<td>'illah supported by external considerations vs. 'illah which is not</td>
<td>'illah associated with many supporting pieces of evidence</td>
<td>More strong and certain</td>
</tr>
<tr>
<td>'illah vs. ḥikmah</td>
<td>'illah</td>
<td>Ḥikmah is a hidden quality</td>
</tr>
<tr>
<td>'illah which has immediate effect vs. 'illah which has not</td>
<td>'illah with immediate effect</td>
<td>More reliable</td>
</tr>
<tr>
<td>Simple vs. mixed 'illah</td>
<td>Simple 'illah</td>
<td>More certain</td>
</tr>
<tr>
<td>------------------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Qiyas vs. qiyas</td>
<td>Qiyas with a discrepancy is overruled</td>
<td>The overruled qiyas is not valid and authoritative</td>
</tr>
<tr>
<td>'illah mun'akisah vs.</td>
<td>'illah mun'akisah</td>
<td>More co-exclusive</td>
</tr>
<tr>
<td>'illah ghayr mun'akisah</td>
<td>'illah in accordance with generality vs. 'illah which is not</td>
<td>'illah which is line with generality</td>
</tr>
<tr>
<td>'illah which covers all its elements vs. 'illah which does not.</td>
<td>'illah which is applicable to all its relevant individuals</td>
<td>More accurate and logical</td>
</tr>
</tbody>
</table>

As regards chapter seven, the last chapter of the methodological aspects of *tarjīh*, I have examined many areas of conflict in the hope that appropriate external factors which, in one way or another, might add weight to one of the conflicting pieces of evidence, could be identified and utilised in removing conflict. These external factors, as identified in the work, are displayed in the following table(K).
# Table K: Tarjīḥ Based on External Factors

<table>
<thead>
<tr>
<th>External Factors</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supported by many pieces of evidence</td>
<td>Highly acceptable since it is more convincing</td>
</tr>
<tr>
<td>To consider Companions' fatawa</td>
<td>Acceptable (in fact, it is one supporting piece of evidence)</td>
</tr>
<tr>
<td>To consider the hierarchical order of legal source / evidence.</td>
<td>Acceptable in theory but still disputed in terms of practical sense.</td>
</tr>
<tr>
<td>A comprehensive order of tarjih</td>
<td>The most systematic method of tarjih</td>
</tr>
<tr>
<td>To consider language role in textual implication</td>
<td>Highly acceptable since both the Qur'an and the Sunnah are Arabic in wording.</td>
</tr>
<tr>
<td>To consider the text whose content exceeds that of the others</td>
<td>Disputed</td>
</tr>
<tr>
<td>To consider affirmative or negative text</td>
<td>Disputed</td>
</tr>
<tr>
<td>To consider prohibitory or obligatory rule</td>
<td>Disputed</td>
</tr>
<tr>
<td>To consider ibahah aṣliyyah or the one that alters this ibahah aṣliyyah</td>
<td>Disputed</td>
</tr>
<tr>
<td>To consider legal maxims</td>
<td>Highly acceptable</td>
</tr>
<tr>
<td>To consider siyāsah shar'iyyah</td>
<td>Highly acceptable</td>
</tr>
<tr>
<td>To consider maslahah</td>
<td>Highly acceptable</td>
</tr>
</tbody>
</table>
The summary account of the principles of tarjīḥ gives us some idea of the area of legal theory dealt with by the jurists. It also points out certain logical and systematic methodologies which are useful to remove conflict in different situations; each is applicable only to a particular condition of conflict which suits this method of tarjīḥ. In other words, methodologies of tarjīḥ should be consulted within the table in which they are listed. On the other hand, the study has revealed many relevant and applicable methods of tarjīḥ which had been identified, examined and approved or otherwise. These methods are many in number but the most significant methods, in terms of convincingness, as far as I am concerned, are three. These three methods have been inspired through or suggested by the examination of certain cases discussed throughout the work and particularly in chapter seven. If we take for example, the dispute over the prescribed punishment for collective murder, we will see, as we have seen earlier, that the preference goes to the opinion of the majority for the opinion they hold is supported more by many pieces of evidence as well as by the appreciation of maslahah. The decision of 'Umar concerning retaliation in this case, which constituted one of the supporting pieces of evidence in favour of the majority opinion, "was also based on the rationale that the lives of the people would be exposed to aggression if the participants in murder were exempted from qīṣās. Public interest thus dictated the application of qīṣās to all who took part in murdering a single individual". The three following major conclusions of the methodology of tarjīḥ are derived from this case and many other cases discussed before.

5 Throughout the work, more than seventy methodologies of tarjīḥ have been identified; some of which are highly acceptable and others are disputed.

The first of these three methods lies in the fact that the Shari'ah is a comprehensive legal system for maintaining the welfare of people not only in the Hereafter but also in worldly affairs. Therefore, every legal conclusion should be viewed through the broad objectives of the Shari'ah that are not questionable amongst the Muslims. The Arabic word "maslahah" represents the notion of objectives contained in Islamic law. It is an expression for seeking something generally useful or removing something generally harmful. To maintain maslahah is to maintain and to preserve the maqasid (objectives) of the law which consist of five safeguards for human beings; their faith, their life, their intellect, their posterity and their property. What assures the preservation of these five principles is maslahah and whatever fails to preserve them is mafsadah i.e. evil and wrong-doing. Accordingly, should there be any conflict between two pieces of evidence with the two considerations of maslahah and mafsadah on the one hand or between greater or additional maslahah and individual or ordinary maslahah on the other, a jurist should give more weight to the one which serves maslahah more or the most.

The second obvious method of tarjih has to do with the methodology of how to give preference to one piece of evidence over the other when they conflict. Instead of a narrowed perception of preference, I am more inclined towards the comprehensive examination of conflict and its related discussion.7 A narrowed treatment of conflict and preference, it appears to me, would produce an unsatisfactory legal construction. That is to say that it is safer and more reasonable to base the preference on considering the whole contents of legal arguments from many different standpoints, as long as this is possible and appropriate, rather than by

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limiting our investigation to one or two basic and general legal procedures in establishing the law. There seems to be no reason for not accepting this as completely valid because the source of the Shari‘ah is a combination of text, spirit of law, consensus, rationality, linguistics, transmission system i.e. isnād, personal reasoning, maslahah, etc. Texts and legal reasonings must therefore be equally observed for the truly traditional is always consistent with the truly rational. This method, in fact, is an embodiment of the significant role that other parts of evidence must play side by side with revelation for all are complementary to each other.

The third and the most influential methodology of tarjīḥ is to consider "many" or other supporting pieces of evidence. This is reasonable and acceptable since the purpose of preference is to strengthen the choice of a particular legal conclusion and its argument. The more it is supported by, or consistent with, other pieces of evidence, the more it gives the impression that a particular argument is stronger and more relevant to the intention of the Lawgiver. Again, there seems to be no reason not to accept this method of preference as valid and valuable. Moreover, as one can realise that the most satisfactory conclusion that one can feel in applying tarjīḥ is the fact that a particular preferred opinion is being supported by various types of argument which renders uncertainty and doubt overruled.

Finally, to tackle the problem of legal conflict systematically, we have to have a comprehensive knowledge of usūl al-fiqh and other subjects related to the business of interpreting the laws. For the solutions and answers for conflict of law cannot be plucked from the sky or sought from any source one wishes. As the conflict arises from Islamic legal theory, it
should be diagnosed and cured within the same laboratory and procedure. Equally, it should not be solved with mere whims and fancies.

The jurists have left for Muslims a complete and comprehensive body of theory for answering the problem of conflict. Whether we agree or disagree with their methods and answers, many of the questions they considered important for their times do not lose their importance today. In other words, the jurists have treated the doctrine elaborately, discussing at length most of the theoretical issues which would arise under what is known as "conflict of law". But their efforts remained individual and personal in character. At no time was there a body of men ever formally designated for such a task. Nor do we find a recognised authority to call such a body to meet - whether it be ad hoc or periodically. In brief, Muslims have had the theory elaborated by individual endeavours but they never had the adequate machinery by which to apply it.

This procedural defect is a fundamental weakness in applying *tarjīh* as an effective way to neutralise conflict of law. The whole principle of *tarjīh* has suffered from this defect. Without adequate machinery through which the community could arrive at a preferred opinion, it is doubtful whether *tarjīh* would be able to materialise at a practical level in Muslim communities.

The problem of the codification of Islamic law in the form of modern codification has its exponents as well as opponents amongst the Muslims. The fundamental objection raised by the opponents is a principal one. They say that codification would stand against the creativity

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of *ijtihād*. In other words, *ijtihād* is no longer as necessary as it was since all the problems pertinent to the law are then codified in the fixed articles which permit no other interpretations.\(^9\) As far as *tarjīḥ* is concerned, I should say that once it has been shown to be practical, codification would immediately follow which in turn will affect the future of *ijtihād*. Therefore, to overcome the problems of both the impracticability of *tarjīḥ* and the limitation of *ijtihād*, I would like to offer the following suggestions, organised hierarchically according to the stage or scope of its immediate importance:

1. As far as the faculties and departments of Islamic law in Muslim communities are concerned, efforts should be increased to base every branch of Islamic law on a broad comparative study of *fiqh*. The same should apply to Islamic legal theory which should be treated as comparative legal theory (*uṣūl al-fiqh al-muqāran*) and no longer as *Uṣūl al-fiqh* of X or Y. This comparative study would, in my opinion, offer some of the practical fundamental lines which will lead to the unification of Muslim law.

2. From my reading, I have noticed that the jurists were emphasising the significance of the knowledge and appreciation of *maslahah* in Islamic law and its role in conflict and *tarjīḥ*.\(^10\) Therefore, alongside the traditional study of *uṣūl al-fiqh*, more emphasis should be devoted to a careful study of *maslahah*. Accordingly, a student in Islamic law particularly in legal theory should be equipped with high quality books on the subject.

3. Since *tarjīḥ* is closely related to the administration of both fatwā and justice, both the *muftī* and the judge should be provided with a code of

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9 Ibid.

10 See e.g. Bagby, "The issue of *maslahah* in classical Islamic legal theory", in *IJIAS*, vol. 2, 1985, passim.
how to apply *tarjih* systematically when there appears to be a conflict of evidence in a disputed case. Relatively speaking, a judge's position is more critical since his judgement is binding and authoritative. In this context, codification might help him but on many occasions, what is stated in the codification does not cover the broad objectives of the *Shari‘ah* in which a judge might feel that strict adherence to what is stated in the codification would lead to injustice. How *tarjih* can release this tension is a question that the following lines will attempt to answer.

3.1. Every judgement passed by a judge or even a *fatwa* by a *mufti* should be presented in writing explaining the conflict and the basis of *tarjih* i.e. the selection of verdict or legal opinion. This written verdict or *fatwa* should be made public in order that it can be re-examined by other jurists inside and outside the justice office. An opposite finding and conclusion (if any) will be useful either in an appeal stage of the same case or in future cases.

3.2. To arrive at the most approximate law intended by the Lawgiver in a disputed case, it is suggested that every verdict and *fatwa* should be passed by the majority of the jurists and muftis. This idea has been raised and promoted by many contemporary scholars in what they call a collective *ijtihad* (*ijtihad jama‘i*). When there appears to be a serious conflict of evidence in a disputed case before the court, a committee of judges should be appointed to study the problem as their conclusion would be more convincing and free from errors. If necessary, proper and frequent meetings among the contemporary jurists (*majma‘ fiqh*) should

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be tabled so as to tackle current issues with one voice leaving no room for disagreement or conflict.\textsuperscript{12}

3.3. Codification of Islamic law (if any) should be made liable to amendment but only for serious and genuine reasons in such a way that to continue with the existing provisions of laws would lead to great injustice and violation of the principles and broad objectives of Islamic fiqh.\textsuperscript{13}

After listing these few suggestions to make the tarjih instrument more applicable, I have to say that one should always keep in mind that the Shari'ah, "has much wider scope and purpose than an ordinary legal system in the Western sense of the term".\textsuperscript{14} Therefore, anything acceptable in a Western point of view regarding legal process does not necessarily fit the text as well as the spirit and the philosophy of Islamic law.\textsuperscript{15} Governed by the broad objectives of the Shari'ah and its primary principles, a highly trained and skilled jurist, will be able to put tarjih into practice in a manner methodologically acceptable. The present study has been devoted to contributing to this end.

\textsuperscript{12} See Introduction to al-Mawsu'ah al-Fiqhiyyah, p. 62.
\textsuperscript{13} This problem also applies to common law. See Hallaq's "Legal Reasoning", p. 88, note no. 30.
\textsuperscript{14} Coulson, A History, p. 83. See also Weeramantry, Islamic Jurisprudence, p. 1; Humphreys, Islamic History, p. 209.
\textsuperscript{15} Mas'ud, Islamic Legal Philosophy, p. 4.
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