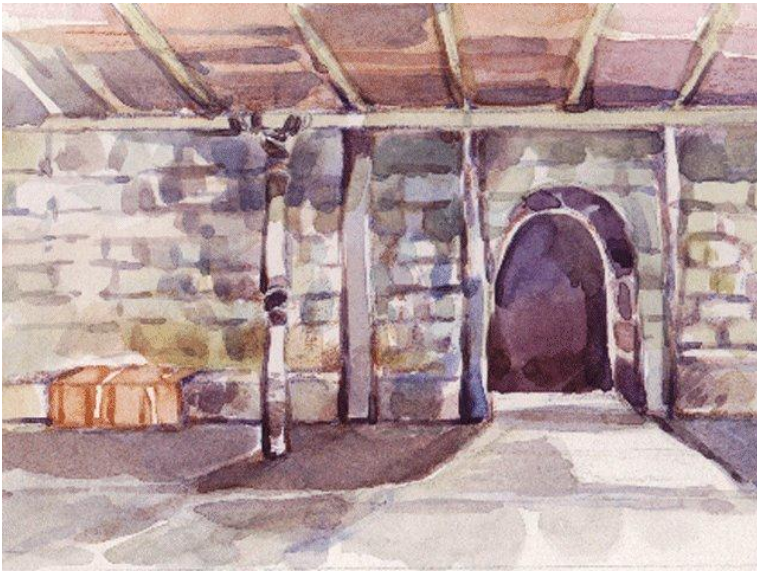


A BEGINNER'S GUIDE TO USOOL-UL-FIQH



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الإهداء . . .

أهدي عملي هذا إلى

الوالدين الذين قاما بتربيته صغيرا

و إلى الوالدين الذين قاموا بتربيته
كبيرا

علما مني بأن الولد لن يجزي عن والده
شيئا

. . . إبنكم أبو حذيفة

بسم الله الرحمن الرحيم

AN INTRODUCTION TO USOOL-UL-FIQH

The Definition of Usool-ul-Fiqh

The term Usool-ul-Fiqh comprises of two parts; a مضاف (the word usool) and a مضاف اليه (the word fiqh). In order to understand what Usool-ul-Fiqh is, it is necessary to understand these two words first.

The Meaning of Usool: Usool is the plural of asl which was initially used in the meaning of:

ما يبتنى عليه الشيء

“Anything upon which something else rests
or is based or built”.

Since the roof a building rests on its walls, the walls could be called the asl of the roof. With the passing of time the word asl began to be used for a number of different meanings viz.

~ الراجح (the preferred option) – This is the meaning of asl in the statement:

الأصل فى الاستعمال الحقيقة

*When the حقيقة and مجاز of a word are both possible,
preference must be given to the حقيقة*

~ القاعدة الكلية (the general rule) – This is the meaning of asl in the statement:

الفاعل مرفوع أصل فى النحو

The فاعل is (always) مرفوع is an asl (general rule) in nahw.

~ الدليل (proof) – Thus we say:

قوله تعالى "وآتوا الزكاة" أصل وجوب الزكاة

The statement of Allah وآتوا الزكاة is the asl (proof) for the compulsion of zakaah.

The Meaning of Fiqh: The literal meaning of fiqh is الفهم (to understand). This is the meaning of fiqh in the aayah:

قالوا يا شعيب ما نفقه كثيرا مما تقول...

“They said: O Shu’aib! We do not understand much of what you say...”

The Fuqahaa, however, define fiqh as:

العلم بالأحكام الشرعية العملية من أدلتها التفصيلية

“The study of the sharee’ah laws pertaining to practical life as derived from their detailed proofs.”

Note 1: There are two types of sharee’ah laws: الاعتقادية (related to belief) and العملية (related to practical actions). It is clear from the above definition that fiqh centers around the latter type only; it does not discuss issues related to belief.

Note 2: الأدلة الشرعية (shar’i proofs) are also of two types: الاجمالية (brief) and التفصيلية (detailed).

- ~ An example of الدليل الاجمالي is that, when asked for the دليل for the compulsion of zakaah, we say that it is an aayah of the Qur’aan.
- ~ However, if we answer the same question by quoting a specific aayah of the Qur’aan, then we have provided the questioner with a دليل تفصيلي.

الحد الاضافي

By defining the words usool and fiqh separately from each other, we have explained to you the حد الاضافي of Usool-ul-Fiqh. The meaning of الحد الاضافي is to separately define the two components of the term ie. the مضاف اليه and the مضاف

الحد اللقبى

Defining Usool-ul-Fiqh as a single term (without differentiating between the مضاف and the مضاف اليه) is called الحد اللقبى . The حد اللقبى of Usool-ul-Fiqh is:

العلم بالقواعد التى يتوصل بها المجتهد الى استنباط الأحكام الشرعية
من أدلتها التفصيلية

A study of the laws by means of which the mujtahid deduces shar'i laws from their detailed (تفصيلى) proofs.

Why Do We Study Usool-ul-Fiqh?

The reason why we study Usool-ul-Fiqh is:

1. To understand how shar'i injunctions are deduced from الدلائل التفصيلية
2. To ensure that our deduction of shar'i injunctions from الدلائل التفصيلية are correct.

The Subject Matter of Usool-ul-Fiqh

The subject matter of Usool-ul-Fiqh comprises:

1. الأحكام الشرعية
2. دلائلها التفصيلية

The Difference between Usool-ul-Fiqh and Fiqh

While Fiqh is a study of shar'i injunctions and their proofs, Usool-ul-Fiqh is a study of the method through which these injunctions are deduced from the proofs. For example, in Fiqh we are taught that:

1. Salaah and zakaah are compusory.
2. The دليل for their compulsion is the statement of Allah in the Qur'aan that أقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ

In Usool-ul-Fiqh we are taught how the compulsion of salaah and zakaah was deduced from the statement of Allah

و أقِيمُوا الصَّلَاةَ وَ آتُوا الزَّكَاةَ

Note:

- The **غير الوحي** or **الوحي** دليل for any fiqhi injunction is either
- If the **دليل الوحي** is **الوحي المتلو** or **الوحي غير المتلو**, it is either The former is Al-Qur-aan and the latter is As-Sunnah.
- If the **دليل الوحي** is **غير الوحي** it will definitely be based on **الاجتهاد**
- Such **اجتهاد** is called Al-Ijmaa' if there is consensus among the Mujtahideen.
- If there is no consensus, it is called Al-Qiyaas.

In short, there are four **دلائل اجمالية** of all fiqhi injunctions:

(1) Al-Qur-aan (2) As-Sunnah (3) Al-Ijmaa' (4) Al-Qiyaas.¹

Hence, this book is divided into five **أبواب** (sections).

1. The first **باب** deals with Al-Qur-aan.
2. The second **باب** deals with As-Sunnah.
3. The third **باب** deals with Al-Ijmaa'.
4. The fourth **باب** deals with Al-Qiyaas.
5. The fifth **باب** deals with a few miscellaneous issues.

¹ Although a number of fiqhi injunctions are derived from **شرائع من قبلنا**, **قول الصحابي**, and **الاستصحاب**, it would not be said that there are eight **دلائل اجمالية** because:

- ~ **شرائع من قبلنا** is only regarded as a valid argument if it is mentioned in Al-Qur-aan or As-Sunnah without any disapproval. Hence it falls under Al-Qur-aan or As-Sunnah and is therefore not a separate **دليل**
- ~ **الاجماع** is actually a form of **التعامل**
- ~ If the **قول** of a **صحابي** agrees with Al-Qiyaas, it will be categorised accordingly.
- ~ If it contradicts Al-Qiyaas, it will be regarded as As-Sunnah because when a **صحابي** says something contrary to Al-Qiyaas, he must have heard it from **رسول الله عليه و سلم**
- ~ **الاستصحاب** is in reality a type of Al-Qiyaas (as you will learn in the latter part of this book, Insha Allah).

Hence, none of them are separate **دلائل**.

باب (Section)
Al-Qur'aan
فصل (Chapter): The Different Types of اللفظ in Al-Qur'aan

Deduction of shar'i (fiqhi) injunctions from Al-Qur-aan is based primarily on the Arabic text. It is therefore imperative to understand the text and the minute differences between the various types of words contained therein. لفظ القرآن is therefore the dominant topic in this باب

اللفظ may be divided in four different ways viz.

1. According to its شمول (inclusiveness).
2. According to its كيفية الاستعمال (how it has been used).
3. According to its ظهور (clarity).
4. According to the كيفية (method) in which it indicates its meaning.

- If اللفظ is divided according to its شمول (inclusiveness), there are four types:

- | | |
|----------|------------|
| 1. الخاص | 3. المشترك |
| 2. العام | 4. المؤول |

- الخاص is also of four types:

- | | |
|-----------|----------|
| 1. المطلق | 3. الأمر |
| 2. المقيد | 4. النهى |

- If اللفظ is divided according to its كيفية الاستعمال (how it has been used), there are four types:

- | | |
|------------|------------|
| 1. الحقيقة | 3. الصريح |
| 2. المجاز | 4. الكناية |

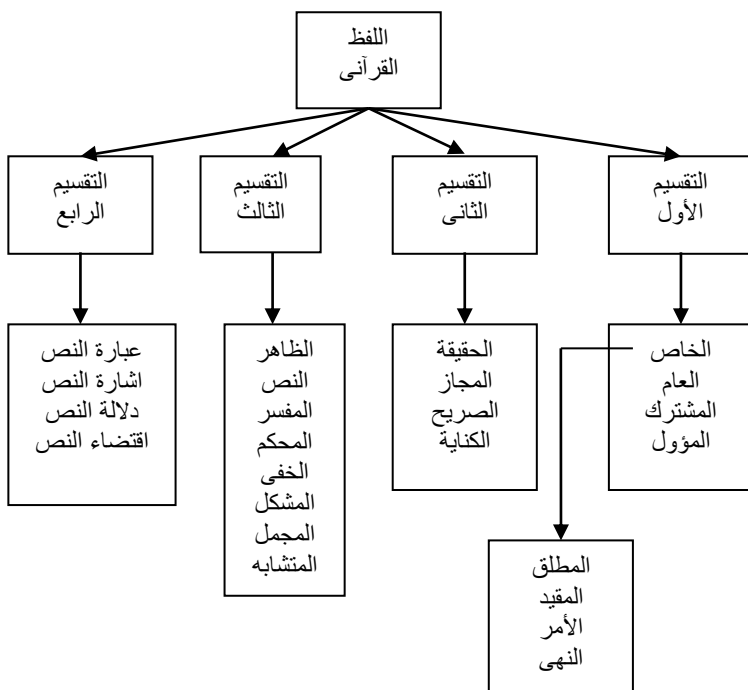
- If اللفظ is divided according to its ظهور there are eight types:

| | |
|-----------|-------------|
| 1. الظاهر | 5. الخفى |
| 2. النص | 6. المشكل |
| 3. المفسر | 7. المجمل |
| 4. المحكم | 8. المتشابه |

- If اللفظ is divided according to the كيفية (method) in which it shows its meaning, there are four types:

| | |
|---------------|----------------|
| 1. عبارة النص | 3. دلالة النص |
| 2. اشارة النص | 4. اقتضاء النص |

Study the following diagram:



فصل (Chapter) النوع الأول من التقسيم الأول الخاص

The first division of اللفظ is based on its شمول (inclusiveness ie. its reference to a single item or numerous items). As mentioned in the previous chapter, there are four types in this division. الخاص and العام are the first two.

الخاص The Definition of

الخاص is a لفظ which refers to a single and specific meaning على سبيل الانفراد (without referring to anything else).

The Ruling of الخاص

الخاص is قطعى as دليل means that there is not the slightest shadow of doubt regarding its authenticity and meaning.¹ Hence it is compulsory to practise on it. Therefore, if there is any contradiction between a لفظ of Al-Qur'aan that is خاص and a خبر الواحد² or Al-Qiyaas, we will practise on both (الخاص and the خبر الواحد or Al-Qiyaas) without effecting a change in any one of them. However, if this is not possible, only الخاص will be considered and the خبر الواحد and Al-Qiyaas will be disregarded.³

Example:

The word خاصة is ثلاثه because it refers to a single and specific amount. It is therefore compulsory to practise on it in the aayah:

و المطلقات يتربصن بأنفسهن ثلاثة قروء

*Divorced women should withhold themselves
(from nikaah) for three قروء*

قروء is the plural of قراء which has two possible meanings viz. حيض and طهر. For various reasons (which need not be discussed at this point) Imam Shafi'i (Rahmatullahi Alaih) says that although there are instances when قراء means حيض, its meaning in this particular aayah is طهر. On the other hand, Imam Abu

¹ The opposite of قطعى is ظنى – a دليل regarding whose authenticity and purport there is a slight doubt as a result of which we merely *think* that it is correct. Due to absence of such doubt regarding a دليل قطعى we do not merely think that it is correct; we are convinced that it is correct.

² A hadith that is narrated in every era until the age of codification by such a small number of narrators that the possibilities of error and fabrication cannot be ruled out.

³ The reason for this being that خبر الواحد and قياس are ظنى and therefore not strong enough to oppose الخاص

Haneefah (*Rahmatullahi Alaihi*) says that although there are instances when قرء means طهر, in this instance it means حيض. Imam Abu Haneefah (*Rahmatullahi Alaihi*) also has a number of دلائل. However, in the context of the topic under discussion, we will suffice with only one دليل.

Imaam Abu Haneefah's argument is that if قرء is interpreted as حيض, it will be possible for the divorced woman to practise on the word ثلاثة because in this instance her عدة will be three complete أطهار. On the contrary, if قرء is interpreted as طهر it will not be possible for the divorced woman to practise on the word ثلاثة. The reason being that since طلاق can only be issued in طهر, if قرء is interpreted as طهر, the divorced woman's عدة will only be two طهر and a portion of the طهر in which طلاق was issued. Thus Imam Abu Haneefah (*Rahmatullahi Alaihi*) does not consider any خبر الواحد or قياس which imply that قرء means طهر.

(Chapter) فصل The First Two Types of الخاص المطلق و المقيد

As previously mentioned, there are four types of الخاص viz.

- | | |
|-----------|----------|
| 1. المطلق | 3. الأمر |
| 2. المقيد | 4. النهي |

In this chapter we discuss المطلق and المقيد

The Definition of المطلق

Any word that is خاص and refers to its meaning without attaching any قيد (restrictive description) to it is called مطلق

Example:

The word رقية in the following two aayaat:

... فكفارتہ اطعام عشرة مساکین من اوسط ما تطعمون أهليکم

أو کسوتهم أو تحریر رقية

...Thus its expiation (the expiation of your oaths) is that you feed ten poor people the average food that you feed your families or that you clothe them or free a slave

... و الذين يظاهرون من نساءهم ثم يعودون لما قالوا

فتحریر رقية من قبل أن يتماسا

And those who make dhihaar with their wives and thereafter wish to retract from what they had said must free a slave before they touch each other.

The first of these aayaat is regarding the اليمين of كفارة and the second is regarding the الظهار of كفارة. In both aayaat the word رقية is not accompanied with any specific description. It is therefore مطلق

The Definition of المقيد

Any word that is خاص and attaches a قيد (restrictive description) to its meaning is called المقيد

Example One:

The word رقية in the aayah:

و من قتل مؤمنا خطأ فتحریر رقية مؤمنة ...

And whosoever kills a Mu-min by error must free a Mu-min slave...

This aayah is regarding the الخطأ of كفارة. In this aayah the word رقية is مقيد because it is accompanied with the قيد (restrictive description) of مؤمنة

Example Two:

Concerning the مظاهر who is unable to free a slave, Allah Ta'aala says:

فمن لم يجد فصيام شهرين متتابعين من قبل أن يتماسا

*And whosoever is unable to do so (unable to free a slave)
should fast for two consecutive months
before they touch each other.*

The صيام شهرين mentioned in this aayah is مقيد because it is accompanied with two قيود:

1. التتابع (that it be observed consecutively – one after the other)
2. المسيس (that it be completed before المسيس)

The Ruling of المطلق:

The دليل ظنى of المطلق is unchangeable on the basis of a دليل ظنى like اطلاق of الواحد or قياس Hence it is incorrect (according to Imaam Abu Haneefah *Rahmatullahi Alaih*) to make قياس of كفارة اليمين and كقارة الظهار on the كفارة of قتل الخطأ Freeing a Non-Muslim slave will therefore suffice in كفارة اليمين and كقارة الظهار

The Ruling of المقيد

Fulfilment of the demand of the قيد (restrictive description) in كقارة is compulsory. Thus صيام شهرين will not suffice for كقارة if it is not kept consecutively or المسيس occurs before the completion of صيام شهرين

فصل (Chapter) The Third Type of الخاص الأمر

The Definition of الأمر

When the متكلم has استعلاء (authority) over the مخاطب and his لفظ conveys a meaning of طلب الفعل , his لفظ is called أمر

Note:

الأمر is not confined to the صيغة الأمر المعروف . It also occurs in the following forms:

1. الأمر باللام - For example, the aayah:

لينفق ذو سعة من سعته

The possessor of wealth should spend from his wealth.

2. الجملة الخبرية – For example, the aayah:

و الوالدات يرضعن أولادهن حولين كاملين

*Mothers should suckle their children for
two complete years.*

The Ruling of الأمر

The الأمر of مدلول (ie. the مأمور به) واجب However, this only applies if there is no قرينة proving اباحة or any other meaning besides وجوب

In other words, the حقيقة of الأمر is وجوب However, it is sometimes used to show other meanings (تأديب - ارشاد - اباحة) (etc.) As-Subki (Rahmatullahi Alaih) has mentioned twenty six other meanings of الامر besides وجوب in his book جمع الجوامع
In such instances الامر is used مجازا

The دليل for the Above

Study the following aayah:

فليحذر الذين يخالفون عن أمره أن تصيبهم فتنة أو يصيبهم عذاب أليم
*Those who oppose His command should fear being afflicted by
a tribulation or a painful punishment.*

If مخالفة الامر¹ does not imply وجوب, why would مخالفة الامر result in punishment?

Another Example:

Study the following hadith:

لو لا أن أشق على أمتي لأمرتهم بالسواك عند كل صلاة
*If I did not fear causing difficulty for my ummah, I would have
commanded them to use the miswaak before every salaah.*

The meaning of this hadith is that ‘if I commanded my ummah to use the مسواك before every salaah, it would become compulsory and they would experience much difficulty. I therefore did not command them to do so.’ It is quite clear from this explanation that the واجب of الأمر المطلق is مدلول

الأمر بعد الحظر

الأمر بعد الحظر is when a command is pronounced regarding such an action that was initially prohibited.

Example:

It is common knowledge to all students of the شريعة that hunting is prohibited for a person who is in the state of احرام In this regard Allah Ta’aala says:

واذا حللتهم فاصطادوا
And when you exit the state of احرام, go hunting.

¹ الأمر المطلق is that أمر that is not accompanied by قرينة indicating the intended meaning ; وجوب , اباحة etc.

The command to go hunting after exiting the state of احرام is an example of الأمر بعد الحظر

The Ruling of الأمر بعد الحظر

Some of the شافعية are of the opinion that الأمر بعد الحظر shows اباحة. However, the حنفية and most of the شافعية say that its ruling is the same as that of الأمر المطلق (its مدلول is واجب unless if there is a قرينة indicating that it is مباح).

The دليل for the above is the aayah:

فاذا انسلخ الأشهر الحرم فاقتلوا المشركين حيث وجدتموهم

*And when the sacred months pass,
kill the Mushrikeen wherever you find them.*

This aayah is an example of الأمر بعد الحظر because although قتل and قتال were impermissible during الأشهر الحرم (the months of الله Ta'ala commands the same when these months terminate. Now, although this is أمر بعد الحظر, there is consensus among the فقهاء that this قتل and قتال are واجب and not مستحب .

Does الأمر Demand تكرار (Repetition) of the مأمور به ?

The شافعية and most of the حنفية are of the opinion that الأمر المطلق does not demand تكرار. Therefore, whenever the مأمور به is repeated, this تكرار is due to تكرار in the علة , سبب or شرط . For example, there is تكرار in the attainment of الطهارة This تكرار is due to تكرار in the سبب ie. الجنابة and not because the أمر in the Aayah demands تكرار و ان كنتم جنباً فاطهروا

The دليل

The دليل for the above is the consensus of all the أهل العربية that الأمر merely indicates الطلب ; it does not indicate الكمية ie. how often the مأمور به should be done.

على التراخي or على الفور ؟

Does الأمر demand immediate fulfilment or not? The حنفية are of the opinion that there is no harm in delaying¹ the implementation of الأمر المطلق - the أمر regarding which there is no قرينة indicating whether the implementation should be على الفور (immediately) or على التراخي (deferable).

المأمور به The Different Types of

There are two types of المأمور به:

1. المطلق عن الوقت: The مأمور به for which there is no specified time within which it has to be fulfilled.

Example: Zakaat, Sadaqat-ul-Fitr and صومه و صلاة القضاء (fulfilment of missed salaah and saum)

Ruling: Besides Abul-Hasan Al-Karkhi, the rest of the أحناف agree that التراخي (delaying) in the fulfilment of the مأمور به is permissible. However, there is consensus that it is مستحب (preferable) to fulfil this type of مأمور به as soon as possible.

2. المقيد بالوقت - The مأمور به for which there is specified time within which it has to be fulfilled.

Example: The five daily salawaat and the saum of Ramadaan.

Ruling: There are four types of this type of مأمور به and each ones ruling is different.

The first type of المقيد بالوقت is when:

- ~ The time specified for the مأمور به is شرط (pre-requisite) for its fulfilment. Thus الأداء (fulfilment) can neither take place before it nor after it.

¹ Obviously, this is on condition that one does not delay to such an extent that the time allocated for the fulfilment of the مأمور به lapses and the مأمور به is still not fulfilled.

- ~ The time specified for the مأمور به is a سبب for its compulsion.
- ~ Only a portion of the specified time is utilised for the fulfilment of the مأمور به. (When the time specified for the مأمور به is of this nature it is called a ظرف).

Example:

The five daily salawaat. The time specified for the fulfilment of each salaah is its ظرف, سبب and شرط. Thus:

- ~ الأداء (fulfilment) of any of these salawaat can neither occur before their times nor thereafter. (Remember that fulfilment of salaah after its time has lapsed is called قضاء instead of أداء)
- ~ None of these salawaat encompass their respective times from beginning to end. Instead, they only utilise a portion of their times.

Ruling

1. Fulfilment of other actions of the same جنس as the مأمور به within the same period of time is permissible. For example, صلاة القضاء and الصلاة المنذورة are permissible within the time specified for salaah-ul-maghrib.
2. تعيين of one's niyyah is therefore compulsory. For example, a person wishing to perform the dhuhr salaah cannot make niyyah of merely performing salaah. Instead, he must specify that he is performing the fard salaah of dhuhr or the fard salaah of that particular time.
3. This تعيين is not waived due to ضيق الوقت (lack of time). For example, even if there are merely a few minutes (maybe three or four minutes) for sunset and one has to still perform his 'asr salaah, he will still have to make a specific niyyah before commencing his salaah.

4. The مكلف cannot specify any portion of this period of time for the fulfilment of the مأمور به.

The second type of المقيد بالوقت is quite similar to the first type. The only difference between the two is that in this case fulfilment of the مأمور به encompasses the entire period that is specified for it. (When the time specified for the مأمور به is of this nature it is called a معيار).

Example:

The saum of Ramadaan. The time specified for it is its شرط, معيار and سبب. Thus:

- ~ أداء can neither occur before the month of Ramadaan nor thereafter. (Once again, remember that fulfilment of saum after Ramadaan has ended is called قضاء instead of أداء)
- ~ The time specified for the fast of every individual day of Ramadaan is from as-subh as-saadiq to sunset and this entire period is engaged in saum.

Ruling

1. Fulfilment of other actions of the same جنس as the مأمور به within the same period of time is not possible. For example, it is not possible to keep more than one saum on any one particular day.
2. Therefore, التعيين of one's niyyah in the month of Ramadaan is not compulsory. Making niyyah of saum without specifying its type is sufficient.
3. In fact, one's saum will be valid even if he made an incorrect niyyah or intended some other واجب. Thus his saum on any day in Ramadaan will be valid even if he makes niyyah of صوم رمضان even if he makes niyyah of صوم القضاء أو النذر.
4. This, however does not apply to the مسافر and the مريض. If they make niyyah in the month of Ramadaan of any other

واجب, the fast they keep will be in fulfilment of the واجب that they intend.

5. There are two narrations the مسافر and the مريض who fast in the month of Ramadaan with the niyyah of الصوم النفل. However, the more correct narration is that such saum will be in fulfilment of the saum of Ramadaan.

The third type of المقيد بالوقت is when the time specified for the مأمور به is its معيار but it is neither its سبب nor its شرط.

Example:

قضاء رمضان (fulfilment of the missed saum of Ramadaan) and fasting for the purpose of كفارة (atonement).

Ruling

1. تعيين النية (Specification of one's niyyah) is compulsory.
2. This تعيين النية must take place from the night (ie. from before as-subh as-saadiq).

The fourth type of المقيد بالوقت is when the time specified for the مأمور به (it has a semblance with المعيار and الظرف).

Example:

The only example in this category is hajj. In view of the fact that it is not possible to perform more than one hajj at a time, its time resembles المعيار. However, if we consider that the fulfilment of hajj does not engage the entire period specified for it, its time resembles الظرف.

Ruling:

1. This type of مأمور به (ie. hajj) is discharged with an unspecific niyyah. It is therefore sufficient to make niyyah of hajj without specifying what type of hajj one intends performing.

2. According to Imaam Abu Yusuf *rahimahullah* its semblance with المعيار is stronger. He therefore regards the person who delayed the performance of his fard hajj until the following year as sinful.
3. According to Imaam Muhammed *rahimahullah* its semblance with الظرف as stronger. Hence, he does not regard the person who delayed the performance of his fard hajj until the following year as sinful.

فصل (chapter)
The Fourth Type of الخاص
النهي

النهي: The Definition of

When the مخاطب has authority over the متكلم and he commands him not to do something, the لفظ that he uses is called النهي

Note:

النهي is not confined to صيغة النهي; it also occurs in the following forms:

1. صيغة التحريم – For example, the aayah:
حرمت عليكم الميتة ...
Carrion...have been declared impermissible for you.
2. صيغة النفي – For example, the aayah:
لا يحل لكم أن ترثوا النساء كرها
It is impermissible for you to inherit the women.

النهي The Ruling of

Just as الأمر indicates وجوب, النهي indicates تحريم. This, however, is only applicable if there is no قرينة indicating كراهة, ارشاد, تحقير or any other meaning besides تحريم.

الدليل

The *النهي* that indicates *تحريم* is the aayah:

ما آتاكم الرسول فخذوه و ما نهاكم عنه فانتهوا

Accept what the Rasool gives you and abstain from what he prohibits you.

The word *فانتهوا* in this aayah is *أمر مطلق* – it is a command that we abstain from everything prohibited by Rasulallah *صلی اللہ علیہ وسلم*. Furthermore, you have already learnt that the *مدلول* of *أمر المطلق* واجب is *واجب* This therefore means that abstention from anything prohibited by Rasulallah *صلی اللہ علیہ وسلم* واجب is *واجب* Now, if abstention from anything prohibited by Rasulallah *صلی اللہ علیہ وسلم* واجب is *واجب*, could we not say that perpetration of the same is *حرام*? Thus we conclude that:

النهي للتحريم
تحريم indicates *النهي*

Two Types of *النهي*

النهي is of two types:

1. *النهي عن التصرفات الحسية*
2. *النهي عن التصرفات الشرعية*

التصرفات الحسية

التصرفات الحسية are all those *تصرفات* whose *قباحة* is understood through the medium of *الحس*. Hence, even if the *شريعة* did not inform us that they are *قبيح* and *حرام*, they would have still been regarded as such. Adultery, murder and theft are examples of *التصرفات الحسية*

التصرفات الشرعية

التصرفات الشرعية are all those *تصرفات* whose *قباحة* is understood through the medium of the *شريعة* only; *الحس* is unable to detect their *قباحة* on its own (without the aid of the *شريعة*). Thus, nobody would have regarded them as *قبيح* and *حرام* if the *شريعة*

had not informed us of their قباحة Mentioned below are three examples:

1. Fasting on أيام التشريق and يوم العيد
2. Performing salaah at the time of زوال الشمس
3. Trade at the time of أذان الجمعة

النهى The Rulings of These Two Types of

The rulings of these two types of النهى are:

1. The قبيح لذاتها of النهى is دليل that they are التصرفات الحسية Thus their اصل and وصف are both باطل
2. If the نهى of a تصرف شرعى is due to something within it, it is قبيح لذاته and its اصل and وصف are both باطل
Example: The نهى of selling the حمل while it is still in its mother's womb.
3. However, if the نهى of a تصرف شرعى is due to something external (something that is not part of the actual action), it is قبيح لغيره Thus:

~ Only its وصف and not its اصل is قبيح

~ Such a تصرف is valid but, due to the attached مكروه تحريمي, it is قباحة

Example: Zaid took a vow to fast for one day. He later decided to fulfil his vow and keep this fast on يوم العيد In view of what was mentioned above, his fast is valid. His vow has therefore been fulfilled. However, it was مكروه كروه for him to fast on يوم العيد تحريمي

فصل (Chapter) النوع الأول من التقسيم الثانى العام

العام The Definition of

العام is a لفظ that refers to a number of أفراد (individuals or items) at one and the same time.

Example: The words مسلمين and رجال

العام The Three Types of

If العام is divided according to its لفظ and not according to its معنى, there are three types:

1. لفظ الجمع Example: المسلمون
2. لفظ الجنس Example: الناس
3. الالفاظ المبهمة Example: ما and من

العام The Ruling of

The meaning of التخصيص

In order for us to understand the ruling of العام, we will have to understand the meaning of التخصيص. التخصيص is when all the افراد of العام have not been intended.

Example:

و لله على الناس حج البيت من استطاع اليه سبيلا

It is compulsory on the people – those who possess the means – to make haj of the house (the ka'bah) for Allah.

The word الناس in the above aayah is عام and includes everybody (all Muslims, irrespective of whether they have the means to go for haj or not). However, the clause من استطاع اليه سبيلا informs us that those who do not have the means to go for haj are not included in the meaning of this aayah.

- ~ This exclusion of الناس from the عموم of الناس is called تخصيص
- ~ The word عام مخصص منه البعض is الناس
- ~ The clause من استطاع اليه سبيلا is الدليل المخصص

العام Another Three Types of

With regards to التخصيص there are three types of العام:

1. The عام in which there is definitely no تخصيص

Example:

و ما من دابة فى الأرض الا على الله رزقها

There is not a single creature on the earth whose sustenance is not the responsibility of Allah.

2. The عام in which تخصيص definitely did take place.

Example:

و لله على الناس حج البيت من استطاع اليه سبيلا

It is compulsory on the people – those who possess the means – to make haj of the house (the ka'bah) for Allah.

3. The عام in which there is no قرينة indicating whether it is مخصوص (affected by تخصيص) or not.

Example:

و لا تأكلوا مما لم يذكر اسم الله عليه

Do not consume that (meat) on which the name of Allah was not taken.

The Rulings of These Three Types of العام:

1. There is consensus among all the Fuqahaa that the first type is قطعى
2. They also agree that the second type is ظنى
3. As far as the third type is concerned, the opinion of the أفراد of all its حنابلة and شافعية, مالكية under its ruling is ظنى
4. The opinion of the حنفية is that:
 - a. So long as there is no other دليل proving that it is مخصوص (affected by تخصيص), it should be regarded as inclusion of all its أفراد under its ruling is قطعى
 - b. If there is a دليل proving that it is مخصوص (affected by تخصيص), it should be regarded as ظنى (inclusion of the remaining أفراد under its ruling is ظنى)
5. The result of the اختلاف of the Fuqahaa regarding this third type of العام is evident in two issues:
 - a. دليل ظنى and العام (contradiction) between the two

b. الخاص and العام (contradiction) between التعارض

دليل ظني and العام Between Example of Contradiction

Recitation of سورة الفاتحة in salaah is فرض according to Imaam Shaafi'i (Rahmatullahi Alaihi). Imaam Abu Haneefah (Rahmatullahi Alaihi), however, regards it as واجب and not فرض. The reason for this difference of opinion is the apparent contradiction between the following aayah and hadith:

فاقرؤوا ما تيسر من القرآن

Read from the Qur-aan whatever is easy.

لا صلاة لمن لم يقرأ بفاتحة الكتاب

There is no salaah for one who does not read

The Opening of the Book (سورة الفاتحة).

The phrase ما تيسر من القرآن in the aayah is عام and therefore refers to no specific part of the Qur-aan. This عموم demands that the recitation of سورة الفاتحة in salaah is فرض. The hadith, however, is quite the opposite. It implies that the validity of salaah is dependent on the recitation of سورة الفاتحة. The question that we have to answer is whether it is permissible for us to make تخصيص of the aayah on the basis of the hadith which is ا خبر الواحد and therefore ظني.

Imaam Shaafi'i (Rahmatullahi Alaihi) answer to this question is in the affirmative. His argument is that ما تيسر من القرآن belongs to the third type of عام which (in his opinion) is عام. He therefore concludes that the recitation of سورة الفاتحة in salaah is فرض (The compulsory قراءة constitutes the recitation of سورة الفاتحة only.)

Unlike Imaam Shaafi'i (Rahmatullahi Alaihi), Imaam Abu Haneefah's (Rahmatullahi Alaihi) answer to this question is that 'no, we cannot make تخصيص of the aayah on the basis of the

hadith. He argues that the third type of عام is قطعى and cannot be opposed by a دليل ظنى. In such an instance the way forward is to practise on both the دلائل without altering the ruling of any one of them. If this is not possible, we will practise on الدليل القطعى only.

In this particular issue, it is possible to practise on both the دلائل without altering the ruling of any one of them. Thus:

- ~ On the basis of the aayah we conclude that the فرض of آية or سورة is achieved by reciting any unspecified سورة الفاتحة Specific recitation of سورة الفاتحة is not فرض Omission of سورة الفاتحة will therefore not render the salaah invalid.
- ~ On the basis of the hadith we conclude the the recitation of سورة الفاتحة is nevertheless واجب Hence, although its omission will not invalidate the salaah, it will necessitate سجدة السهو

Another Example

What is the ruling of the متروك التسمية (the animal on which التسمية was deliberately omitted) of a Muslim slaughterer? Imaam Abu Haneefah (*Rahmatullahi Alaihi*) regards it as حرام and Imaam Shaafi'i (*Rahmatullahi Alaihi*) regards it as حلال The reason for this difference of opinion is the following aayah and hadith:

و لا تأكلوا مما لم يذكر اسم الله عليه

*Do not eat from that (meat) on which
the name of Allah was not mentined*

ذبيحة المسلم حلال ذكر اسم الله عليها ام لم يذكر

*The animal slaughtered by a Muslim is حلال irrespective
of whether he mentioned the name of Allah or not.*

The phrase عام is ما لم يذكر اسم الله عليه and therefore demands the حرمة of all meat on which التسمية was deliberately omitted

irrespective of whether the the slaughterer is a Muslim or not. The hadith, however, implies that the متروك التسمية عمدا of a Muslim slaughterer is حلال. Once again, The question that we have to answer is whether it is permissible for us to make تخصيص of the aayah on the basis of the hadith which is a خبر الواحد and therefore ظنى

Imaam Shaafi'i (*Rahmatullahi Alaihi*) regards the aayah as ظنى (because it also belongs to the third type of عام). He therefore has no qualms about making تخصيص of the aayah on the basis of the hadith. Thus the متروك التسمية عمدا of a Muslim slaughterer is حلال according to him. On the contrary, Imaam Abu Haneefah (*Rahmatullahi Alaihi*) regards the aayah as قطعى and therefore does not accept that it is مخصوص (affected by تخصيص) on the basis of the hadith. Since it is impossible to practise on both the دلائل in this issue, he gives preference to the aayah over the خبر الواحد (because القطعى is stronger than الظنى) and concludes that the متروك التسمية عمدا of a Muslim slaughterer is حرام

Example of Contradiction Between الخاص and العام

Imaam Shaafi'i (*Rahmatullahi Alaihi*) is of the opinion that it is impossible to find a contradiction between two دلائل one of which is خاص and the other is عام because, in his opinion, the former is قطعى and the latter is merely ظنى. He therefore practises on both دلائل excluding the مدلول of the خاص from the عام of the عموم

Example:

Study the following two ahaadith:

فيما سقت السماء و العيون أو كان عثريا العشر

Al- 'Ushr¹ is payable on crops that are irrigated by rain water and springs or they are irrigated by rain water that is collected in trenches.

ليس فيما دون خمسة أوسق من التمر صدقة

There is no sadaqah (ie. 'ushr) in five awsuq of dates and less.

The first hadith is عام and therefore demands that العشر is compulsory on all crops that are irrigated in the above manner even if they are less than five أوسق². The second hadith is خاص; it implies non-compulsion of العشر on crops that are less than five أوسق Based on his approach to issues of this nature, Imaam Shaafi'i (Rahmatullahi Alaih) maintains that العشر is not payable on crops that are less than five أوسق (The minimum (أوسق for العشر is five أوسق نصاب

The Opinion of Imaam Abu Haneefah

Because Imaam Abu Haneefah (Rahmatullah) regards the third type of العام as قطعى, he regards contradiction between العام and الخاص as possible. In the event of such contradiction his opinion is that:

1. التخصيص (exclusion of the مذكور of the خاص from the عموم of العام) would only be resorted to if there is no time difference between the pronouncement of the two دلائل
2. If there is a time difference between the two and we are able to identify which one was pronounced first, we resort to التنسيخ (we classify the earlier دليل as منسوخ).
3. If neither التخصيص nor التنسيخ are possible (because there is a time difference between the two but we are unable to identify which one was pronounced first), we resort to الترجيح (we give preference to one over the other).

¹ A type of zakaah that is payable on the crops of certain types of land.

² أوسق is the plural of وسق which was a type of measure used in those days. Five أوسق is equivalent to 684 Kg.

Example:

As far as the two ahaadith regarding العشر on crops are concerned, Imaam Abu Haneefah (*Rahmatullahi Alaih*) says that:

- ~ The تاريخ (history) of both دلائل is unknown; we are niether able to say that they were pronounced at the same time nor are we able to specify which one of them was ordained earlier and could therefore be منسوخ
- ~ التخصيص and التنسيخ are therefore not possible. We thus resort to الترجيح
- ~ In this instance, احتياط (caution) requires that الترجيح should be given to the hadith that is عام
- ~ العشر should therefore be payable on all crops even if they are less than five أوسق

فصل (Chapter)

القسم الثالث و الرابع من التقسيم الأول
المشترك و المؤول

The Definition of المشترك

المشترك is a لفظ that has two or more لغوى meanings. There are two types of المشترك

Examples:

1. العين - This word is مشترك; it has the following possible meanings:

| | |
|-----------|----------|
| a. Eye | e. Scale |
| b. Spring | f. Money |
| c. Spy | g. Gold |
| d. Sun | |
2. القرء - This word is also مشترك; it could mean either الحيض or الطهر

3. المشترك. مشترك معنوى - it is مشترك - المولى - This word is also المعنوى is a word that has only one لغوى meaning but its لغوى meaning has many أفراد The لغوى meaning of المولى is الناصر and the أفراد of الناصر are:
- a. Master b. Slave c. Friend

The Ruling of المشترك

1. It is compulsory on the Mujtahid to use an internal¹ or external قرينة to identify one specific meaning of اللفظ المشترك in the text that is under discussion.
2. عموم المشترك (inclusion of all the possible meanings at one and the same time) is incorrect.²

Example:

Some time before Ahmed's death, he had made a وصية (bequest) that in the event of his death, twenty-five percent of his estate should be given to Zaid's مولى When he eventually passed away, it was realised that there were two people who could be called Zaid's مولى; his former master and his freed-slave.³ To whom should Ahmed's وصية?

The Fuqahaa reply that neither of the two would receive it because:

- There is no reason to give it to any one of them and deprive the other.
- Due to the impermissibility of عموم المشترك it cannot be given to both of them.

¹ A قرينة that is in the text itself.

² However, there is no harm in taking one meaning in one text and a second meaning in another text.

³ Former master and freed-slave are also among the various meanings of the word مولى

The Definition of التاويل And المؤول

التاويل is the method observed by the Mujtahid in order to specify the intended meaning of اللفظ المشترك and المؤول is اللفظ المشترك in which التاويل took place.

Example:

An example of التاويل is Imaam Abu Haneefah's interpretation of the word قرء in the aayah يتربصن بأنفسهن ثلاثة قروء as حيض Due to this interpretation the word قرء may now be called مؤول

The Ruling of المؤول

Practising on المؤول is واجب مع احتمال الخطأ (compulsory but possibly incorrect). Thus, if it is ever established that the تاويل is undoubtedly incorrect, it will be compulsory to abandon it.

Example:

It is واجب for the حنفية to abide to their تاويل of the word قرء in the previously mentioned aayah as حيض However, they will bear in mind that this تاويل could be incorrect. Thus, if it is established that قرء definitely means طهر instead of حيض, it will be binding on them to change their opinion.

فصل (Chapter)

القسم الأول و الثاني من التقسيم الثاني
الحقيقة و المجاز

As mentioned in the beginning, the second division of اللفظ is based on كيفية الاستعمال (how it has been used). There are four types in this division:

1. الحقيقة
2. المجاز

3. الصريح
4. الكناية

In this chapter we discuss الحقيقة and المجاز

The Definition Of الحقيقة And المجاز

1. الحقيقة is a word that is used in its موضوع له (original) meaning.
2. المجاز is a word that is not used in its موضوع له (original) meaning.

Examples:

The موضوع له meaning of the word أسد is the wild animal which we know as the 'king of the jungle'; the lion. Thus the word أسد is حقيقة when it is used in this meaning. However, it is مجاز if it is used in the meaning of شجاع 'a brave man'.

Ruling:

الحقيقة is أصل the and المجاز is its خلف (substitute). Since it is impossible for a single item to be the أصل and the خلف at one and the same time, the حنفية are of the opinion that simultaneous intention of الحقيقة and المجاز is impermissible.

Example:

The difference of opinion between Imaam Abu Haneefah and Imaam Shaafi'i with regards to whether مس المرأة (touching a woman) nullifies the وضوء is well known. One of Imaam Shaafi'i's دلائل is the words لامستم النساء in the aayah:

... أو جاء أحدكم من الغائط أو لامستم النساء ...

*“... or you come from answering the call of nature
or you touched women...”*

The response of the حنفية is that المس باليد (touching with the hand) is the حقيقة of لامستم النساء and الوطى (sexual intercourse) is its مجاز Since the حقيقة (ie. الوطى) has already been considered, we cannot consider the مجاز (ie. المس باليد) also.

Question:

The حقيقة of 'Zaid's house' is the house which belongs to him and its مجاز is the house that he is renting from somebody. Now, if a man swears to never enter Zaid's house and later enters the house in which Zaid is presently residing, the حنفيه regard him as حانث (having broken his oath) irrespective of whether that house actually belongs to Zaid or he is merely renting it. Are they not contradicting themselves in this particular issue? Are they not combining the حقيقة and مجاز?

Answer:

No, they are not combining the حقيقة and the مجاز. Instead, they are considering the عموم المجاز

What is عموم المجاز?

لفظ عموم المجاز is when such a broad meaning is attached to the which includes the حقيقة and the مجاز

Another Example:

The word أمهات is حقيقة for mothers and مجاز for grandmothers and great-grandmothers etc. However, everybody agrees that in the aayah "حرمت عليكم أمهاتكم" (*Your أمهات ...are unlawful for you*), it refers to all one's female أصول (all females in one's lineage). This meaning includes the حقيقة and the مجاز of the word أمهات and is therefore an example of عموم المجاز

The Three Types of الحقيقة

الحقيقة is of three types:

1. الحقيقة المهجورة
2. الحقيقة المتعدرة
3. الحقيقة المستعملة

الحقيقة المهجورة

Literally, المهجورة could be translated as ‘abandoned’ or ‘discarded’. Thus الحقيقة المهجورة is that حقيقة which العرف (society and common usage) does not consider.

Example:

The حقيقة of ‘Zaid’s house’ in the first example of عموم المجاز

الحقيقة المتعذرة

Literally, المتعذرة could be translated as ‘impossible’ or ‘extremely difficult’. Thus الحقيقة المتعذرة is that حقيقة which is very difficult or almost impossible to achieve.

Example:

A man took an oath saying: “By Allaah! I will not eat this tree”. The حقيقة of this oath is that he will not eat the actual tree (ie. the bark and the wood) and its مجاز is that he will not eat the fruit of the tree. Obviously the حقيقة is extremely difficult to achieve.

Ruling:

Imam Abu Haneefah (*Rahmatullah Alaihi*) and his two companions (*Rahmatullah Alaihi*) agree that when the حقيقة is مهجورة or متعذرة, it must be disregarded. Thus, in the example of the man who took an oath not to eat ‘this tree’, he will only become حائن (his oath will only be broken) if he eats the fruit of the tree. Hence, if he eats the actual tree (ie. the bark and the wood), he will not become حائن because we have agreed to accept the مجاز and combining the حقيقة and the مجاز is not permissible.

الحقيقة المستعملة

Literally, المستعملة means something that is commonly used. Thus, الحقيقة المستعملة is that حقيقة which is recognised by العرف

(society and common usage). Putting it differently, it is that *حقيقة* which is neither *مهجورة* nor *متعذرة*

Ruling:

Imaam Abu Haneefah and his two companions (*Rahmatullahi Alaihim*) agree that if *الحقيقة المستعملة* does not have a *مجاز متعارف*, the *مجاز* will only be considered if there is a *قرينة* proving that the *حقيقة* has not been intended. However, if *الحقيقة المستعملة* does have a *مجاز متعارف*, Imaam Abu Haneefah prefers the *حقيقة* whereas his two companions prefer the *عموم المجاز*

Example:

Pointing to a bag of flour a man said: “By Allaah! I will not eat this flour!” He later ate bread that was made from the same flour. In this instance Imaam Abu Haneefah (*Rahmatullah Alaih*) says that the man is not *حائث* because the words “this flour” is *مجاز* for the bread. However, since the *حقيقة* is *مستعملة*, the *حقيقة* must be considered. On the other hand, his companions say that because there is a *مجاز متعارف*, the *عموم المجاز* must be considered. This man is therefore *حائث* irrespective of whether he ate the raw flour or anything else (eg. bread) that was made from it.

In What Manner Does The *مجاز* Substitute The *حقيقة*?

Imaam Abu Haneefah and his two companions differ regarding the manner in which the *مجاز* substitutes the *حقيقة*. According to Imam Abu Haneefah the *مجاز* substitutes the *حقيقة* in *التكلم* (speech) and not in *الحكم* (the ruling). This means that utterance of a statement in its *مجاز* is the substitute of uttering it in its *حقيقة*. Imam Abu Haneefah’s argument is that the *حقيقة* and the *مجاز* are attributes of the *لفظ* and not the *معنى*. Thus the *مجاز* substitutes the *حقيقة* in *التكلم*

Example:

Referring to a very brave man, you said: "هذا أشد" (*This is a lion*). Your saying these words in this manner is the substitute of your saying them in reference to a lion.

The Opinion of The Companions:

The argument of Imaam Abu Haneefah's companions is that the ultimate aim of speech is the **حكم** and not the **لفظ**. Hence, the **حقيقة** substitutes the **مجاز** in the **حكم** instead of the **لفظ**. What this means is that the **حكم** of the **مجاز** is the substitute of the **حكم** of the **حقيقة**.

Example:

The **حكم** of your statement "هذا أشد" when referring to a brave man is the substitute of the **حكم** of your statement "هذا أشد" which you should have said in reference to a lion.

The ثمرة (Consequence) of This Difference of Opinion

Since Imam Abu Haneefah says that the **مجاز** substitutes the **حقيقة** in **التكلم** only, he says that in order for the **خلفية** (substitution) to be valid, the **كلام** must be grammatically correct. On the other hand, his companions say that since the **مجاز** substitutes the **حقيقة** in the **حكم** instead of the **تكلم**, the **خلفية** (substitution) will only be valid if the **حكم** of the **حقيقة** is valid. In other words if the **حكم** of the **حقيقة** is impossible, the **كلام** will be **لغو** (meaningless).

Example:

Imaam Abu Haneefah and his companions agree that the **مجاز** can be considered when you say "هذا أشد" in reference to a brave person. Imam Abu Haneefah considers the **مجاز** because the **كلام** is grammatically correct. His companions consider it because the **حكم** of the **حقيقة** (ie. description of the lion as brave) is valid. Thus, the **حكم** of the **مجاز** (ie. description of the man as brave) is also valid.

Another Example:

A man owned a slave who is elder than himself. With the intention of freeing this slave, he said: "هذا ابني" (*This is my son*). Gramatically speaking, there is nothing incorrect in this statement. Thus Imam Abu Haneefah says that it could be used in the meaning of "هذا حر" (*This slave is now a free person*).

His companions disaagree. Their argument is that in this instance, the حقيقة of "هذا ابني" is impossible. How can the son be elder than his father? That being the case, the مجاز is invalid, the كلام is لغو (meaningless) and the slave has not gained freedom.

علاقة المجاز

Before ending our discussion on المجاز and الحقيقة, we must mention that whenever we wish to attach a مجازي meaning to a word, there must be some علاقة (relationship) between the حقيقي and مجازي meanings. Depending on the way in which the حقيقة and the مجاز are linked, there are two types of مجاز :

1. المجاز المستعار – when the علاقة between the حقيقة and the مجاز is that of تشبيه

Example: زيد أسد

2. المجاز المرسل – when the علاقة between the حقيقة and the مجاز is not تشبيه

Example: The words "و اسئل القرية..." (*And ask the town...*) which actually mean "و اسئل أهل القرية..." (*And ask the people of the town...*). The علاقة between the حقيقة and the مجاز is not تشبيه – it is:

ذكر المحل و ارادة الحال
*mentioning of the place with the
intention of those who occupy it*

A Summary of اصول الشاشي

The following is a summary of what the author of اصول الشاشي mentioned in this regard.

1. If the علاقة between the حقيقة and the مجاز is عليّة, it will be permissible to use the علة in the meaning of the معلول (ie. the حكم) and vice versa.

Example: شراء is the علة of الملك. Thus it is permissible to use شراء in the meaning of الملك and vice versa.

2. If the علاقة between the حقيقة and the مجاز is سببية, the سبب can be used in the meaning of the مسبب (حكم) but the مسبب cannot be used in the meaning of the سبب.

Example: شراء الامة is سبب for اباحة الوطي which is also the حكم of نكاح. It is therefore permissible to use the word شراء in the meaning of نكاح. However, the word نكاح cannot be used in the meaning of شراء.

The Difference Between العلة And السبب

العلة is the direct cause of the حكم whereas السبب is the indirect cause of the حكم. The سبب results in the and the علة results in the حكم

Example: شراء results in ملك الرقبة which in turn results in اباحة الوطي. Thus شراء is the سبب for اباحة الوطي and the علة for ملك الرقبة

فصل

القسم الثالث و الرابع من التقسيم الثاني الصريح و الكناية

Definition of الصريح :

الصريح is a لفظ whose meaning is so clear that the نية of the متكلم is not necessary. This applies irrespective of whether the the متكلم intended the حقيقة or the مجاز

The Ruling of الصريح:

Its حكم is established regardless of the نية of the متكلم .

Example:

A man told his wife: "أنت طالق". Since this statement is صريح, *talaaq* will be effective even if he says 'I didn't intend *talaaq*; I was only joking'.

The Definition of الكناية:

الكناية is a لفظ whose meaning is obscure and cannot be understood without a قرينة

The Ruling of الكناية

The ruling of الكناية is that its meaning is only established through نية or دلالة حال

Example:

A man told his wife: "اعتدى". The حقيقة of this statement is 'Count!'. However, it could also mean "observe العدة". Thus (because there is obscurity regarding the intended meaning), it is an example of الكناية. Hence, its حكم (ie. *talaaq*) can only be established through نية (intention of the متكلم) or دلالة حال (the circumstances in which the statement was made).

Note:

It is often asked that if "اعتدى" and similar statements are كنايات (meaning مجاز) for الطلاق and there is never a difference between the ruling of the أصل and the خلف , should not the resultant be رجعى instead of بائن

The answer to this question is that "اعتدى" and similar statements are not كنايات (meaning مجاز) for الطلاق. However, because the meanings of the كنايات are also obscure, we compare these statements to the كنايات and describe them as

كنايات. In short, the reason for labelling statements like "اعتدى" as كنايات is كنايات and not that they are كنايات (meaning مجاز) for الطلاق

Another Ruling:

It is mentioned in a hadith that the حدود (legal punishments in the شريعة) must be waived in the presence of شبهات (doubts whether the accused definitely deserves that particular حد. In view of this hadith it is concluded that:

1. If a person uses الكناية to acknowledge having committed zinaa or any other crime that warrants the implementation of حد, he will not receive the appropriate حد (The obscurity in the meaning of his speech creates the شبهة that he does not deserve the حد
2. If a dumb person uses sign language to acknowledge that he committed zinaa, he too will not be given the relevant حد because there is a possibility that we did not fully understand what he was trying to tell us.

فصل (Chapter)

التقسيم الثالث

الظاهر و النص و المفسر و المحكم

The third division of اللفظ is based on its ظهور (clarity) and comprises of eight types. Of these eight types, four are واضح (their meanings are clear and no external factors are required to understand them)) and four are خفى الدلالة (their meanings are unclear). The first four are:

1. الظاهر

2. النص

3. المفسر

4. المحكم

الظاهر The Definition of

الظاهر is that لفظ whose meaning is so clear that mere سماع (listening) is sufficient for it to be understood - understanding its meaning niether requires تأمل (thinking) nor any other قرينة خارجية (external factor). This definition is applicable irrespective of whether the لفظ was brought to expound that particular meaning or not.

Example:

Study the aayah:

فنكحوا ما طاب لكم من النساء مثنى و ثلاث و رباع
(Marry the women who please you – two, three or four)

This aayah was brought to expound the maximum number of wives a man may have. However, by merely listening to it, one also understands that marriage is permissible. This is understood with the aid of niether تأمل nor any قرينة خارجية We therefore classify this aayah as ظاهر.

الظاهر The Ruling of

Unless there is a دليل proving that the (apparent) meaning has not been intended, its implementation is compulsory irrespective of whether it is عام or خاص. However:

- a. It could be subjected to التخصيص if it is عام
- b. Its مجاز may be considered if it is خاص
- c. It could be subjected to التقيد if it is مطلق

النص The Definition of

النص is a لفظ that has each of the following features:

1. Its meaning is clearer than that of الظاهر
2. The extra وضوح (clarity) is not due to the لفظ itself; it is due to a قرينة in the متكلم

3. The قرينة that we are referring to is the fact that the aayah was brought for no other purpose but to expound that particular meaning.

Example:

The aayah فنكحوا ما طاب لكم من النساء مثنى و ثلاث و رباع is نص with regards to the maximum number of wives a man may at any specific time.

The Ruling of النص

The ruling of النص is exactly the same as the ruling of الظاهر Thus it could be subjected to التأويل and التخصيص

The Definition of المفسر

النص is a لفظ whose meaning is even clearer than that of المفسر and the cause of such وضوح (clarity) is بيان (clarification) from the متكلم

The Ruling of المفسر

The ruling of المفسر is that:

1. Fulfilling its demands is واجب
2. Since its clarity is due to بيان (clarification) from the متكلم, there is no scope for التأويل and التخصيص However, النسخ is possible during the lifetime of Rasulullah (*sallallahu alaihi wasallam*)

Example:

Describing the angel's reponse to Allah Ta'aala's command to them to make سجود to Sayyidina Adam (*Alaihis Salaam*), He said: "فسجد الملائكة" (*Thus the angels prostrated*). This statement is open to تخصيص – it could be claimed that there is no indication regarding the number of angels who actually complied with this command of Allah; it is possible that not all of them did so. However, this تأويل is averted by addition of the word كلهم (*all*

of them). However, it could still be argued that this does not mean that they made سجود collectively; all at once. This تأويل is averted by addition of the word أجمعين. In short, the result of the words كلهم and أجمعين is that the word الملكة became مفسر

Another Example:

Acknowledging that he owes Bakr some money, Zaid said: “I owe Bakr one thousand”. (لِبَكْرٍ عَلَى أَلْفٍ) The word “one thousand” is مجمل (unclear); it does not specify the currency of payment. Does Zaid mean a thousand rands, dollars or pounds? In such an instance the Fuqahaa take it for granted that he is referring to the most commonly used currency in the place where Zaid made this acknowledgement. By doing this, the word “one thousand” becomes مؤول. If, however, Zaid added the word riyals to his statement and said “I owe Bakr one thousand riyals” (لِبَكْرٍ عَلَى أَلْفٍ رِيَالٍ), the same word is now an example of المفسر

The Definition of المحكم:

المحكم is a لفظ whose meaning is so apparent that just as التأويل and التخصيص are not possible, النسخ in the era of رسالة is also not possible.

The Ruling of المحكم

It is quite clear from the above that it is absolutely imperative to fulfill the requirements of المحكم

Example:

و لا تتكحوا أزواجه من بعده أبدا

*And do not ever marry his (Rasulullah's) spouses
after his demise.*

This aayah is محكم – it does not entertain the slightest possibility of النسخ and التخصيص, التأويل

Another Ruling:

Each one of the four types of اللفظ that have been discussed in this فصل is clearer and hence, stronger than the one before it. Thus:

- ~ النص is clearer and stronger than الظاهر,
- ~ النص and المفسر is clearer and stronger than المفسر,
- ~ المفسر is clearer and stronger than المحكم.

Furthermore, the strength of one type over the other only surfaces at the time of تعارض (conflict) between the دلائل. For example, if there is a تعارض between two دلائل, one of which is ظاهر and the other is نص, preference will be given to the latter.

النص And الظاهر between تعارض: An Example of

When the people of عرينة complained of their illness to Rasulullah (*sallallahu alaihi wasallam*), he advised them to drink the urine and the milk of the camels. By merely hearing this hadith, one understands that it is permissible for a Muslim to drink camel-urine. This, however, was not the purpose of the hadith. Its purpose was to guide the questioners to a cure for their illness. The hadith is therefore ظاهر in this regard.

On the other hand, there is the hadith in which Rasulullah (*sallallahu alaihi wasallam*) said:

استنزهوا من البول فان عامة عذاب القبر منه

Be cautious of urine because most of the punishment in the grave is due to (negligence regarding) it.

This hadith was mentioned by Rasulullah (*sallallahu alaihi wasallam*) specifically for this reason. It is therefore نص regarding the impermissibility of all¹ types of urine. Since الظاهر is clearer and stronger than النص we give preference to

¹ The word البول is عام

this hadith over the previous one and conclude that even camel-urine is impermissible for Muslim consumption.

An Example of تعارض between النص And المفسر

With regards to the مستحاضة one hadith states that تتوضأ لكل صلاة (she should make a fresh wudoo for every salaah). This implies that if she is going to perform two salaats in the same time – one وقتية and one فائتة), she will have to make a fresh wudoo before commencing the second salaah. However, another hadith regarding the same topic states that تتوضأ لوقت كل صلاة (should make a fresh wudoo at the time of every salaah). This suggests that she must renew her wudoo at the time of every salaah. Put differently, it means that her wudoo is nullified with the expiry of every salaah time. Subsequently, if she is going to perform two salaats in the same time, she will not have to make a fresh wudoo before commencing the second salaah. Now, which hadith do we consider? Our answer is that while the first hadith is نص, the second hadith is مفسر and therefore stronger.

An Example of تعارض Between المفسر And المحكم

Some scholars claim that there is not a single example of تعارض between المفسر and المحكم Others cite the following example:

What is the ruling concerning the testimony of the محدود في القذف (one who received the shar'i punishment for false accusation of zinaa)? The اطلاق (unrestricted description) in the aayah و أشهدوا (And make two upright men among you bear testimony) warrants its acceptance. This, however, contradicts the aayah "و لا تقبلوا لهم شهادة أبدا" (And do not ever accept their testimony). Now what do we do? The approach of the حنفية is to give preference to the latter aayah because it is محكم whilst the former aayah is only مفسر

النص and المحكم between تعارض

Having mentioned all the محرمات (women to whom a man may not get married), Allah Ta'aala then says "وَأَحَلَّ لَكُم مَّا وَرَاءَ ذَلِكَ" (All other women are lawful for you). Does this اطلاق (unrestricted description) not imply that after the demise of Rasulullah (sallallahu alaihi wasallam) marriage to one of his wives would be permissible. However, the aayah was not revealed to expound this particular ruling. Furthermore, this deduction contradicts the aayah:

"وَمَا كَانَ لَكُمْ أَنْ تُؤْذُوا رَسُولَ اللَّهِ وَلَا أَنْ تُنَافِكُوا أَزْوَاجَهُ مِنْ بَعْدِهِ أَبَدًا"

(It is unbecoming of you to annoy the Rasool or marry his spouses after him)

With regards to the impermissibility of marrying any of the wives of Rasulullah (sallallahu alaihi wasallam) this aayah is محكم and thus annuls the deduction made from the previous aayah.

الملخص (Summary)

| القسم | يحتمل التخصيص | يحتمل التأويل | يحتمل النسخ |
|----------|---------------|---------------|-------------|
| الظاهر | نعم | نعم | نعم |
| النص | نعم | نعم | نعم |
| المحكم | لا | لا | نعم |
| المتشابه | لا | لا | لا |

فصل (Chapter) التقسيم الثالث (مستمر) الخفى و المشكل و المجمل و المتشابه

In this chapter we discuss the four types of اللفظ that are خفى (unclear and cannot be understood without some external aid).

- The four types of اللفظ that are خفى الدلالة are:
 - a. الخفى
 - b. المشكل
 - c. المجمل
 - d. المتشابه
- Similar (but different) to the previous four types, each one of them is more خفى (unclear) than the other. Thus:
 - a. الخفى is more unclear than المشكل
 - b. المجمل is more unclear than المشكل
 - c. المتشابه is more unclear than المجمل
- The eight types in this division are known as المتقابلات (The Opposites) because each one of the first four has a direct opposite among the second four. الخفى is the opposite of الظاهر, المشكل is the opposite of النص, المجمل is the opposite of المحكم and المتشابه is the opposite of المفسر

العرفى

العرفى is a word that possesses the following features:

1. Its meaning is obscure and cannot be understood except through الطلب.
2. This obscurity is due to an external factor and not the صيغة itself. Thus we could say that the meaning of the لفظ is actually ظاهر, but the intention of the متكلم is obscured by some external factor..

Example:

The word السارق in the aayah:

السارق و السارقة فاقطعوا أيديهما...

(The male and female thief, amputate their right hands...)

The actual meaning of this word is ظاهر. However:

- ~ It is خفى in relation to whether it encompasses the طرار (pickpocket) and the نباش (grave-thief).
- ~ The cause of this خفاء (obscurity) is not the صيغة itself; it is the fact that the طرار and the نباش have separate names. If they are included in the meaning of السارق, why do they have separate names?

The Ruling of الخفى

- خفاء (خفاء) the التأمل and البحث (الطلب) until its meaning is clarified is imperative.
- If after التأمل and البحث it is realised that the cause of the خفاء is الزيادة فى المعنى (presence of more than the actual meaning), the two issues will be classified as one.

Example: After التأمل and البحث it was realised that the خفاء in السارق in relation to the طرار is الزيادة فى المعنى – while السارق steals from people who are asleep, the طرار steals from them who are wide awake. Thus the طرار should be categorised as سارق and dealt with accordingly.

- If the التأمل and البحث reveal المعنى (the actual meaning is not totally present) as the cause of the خفاء, the two issues will not be classified as one.

Example: revealed المعنى as the نقصان فى the التأمل and البحث – unlike the خفاء in السارق in relation to the نباش (protected place). Therefore he cannot be terated as سارق.

The Definition of المشكل

المشكل is a لفظ whose obscure meaning is due to the لفظ itself.

Example:

The word أنى is used in the meaning of either من أين or كيف. The former meaning is used in the aayah "أنى لك هذا" (*From where did you get this?*) and the latter meaning is used in the aayah "أنى يكون لى غلام" (*How can I have a son?*). However, its meaning in the aayah "فأتوا حرثكم أنى شئتم" is مشكل (unclear). The implication of the former meaning is that anal-intercourse is permissible. This, however, does not apply to the latter meaning which merely indicates the permissibility of various different postures – standing, sitting, laying on one's side etc. Thus the Fuqahaa engaged in البحث and التأمل and concluded that it has been used in the meaning of كيف. They came to this conclusion on the basis of the word حرث (plantation) which, in this context, means موضع طلب الأولاد (the place for seeking children). Since anal-intercourse does not result in pregnancy, the anas does not befit the description of حرث. Besides, there are other دلائل regarding the impermissibility of anal-intercourse. Thus, the word أنى in this aayah cannot be in the meaning of من أين.

The Ruling of المشكل

Mere طلب is insufficient to remove its obscurity. Instead, it is also necessary to identify some قرينة which specifies the meaning of the لفظ. An example of such a قرينة is the word حرث in the aayah "فأتوا حرثكم أنى شئتم"

The Definition of المجمل

المجمل is a word whose obscure meaning:

- Is the result of the لفظ itself
- Can only be understood through بيان (clarification) from the متكلم.

The Ruling of المجمل

The meaning of any word that is مجمل can neither be understood from its صيغة nor from any قرينة خارجية. Instead, مرجوع (referring) to the متكلم is incumbent.

Example:

When the aayah و حرم الربوا (*And He prohibited interest*) was revealed, the word الربوا was initially مجمل. The reason for this being that the لغوى (linguistic) meaning of الربا is مطلق الزيادة (any type of excess). This meaning is not confined to interest; it also includes the profit that is gained from the sale of merchandise. There are, however, other دلائل proving the permissibility of selling items for a profit. Consider the first part of this aayah viz. أحل الله البيع (*Allah has permitted trade*). The Sahaabah (*radiallahu anhum*) were therefore uncertain about the meaning of الربوا and this uncertainty could only be resolved through بيان (clarification) from Rasulullah (*sallallahu alaihi wasallam*)

Another Example:

In Arabic, the former master and the freedslave are both called مولى. So, if a man who has a former master and a freedslave makes وصية that اذا مت فتتلى مالى لمولاي (*When I die, one third of my estate should be given to my مولى*), we would only know whether he is referring to his former master or his freedslave if he informs us himself. The word مولى is therefore مجمل.

The Definition of المتشابه

المتشابه is a word whose meaning is unclear and there is no hope in this worldly life of it ever being clarified.

Example:

(indepth study and research) reveal that there is niether a single aayah of the Qur-aan nor a single hadith related to any fihi issue that could be described as متشابه (None of the aayaat and ahaadith that are classified as متشابه discuss fiqh-related issues.) Nevertheless, the حروف المتشابهات and the صفات المتشابهات (attributes of Allah which bear an apparent resemblance with the attributes of the creation) belong to this type.

The Ruling of المتشابه

It is compulsory to believe that although we cannot comprehend the intended meaning of المتشابه, it is undoubtedly حق (correct).

(Summary) الملخص

| القسم | الحكم |
|----------|--|
| الخفي | مراد المتكلم ينكشف بالبحث و التأمل |
| المشكل | مراد المتكلم ينكشف بالبحث و التأمل و قرينة من خارج اللفظ |
| المجمل | مراد المتكلم لا ينكشف الا ببيان من المتكلم |
| المتشابه | مراد المتكلم لا ينكشف أبدا |

فصل

القسيم الرابع

عبارة النص و اشارة النص و دلالة النص و اقتضاء النص

The fourth division of اللفظ is based on the كيفية (method) by means of which it indicates its meaning Here too, there are four types:

1. عبارة النص
2. اشارة النص

3. دلالة النص
4. اقتضاء النص

Note: The meaning of النص in this chapter differs from its meaning in the previous chapter. In this chapter it refers to the لفظ from which the meaning is understood irrespective of whether, in relation to clarity, this لفظ is ظاهر, نص, مفسر, or محكم.

عبرة النص

Reference of the لفظ to its intended meaning (the meaning for which it was actually revealed or uttered) is called عبرة النص

Example:

The purpose of the aayah أحل الله البيع و حرم الربو is to highlight the permissibility of trade and the impermissibility of ribaa. The reference of this aayah to this meaning is called عبرة النص.

إشارة النص

Reference of the لفظ to a meaning other than the meaning for which it was revealed or uttered is called إشارة النص.

Example:

Study the aayah أحل لكم ليلة الصيم الرفث الى نساكم (*Intercourse with your women during the night of fasting is permissible for you*). The purpose of this aayah is to convey the permissibility of conjugal-relations during the nights of Ramadaan. The reference of this aayah to this meaning is called عبرة النص. However, it is also understood from this aayah (from the fact that no specific part of the night has been mentioned) that intercourse is permissible throughout the night, even if it means just a few minutes before الصبح الصادق – so few minutes that the الصبح الصادق would not be possible before الغسل. If somebody does do something like this, would he not be in a state of جنابة (major impurity) at the time of الصبح الصادق? Furthermore, if the الصبح الصادق is included in the صوم, would this not mean that:
~ Being in a state of جنابة after الصبح الصادق does not invalidate the صوم

~ A wet-dream does not invalidate the صوم

However, conveying these meanings is not the actual purpose of the aayah. The aayah's reference to them is therefore called إشارة النص.

دلالة النص The Definition of

Reference of the meaning of the لفظ to its application to situations not discussed by the لفظ is called دلالة النص provided this reference is understood through the means of اللغة instead of الاجتهاد. In other words, دلالة النص entails the following steps:

1. اللغة is used to specify the علة of the نص. عبارة النص
2. The علة is then identified in a situation that is not discussed by the لفظ.
3. The ruling that is established through the نص عبارة is thereafter applied to this other situation.

Note:

1. دلالة النص is almost the same thing as القياس. In fact, some Fuqahaa call it القياس الجلى. The difference between the two is that the تعليل (specification of the علة) in دلالة النص is based on اللغة whereas in القياس it is based on الاجتهاد.
2. The difference between نص عبارة and دلالة النص is that the first two are established through the لفظ itself whereas the دلالة النص is established through the meaning of the لفظ.

Example:

Study the aayah "و لا تقل لهما أف" (*And do not tell them oof!*). Its عبارة conveys the prohibition of التأفیف (telling the parents oof). The علة behind this prohibition is دفع الأذى عن الوالدين (to avoid annoying and causing difficulty to one's parents). That being the case, wouldn't swearing one's parents and beating them fall in the same category? Most certainly swearing one's parents and beating them annoys them and causes them untold

difficulty. We therefore conclude that the above aayah refers to the impermissibility of swearing one's parents and beating them through the means of دلالة انص.

اقتضاء النص The Definition of

- Recognition of a meaning that is not mentioned in the لفظ although it is a pre-requisite for its shar'i validity is called اقتضاء النص.
- The unmentioned meaning that is recognised in order to ensure the shar'i validity of the لفظ is called المقتضى (the passive participle of الاقتضاء).

Example:

A commonly quoted example in this regard is the hadith:

رفع عن أمتي الخطأ و النسيان و ما استكروها عليه

Error, forgetfulness and coercion have been lifted from my ummah.

It is common sense that once an action is committed, it cannot be undone even if it was committed by error or due to forgetfulness or coercion. Yes, its consequences could be undone or overlooked. Hence, the meaning of this hadith would only be correct if the word اثم is recognised before the word الخطأ. Thus:

- The actual meaning of the hadith is:

رفع عن أمتي اثم الخطأ و النسيان و ما استكروها عليه

The sin of error, forgetfulness and coercion have been lifted from my ummah.

- مقتضى is the اثم

Another Example:

Commission of actions (good and bad) does not depend on نية. Actions are often committed without any نية at all. Therefore, the meaning of the hadith "انما الأعمال بالنية" can only be correct if the word تعتبر is recognised before الأعمال. Hence:

- The actual meaning of the hadith is:
انما تعتبر الأعمال بالنيات
Actions are judged according to their intentions only.
- مقتضى is the تعتبر

Ruling

المقتضى is recognised on the basis of الضرورة – necessity; the necessity to ensure the shar’i validity of the لفظ. Therefore, like everything else that is recognised on the basis of الضرورة, it can only be recognised to the extent of the ضرورة.

Example:

If a man tells his wife "اعتدى" (Observe iddah!) with the نية of talaq, talaq will be recognised on the basis of الاقتضاء (Can a woman observe iddah without having been given talaq? (If we do not recognise talaq on the basis of الاقتضاء, the لفظ would be meaningless.) Since this talaq is recognised on the basis of الاقتضاء and everything that is recognised on the basis of الضرورة can only be recognised to the extent of the ضرورة, it will have to be رجعى (revocable) instead of بائن (irrevocable).

Ruling

The strongest of the four types discussed in this chapter is عبارة. This is followed by اشارة النص, thereafter دلالة النص and finally اقتضاء النص. Therefore, in the instance of تعارض (conflict) between any two of these four types, the stronger type is always given preference.

Example:

When Rasulullah (*sallallahu alaihi wasallam*) was asked why he described the women as ناقصات الدين (deficient in relation to deen), he referred to the fact that menstruating women are impure and therefore not permitted to perform salaah and keep suam. Thus he said: “*because they spend half of their lives*

neither performing salaah nor observing saum". While the reason for describing women as ناقصات الدين is the عبارة النص of this hadith, its اشارة النص is that the maximum period of الحيض is fifteen days. However, this is in conflict with the hadith "أقل" (The minimum haid is three days and its maximum is ten days). Since ten days are established from the عبارة النص of this hadith and عبارة النص is stronger than اشارة النص, we give preference to this hadith and conclude that the maximum period of الحيض is ten days.

Another Example:

Study the aayah:

و من يقتل مؤمنا خطأ فتحرير رقبة مؤمنة...

Whoever kills a believer in error must free a believing slave...

The compulsion of الكفارة (atonement) upon the قاتل الخطأ is its عبارة النص. Its دلالة النص is that this كفارة is also compulsory upon قاتل العمد because his crime is worse than the crime of the قاتل الخطأ. If الكفارة is compulsory upon قاتل الخطأ, why should it not be compulsory upon قاتل العمد whose crime is worse? This, however, contradicts the aayah

و من يقتل مؤمنا متعمدا فجزاؤه جهنم خالدا فيها

Whoever intentionally kills a believer, his punishment will be Jahannam in which he will abide forever...

The اشارة النص of this aayah is that الكفارة is not compulsory upon قاتل العمد. Since اشارة النص is stronger than دلالة النص we give preference to the اشارة النص of this second aayah over the دلالة النص of the previous aayah and conclude that الكفارة is not compulsory upon قاتل العمد.

وجوه البيان

Having understood the different تقاسيم and أقسام of the لفظ, you now have to understand the different types of البيان (modes of expression). In total, there are five types of البيان. They are:

- | | |
|-----------------|-----------------|
| 1. بيان التقرير | 5. بين الحال |
| 2. بيان التفسير | 6. بيان العطف |
| 3. بيان التغيير | 7. بيان التبديل |
| 4. بيان الضرورة | |

The Definition of بيان التقرير

بيان التقرير is an additional statement that is uttered by the متكلم after his initial لفظ in order to emphasis that he had intended the ظاهر and not the مجاز.

Example:

One example of بيان التقرير is the word بجناحيه in the aayah
"... ولا طائر يطير بجناحيه"

"...nor any bird that flies with its wings."

If it was not for this word, one could possibly think that just as the Arabs describe somebody with high aspiration as "يطير" (flying with his aspiration), this aayah is also referring to a similar meaning. However, this possibility is averted through the word بجناحيه allowing us no scope to seek any meaning other than the ظاهر.

Another Example:

The ظاهر of a man's statement ألف على (I owe so-and-so one thousand) is that the debt is payable in the local currency. However:

- It being payable in some other currency is possible.

- This possibility may be averted by adding the words من نقد البلد (in the local currency)
- Hence, if the متكلم said: لفلان على ألف من نقد البلد, his words من لفلان على ألف are بيان التقرير – they merely confirm what was already understood from the words لفلان على ألف.

The Ruling of بيان التقرير

موصولا is valid irrespective of whether it is mentioned موصولا (immediately after the initial statement) or مفصولا (some while later).

The Definition of بيان التفسير

بيان التفسير is an additional statement that is uttered by the متكلم after his initial لفظ in order to clarify its unclear meaning.

Example:

The meanings of as-salaah and az-zakaah in the اقيموا The meanings of as-salaah and az-zakaah in the اقيموا were initially unclear. They were later clarified by Rasulullah (sallallahu alaihi wasallam). Thus all the ahaadith that expound the details of salaah and zakaah may be classified as the بيان التفسير of these two words.

Another Two Examples:

1. If a man says: لفلان على شيء (I owe so-and-so something) and thereafter clarifies the meaning of شيء as one-hundred rands, his latter statement would be بيان التفسير
2. If a man who is in South Africa (where the currency is rands) says: “I owe Zaid one-hundred riyaaals”, the word riyaaals would be بيان التفسير because it is clarifying the meaning of ‘one-hundred’.

بيان التفسير The Ruling of

موصولا is valid irrespective of whether it is mentioned (immediately after the initial statement) or مفصولا (some while later).

بيان التغيير The Definition of

لفظ of بيان التغيير is a statement that alters the ruling of the initial متكلم. There are two types of بيان التغيير viz.

1. التعليق بالشرط – when the متكلم makes the ruling of his initial statement dependent on a شرط.

Example: A man told his wife أنت طالق (*You are divorced*). This statement demands immediate effect of the talaaq. However, if he adds a شرط to his initial statement, for example: ان دخلت الدار (*If you enter the house*), the talaaq will only be effective when the شرط is found. ان دخلت الدار is therefore an example of بيان التغيير

2. الاستثناء – when the متكلم makes an exclusion from the ruling of his initial statement.

Example: A man said: لزيد على عشرة الا تسعة (*I owe Zaid ten dirhams except nine*). The words الا تسعة are بيان التفسير because they alter the ruling of the صدر الكلام (initial statement) ie. لزيد على عشرة

Ruling

As far as التعليق بالشرط is concerned, there is a difference of opinion with regards to when the صدر الكلام (initial statement) becomes the سبب. The أحناف are of the opinion that it only becomes the سبب when the شرط is found. On the other hand, the شافعية claim that it becomes the سبب the moment it is uttered. Its effect, however, will only take place when the شرط is found.

Example

A man told his wife: أنت طالق ان دخلت الدار (*You are divorced if you enter the house*). According to the أحناف the words أنت طالق

only become the سبب for talaaq when the wife enters the house. The شافعية say that أنت طالق becomes the سبب for talaaq the moment it is uttered by the متكلم. However, due to absence of the شرط, talaaq will not yet be effective. Talaaq will only take effect when the wife enters the house.

The ثمرة (Outcome) of This Difference of Opinion

The ثمرة (outcome) of this difference of opinion is evident in the case of a man who tells an أجنبية (a woman whom he can marry but has not yet done so): أنت طالق ان تزوجتك (*If I marry you, you are divorced!*). The شافعية say that this statement is meaningless. Their argument is that because أنت طالق becomes the سبب for talaaq from the moment it is uttered, it is imperative that the woman to whom these words are uttered is محل للطلاق (somebody who the متكلم can divorce) at that very same moment. However, this woman is an أجنبية in relation to the متكلم. She is therefore not محل للطلاق. The statement of the متكلم is hence meaningless and void.

The أحناف differ. They argue that أنت طالق only becomes the سبب for talaaq when the شرط is found. There is therefore no harm if at the time of uttering the statement under discussion, the woman concerned was not محل للطلاق. So, if أنت طالق only becomes the سبب for talaaq when the شرط is found and when the متكلم does marry her she will become محل للطلاق, the talaaq will be effective. In short, this statement of the متكلم is not meaningless.

Ruling

There is also a difference of opinion regarding الاستثناء. The أحناف are of the opinion that its ruling is equivalent to تكلم بالباقي (utterance of what is left after الاستثناء). Thus the statement لفلان على عشرة الا تسعة (*I owe so-and-so ten excluding nine*) is equivalent to لفلان على واحدة (*I owe so-and-so one*). In

other words, the initial demand of لفلان على عشرة الا تسعة was never ten. On the contrary, the شافعية say that the entire amount mentioned in the صدر الكلام (initial statement) becomes compulsory. However, due to the دليلى\معارض (ie. the استثناء) the excluded amount is not effective. Thus لفلان على عشرة الا تسعة demands that the initial demand of the statement under discussion is ten. However, nine are excluded due to the استثناء. In short, الاستثناء is not تكلم بالباقي بعد الثنيا (utterance of what is left after الاستثناء).

The ثمرة (Outcome) of This Difference of Opinion

The ثمرة (outcome) of this difference of opinion is evident in the issue of بيع الحفنة بالحفنتين من الطعام (the sale of one handful of grain in exchange for two handfuls of the same).

Rasulullah (*sallallahu alaihi wasallam*) prohibited the sale of grains in exchange for grains except in equal quantities. He said:

لا تبيعوا الطعام بالطعام الا سواء بسواء

*Do not sell grains in exchange for grains except in
Equal quantities.*

Does this prohibition include بيع الحفنة بالحفنتين من الطعام (the sale of one handful of grain in exchange for two handfuls of grain)? According to their approach to الاستثناء, the شافعية answer in the affirmative. They say that the صدر الكلام demands the impermissibility of all sales of grains in exchange for grains even if both quantities are equal. However, due to the استثناء, the sale in which both amounts are equal is excluded from this prohibition. Thus, بيع الحفنة بالحفنتين من الطعام remains under the initial prohibition.

The أحناف disagree. They argue that since الاستثناء is equivalent to تكلم بالباقي بعد الثنيا (utterance of what is left after الاستثناء), it is as if Rasulullah (*sallallahu alaihi wasallam*) merely said:

بيعوا الطعام بالطعام سواء بسواء

Sell grains in exchange for grains in equal quantities.

Now, this injunction can only include such quantities that may be measured – quantities that are too small to be measured are excluded. One or two handfuls are too small to be measured and therefore do not fall under this category. Hence there is no harm in بيع الحفنة بالحفنتين من الطعام.

بيان الضرورة

...اضافة الشيء الى سببه is بيان الضرورة in the phrase The word الضرورة is usually translated as necessity. In this context it could be translated as the necessary (unavoidable or obvious) consequence. بيان الضرورة is therefore the necessary (unavoidable or obvious) consequence of what was mentioned in صدر الكلام.

Example:

With regards to the person who dies leaving behind no heirs besides his parents, Allah Ta'aala says in the Qur-aan:

"... و ورثه أبواه فلأُمه الثلث"

(...And his parents inherit from him, then his mother will receive one-third).

The words و ورثه أبواه inform us that the parents will share their deceased son's estate. Having said that, the aayah continues to inform us of the mother's share only. It mentions nothing about the father's share. However, despite this سكوت about the father's share, we do understand from the aayah itself that the father will receive the remaining two-thirds. (If the estate must be shared between his parents and his mother will receive one-third, it is quite obvious the his father will receive the remaining two-thirds.) In short, the father's share has been understood through the medium of بيان الضرورة.

بيان الحال The Definition of

Clarification that is attained through some دلالة (indication) in the حال of the متكلم is called بيان الحال. The author of Usool-ush-Shaashi writes in this regard that: “*Silence when speech is required is equivalent to speech.*”

Example:

When something was done in the presence of Rasulullah (sallallahu alaihi wasallam) and he did not express any disapproval, his silence is construed as بيان that that particular action is permissible.

Another Example:

Zaid sold his house. When his neighbour heard of the sale, he made no indication that he would be seeking الشفعة (annulment of the sale on the premise that he is more entitled to purchase the house than anyone else). His silence in this regard would be construed as consent. Hence his right to claim الشفعة is lost.

بيان العطف The Definition of

Clarification that is the result of abbreviation of speech is called بيان العطف.

Example:

Instead of saying لزيد على مئة درهم و درهم (I owe Zaid one-hundred dirhams and one dirham), we merely say:

لزيد على مئة و درهم

I owe Zaid one-hundred and one dirhams.

The word درهم is معطوف on the word مئة and it is بيان that the مئة (one-hundred) are also dirhams. It is thus بيان العطف.

بيان التبديل The Definition of

النسخ لغوى is more commonly known as بيان التبديل. The نسخ الشمس meaning of الازالة (to remove). Thus the meaning of

الظل is 'The sun took the shade away'. Similarly, the meaning of of نسخت الريح آثار المشى is 'The wind blew the footsteps away'.

النسخ اصطلاحى (Technical) Meaning of

Mentioned below are two famous explanations of the اصطلاحى (technical) meaning of النسخ:

1. رفع حكم شرعى بدليل شرعى متأخر – It is the annulment of a (former) shar'i ruling on the basis of a latter shar'i دليل.
2. بيان انتهاء مدة الحكم الشرعى بدليل شرعى متأخر عنه – It is when a latter shar'i دليل is used to clarify the expiry of the period of validity of a former shar'i ruling.

Both these definitions are correct. However, while the first definition is based on human perception of النسخ, the second definition considers the huge difference between النسخ in man's statements and النسخ in the rulings of Allah. النسخ in man's statements is proof of the inaccuracy and deficiency of his knowledge. His latter ruling is indicative of error in his former ruling. On the contrary, the knowledge of Allah is infinite; it encompasses everything. There is hence no possibility of error in any of His rulings. Therefore, while explaining the meaning of النسخ, the Fuqahaa say that:

- The former ruling was temporary.
- However, besides Allah Ta'aala, nobody else was aware its temporary application until the occurrence of النسخ.
- النسخ is therefore بيان from Allah that the period of validity of the former shar'i ruling has expired.

Two Types of النسخ

النسخ is of two types:

1. النسخ الصريح
2. النسخ الضمنى

النسخ الصريح

النسخ الصريح is when there is صريح (explicit) proof of the occurrence of النسخ in the نص (text) under discussion.

Example:

An excellent example in this regard is the نسخ (abrogation) of facing المسجد الأقصى in salaah on the basis of the aayah:

قد نرى تقلب وجهك في السماء فلنولينك قبلة ترضاها
فول وجهك شطر المسجد الحرام

We certainly see the lifting of your face (gaze) to the sky. We will therefore turn you to a qiblah that you prefer. So turn your face in the direction of Al-Masjid-il-Haraam.

Another Example:

Another example of this type of النسخ is in the hadith:

كنت نهيتكم عن زيارة القبور ألا فزوروها

I had prohibited you from visiting the graves (but) listen, go and visit them.

النسخ الضمني

When there is تعارض (contradiction) between two دلائل and التوفيق (reconciling them) is not possible, then if the Fuqahaa are able to identify which of the two was ordained first, they consider it as منسوخ (abrogated). This type of النسخ is called النسخ الضمني.

Example:

An example in this regard is the نسخ of the permissibility of الوصية للوارث (making a bequest in favour of a person who has already been allocated a share in the deceased's estate) on the basis of the آية المواريث (Surah An-Nisaa, Aayah).

Ruling

1. It is imperative to note that nobody can claim that النسخ has occurred in any of the following:

- a. A ruling in which there is صريح (explicit) indication to its perpetuity.

Example: Rasulullah (*sallallahu alaihi wasallam*) said that "الجهاد ماض الى يوم القيامة" (*Jihaad will continue until the Day of Qiyaamah*). The words 'until the Day of Qiyaamah' are an indication to the perpetuity of the ruling of jihad. Thus it can never be regarded as منسوخ (abrogated).

- b. A ruling whose حسن (goodness) or قبح (evil) is unanimously agreed upon by the people of every era in history.

Example: Kindness to one's parents, truthfulness, theft, talking lies etc.

- c. A ruling that is established through القياس or الاجماع instead of النص (an aayah of the Qur-aan or a hadith). The reason why such a ruling can never be منسوخ is that النسخ can only occur through an aayah of the Qur-aan or hadith of Rasulullah (*sallallahu alaihi wasallam*). On the other hand, shar'i rulings can only be deduced from القياس and الاجماع after the demise of Rasulullah (*sallallahu alaihi wasallam*). Therefore, such rulings can never be subject to النسخ.

2. It is quite clear from the above that القياس and الاجماع can never be ناسخ of any shar'i ruling.
3. النسخ is not permissible in the speech of anybody besides the شارع (lawgiver ie. Allah Ta'aala and His Rasul *sallallahu alaihi wasallam*). Thus if a man tells his wife طلقتك ثلاثا الا (I divorce you thrice except thrice), all three talaqs will be effective. Similarly, if he says لا زيد على عشرة دراهم الا (I owe Zaid ten dirhams except ten dirhams), Zaid will still be entitled to claim a full ten dirhams from him. The reason being that his words لا عشرة and الا ثلاثا

are examples of النسخ which is invalid in the speech of
besides the شارع.

The Different Types of النسخ

A study of the Qur-aan and the sunnah reveal that there are different types of النسخ. They are:

1. نسخ الكتاب بالكتاب – When the ناسخ and the منسوخ are both aayaat of the Qur-aan.

Example: Study the aayah:

ان يكن منكم عشرون صابرون يغلبوا مائتين و ان يكن منكم مائة يغلبوا الفا
من الذين كفروا بأنهم قوم لا يفقهون

If there are twenty patient combatants among you, they will defeat two-hundred. And if there are among you one-hundred combatants, they will defeat one-thousand of those who disbelieve because they are a people who do not understand.

The crux of this aayah is that it is not permissible for Muslim combatants to flee the battlefield even if the enemy is ten times more than them. However, this injunction was later abrogated by the aayah:

الآن خفف الله عنكم و علم أن فيكم ضعفا فان يكن منكم مائة صابرة يغلبوا
مائتين و ان يكن منكم ألف يغلبوا ألفين باذن الله و الله مع الصابرين

*Now Allah has given you a concession – and He knows that there is weakness among you. Therefore, if there are one-hundred combatants among you, they will defeat two-hundred. And if there are one-thousand among you, they will defeat two-thousand with the permission of Allah –
And Allah is with the patient.*

The crux of this aayah is that henceforth it is impermissible for Muslims to flee the battlefield if the enemy is double their amount.

2. نسخ الكتاب بالسنة – When the منسوخ is an aayah of the Qur-aan and the ناسخ is a hadith.

Example: At one stage Allah Ta'aala told his Nabi (sallallahu alaihi wasallam) that:

لا يحل لك النساء من بعد ...

Henceforth (no other) women (besides those whom you are already married to) are permissible for you...

The prohibition mentioned in this aayah was later abrogated. However, there is no reference to its abrogation anywhere in the Qur-aan. Instead it is mentioned in a hadith narrated by Sayyidatuna 'Aa-isha (radiallahu anha).

3. نسخ السنة بالكتاب – When the منسوخ is a hadith and the ناسخ is an aayah of the Qur-aan

Example: Initially, sexual intercourse in the month of Ramadaan was impermissible at night also. However, this impermissibility was later abrogated by the aayah:

أحل لكم ليلة الصيام الرفث الى نساكنكم...

Intercoarse with your women during the night of fasting has been made permissible for you.

This is an example of نسخ السنة بالكتاب because the initial impermissibility of intercourse during the nights of Ramadaan is not mentioned in any aayah of the Qur-aan. Instead, it is in a hadith.

Another example in this regard is the نسخ (abrogation) of facing المسجد الأقصى in salaah on the basis of the aayah:

قد نرى تقلب وجهك في السماء فلنولينك قبلة ترضاها

فول وجهك شطر المسجد الحرام

*We certainly see the lifting of your face (gaze) to the sky.
We will therefore turn you to a qiblah that you prefer. So
turn your face in the direction of Al-Masjid-il-Haraam*

(The initial command to face المسجد الأقصى is not mentioned in the Qur-aan; it is understood from certain ahaadith.)

4. نسخ السنة بالسنة – When the ناسخ and the منسوخ are both ahaadith.

Example: One example of this type of النسخ is found in the hadith:

كنت نهيتكم عن زيارة القبور ألا فزوروها

*I had prohibited you from visiting the graves (but)
listen, go and visit them.*

The Different Types of المنسوخ in The Qur-aan

There are three types of المنسوخ in the Qur-aan viz.

1. منسوخ الحكم و التلاوة - When the recitation of the aayah and the ruling it contains are both منسوخ.

Example: Sayyidatuna ‘Aa-isha (radiallahu anha) narrates that initially there was an aayah in the Qur-aan that عشر رضعات يحرم (Ten feeds establish the impermissibility of marriage).

2. منسوخ الحكم دون التلاوة – When only the ruling mentioned in the aayah is منسوخ. Thus, the aayah itself is still part of the Qur-aan and its recitation in salaah is valid.

Example: The aayah that commands us to make وصية (a bequest) in favour of our parents and other close relatives:

كتب عليكم اذا حضر أحدكم الموت ان ترك خيرا
الوصية للوالدين و الأقربين...

*A bequest in favour of your parents and relatives is
binding on you when death appears to any of you - if he
is going to leave behind some wealth.*

3. منسوخ التلاوة دون الحكم – When only the recitation of the aayah is منسوخ. Such an aayah is therefore no longer found

in the Qur-aan. However, the ruling it contains is still applicable.

Example: A commonly cited example of this type of منسوخ is:

الشيخ و الشيخة اذا زنيا فارجموهما

*When the married male and female commit adultery,
stone them to death.*

Although the recitation of this aayah is منسوخ, there is consensus that the ruling it contains is still applicable.

The Second باب (Section) As-Sunnah

- The second دليل اجمالى (primary source) of all shar'i injunctions is the sunnah.
- The الطريقة المعتادة is السنة (literal) لغوى (common habit) irrespective of its description (whether it is good or bad). This meaning is found in the hadith:

من سن سنة حسنة فله أجرها و أجر من عمل بها من غير أن ينقص من أجورهم شيئاً...

Whoever initiates a good habit will receive its reward and the reward of all those who followed suit without any decrease in their rewards. (Similarly) whoever initiates a bad habit will bear its burden and the burden of all those who followed suit without any decrease in their burdens.

- In the shar'i context, it has three possible meanings:
 - a. Something that is not واجب
 - b. Something that is not بدعة
 - c. The أقوال (speech), أفعال (actions) and تقارير (tacit approvals) of Raulullah (*sallallahu alaihi wasallam*).
- The scholars of Usool-ul-Fiqh prefer the third meaning.

The Ruling of السنة

و ما ينطق عن الهوى ، ان هو الا وحى يوحى

He does not speak according to his desires; his speech is nothing but wahi that is conveyed to him.

و أطيعوا الله و الرسول لعلكم ترحمون

Obey Allah and His Rasul so that mercy be shown to you.

من يطع الرسول فقد أطاع الله

Whoever obeys Allah has certainly obeyed Allah.

Due to the above and other similar aayaat, it could be concluded that there is no difference between the rulings of the Qur-aan and the Sunnah; both are compulsory. However, throughout history – in every generation - the aayaat of the former have always been narrated by such large numbers of people that there conspiring to fabricate a lie is uncomprehendable. On the other hand, this does not apply to every hadith in the Sunnah. While some ahaadith have also been narrated by extremely huge numbers of people, the narrators of some ahaadith are very few. The authenticity of such ahaadith is questionable. It could be asked: *‘If this is a valid hadith, why are there so few narrators? Is it possible that the narrators are lying? Is it possible that they have erred?’* This is the reason why the ‘Ulamaa differentiate between three types of hadith viz.

1. الحديث المتواتر
2. الحديث المشهور
3. خبر الواحد

الحديث المتواتر

الحديث المتواتر is a hadith that is narrated in every era by such large numbers of people that عادة (generally) their agreement to lie is unconceivable.

Example

1. The aayaat of the Qur-aan
2. The number of ركعات in each of the five daily صلوات

Ruling

- الحديث المتواتر is قطعي الثبوت (its authenticity is unquestionable).
- It results in علم and يقين (definite knowledge and conviction regarding its subject matter). For example, we never doubt the number of obligatory ركعات in any of the five daily صلوات
- Rejection of such a hadith renders a person out of the fold of Islaam.

الحديث المشهور

الحديث المشهور is a hadith which was initially (in the first generation) narrated by so few people that it was a خبر الواحد but it was later (in the second and third generations) narrated by such a large number of people that their conspiracy to lie is unconceivable.

Example

The hadith in which Rasulullah *sallallahu alaihi wasallam* told Rifaa'ah's wife that she could not remarry him (because he had given her three *talaafs*) until تذوق عصيلته و يذوق عصيلته "you taste his honey and he tastes yours" (...until the second husband does not consummate the nikaah).

Ruling

الحديث المشهور results in طمانينة (confidence) instead of علم and يقين. طمانينة is slightly weaker than علم and يقين. For example, the hadith of Rifaa'ah's wife is مشهور and not متواتر. Hence we cannot have علم and يقين that consummation of the second nikaah is necessary for the validity of the تحليل. However, the fact that

the hadith is مشهور gives us طمانينة (confidence) that in all probability it is necessary. Put differently, what this means is that our ظن (suspicion) that consummation of the nikaah is necessary is close to يقين

خبر الواحد

خبر الواحد is a hadith that was narrated in each of the first three generations by such a small number of individuals that does not fulfil the requirements of التواتر

Ruling

- دليل ظني ; طمانينة nor يقين خبر الواحد niether results in
- Due to the doubt surrounding its authenticity, believing its contents is not compulsory.
- However, in the presence of certain conditions, practising on it is compulsory.

The Conditions for the Compulsion of Practising on خبر الواحد

In this regard there are two types of conditions:

1. Those that are to be found in the راوى (narrator).
2. Those that are to be found in the مروي (narration).

The first type comprises the following:

- i. البلوغ – The راوى must be بالغ (he must have reached the age of puberty).
- ii. الاسلام – He must be a Muslim.
- iii. العدالة – He must not be a فاسق (somebody who openly violates the laws of the شريعة)
- iv. الضبط – He must posses an accurate memory and sound understanding.

The conditions of the second type are:

i. اتصال السند – Uninterrupted continuity of the chain of narrators; there must be no breakage anywhere in the سند. However, this does not apply to الحديث المرسل (a hadith that is narrated from Rasulullah *sallallahu alaihi wasallam* by a Taabi'i). According to the أحناف there is no harm in the breakage in the سند between Rasulullah *sallallahu alaihi wasallam* and the Taabi'i.

ii. There must be no such omission from the متن (text) that alters the meaning of the hadith.

Example: Ubaadah bin Saamit *radiallahu anhu* narrated that he had heard Rasulullah *sallallahu alaihi wasallam* prohibiting بيع الذهب بالذهب الا سواء بسواء عينا بعين 'the sale of gold in exchange for gold unless both amounts are equal...' Now, if the راوي omitted the استثناء (the underlined words), it would not have been compulsory for us to practise on this hadith.

iii. It must not contradict any aayah of the Qur'aan.

Example: Abdullah bin 'Umar *radiallahu anhu* heard some people crying at the time of the death of Umm 'Amr bint Abaan bin 'Uthmaan. He therefore said to Ibn Abi Mulaykah: "Are you not going to stop them from crying? I heard Rasulullah *sallallahu alaihi wasallam* saying that the deceased is punished due to the living person's crying for him." Ibn Abi Mulaykah later mentioned this to 'Aa-isha *radiallahu anhaa*. She said: "By Allah, you are informing me of a person who is not a liar. However, he did not hear correctly; there is sufficient proof for you in the Qur-aan." She then cited the aayah:

و لا تزر وازره وزر أخرى

And no soul will carry the burden of another.

In short, the hadith of Ibn 'Umar *radiallahu anhu* is خبر الواحد and hence unacceptable because it contradicts the above aayah of the Qur-aan.

iv. It must not contradict any حديث مشهور or حديث متواتر

Example: The أحناف do not practise on the خبر الواحد which states that Rasulullah *sallallahu alaihi wasallam* passed judgement on the basis of one witness and an oath. (It is common knowledge to every student of the شريعة that in the Islamic judicial system the claimant must present two witnesses to the court. If he is unable to do so, the defendant will be told to take an oath. If the defendant complies, he will win the case. However, the خبر الواحد under discussion implies that if the claimant has only one witness, he can still win the case by taking an oath that he is talking the truth.) The reason for not practising on this خبر الواحد is that it contradicts the مشهور hadith which states that *“The claimant must bring testimony (two witnesses) and the defendant must take an oath”*.

v. It must not contradict الظاهر (the apparent circumstances). Mentioned below are two issues of this nature.

a. When the practise of a Sahaabi contradicts the خبر الواحد that is narrated by himself.

Example: One of the reasons why the أحناف do not practise on the narration of Ibn ‘Umar *radiallahu anhu* that Rasulullah *sallallahu alaihi wasallam* used to raise his hands before and after the rukoo’ is that Ibn ‘Umar himself never practised on it. Mujaahid narrates that he had stayed with Ibn ‘Umar for many years and he never seen him raising his hands on any other occasion besides التكبيرة التحريمة

b. When there was عموم البلوى (general involvement of the masses) during the time of the Sahaabah and the Taabi’een in the topic discussed in the خبر الواحد

Example: Consider the number of times Muslims make wudoo in their daily lives. It is therefore surprising that despite the importance of wudoo and the large number

of Sahaabah, only one person narrated that touching the private part nullifies one's wudoo.

- vi. It must not contradict القياس if its narrator was not an expert in fiqh and ijtihaad.¹

Example: The حديث المصبرات do not practise on the because is narrator, Abu Hurairah *radiallahu anhu*, was not an expert in fiqh and ijtihaad.²

The حديث المصبرات

1. التصرية is the مفعول (passive participle) of المصبرات. The meaning of التصرية is to refrain from milking the cow or camel so that extra milk collects in its udders. It was practised in order to deceive prospective buyers into believing that the animal produces a large amount of milk.
2. In the حديث المصبرات Rasulullah *sallallahu alaihi wasallam* told the buyer who was deceived in this manner that if he desired, he could return the animal to the seller. However, he would also have to give the seller one صاع of dates in lieu of the milk that he had already consumed.
3. This ruling is in conflict with القياس because one صاع of dates is neither the ضمان بالمثل nor the ضمان بالقيمة of the milk consumed by the buyer. Hence the أحناف do not practise on it. Instead, they regard the sale of the animal as binding and they give the buyer the option of claiming ضمان النقصان

¹ This is the opinion of Eesa bin Abaan and most of the متأخرين (latter-day scholars). Abul-Hasan Al-Karkhi and some others disagree.

² It is incorrect to disregard Abu Hurairah *radiallahu anhu* as a Faqeeh. This is therefore not the reason for not practising on the حديث المصبرات. Instead, it is because this hadith contradicts the following aayaat of the Qur-aan:

- a. فمن اعتدى عليكم فاعتدوا عليه بمثل ما اعتدى عليكم “Whoever transgressers against you, then transgress against him to the extent he transgressed against you.”
- b. و ان عوقبتم فعاقبوا بمثل ما عوقبتم به “And if you punish, do so to the extent that you were punished.”
- c. و جزاء سيئة سيئة مثلها “The requital of evil is an equal amount of evil.”

from the seller. For example, if he paid ten thousand rand for the animal and now realises that it is only worth seven thousand rand, he can claim three thousand rand from the seller.

When is خبر الواحد Regarded As حجة?

There are four types of issues in which خبر الواحد is regarded as حجة:

- 1 The حق (right) of Allah which is not a legal punishment.
Example: salaah, saum and all other issues related to العبادات. It is in this regard that Rasulullah *sallallahu alaihi wasallam* accepted the شهادة (testimony) of the bedouin who claimed that he had seen the هلال (crescent) of Ramadaan.
- 2 The حق of man in which there is الزام (a claim from another person).
Example: All the disputes that transpire between people in their daily dealings.
Ruling: In these issues العدد and العدالة are required (ie. the خبر must be related by at least two people and both of them must be religiously upright – they must not be guilty of openly violating any law of the شريعة).
- 3 The حق of man in which there is no الزام (a claim from another person).
Example: الوكالة and all other dealings in which there is no الزام.
Ruling: In such issues خبر الواحد is accepted provided the مخبر (person bearing the خبر) has التمييز (sound understanding). Hence there is no differentiation between العدل and الفاسق, المسلم and الكافر and البالغ and الصبي.
- 4 The حق of man in which there is partial الزام.
Example: الحجر and العزل (when the مخبر informs somebody that he has been interdicted or dismissed).

Ruling: In these issues العدد or العدالة are required. Thus the خبر of two men whose العدالة is unknown as well as the خبر of a single عدل are regarded as حجة.

The Third باب (Section) Al-Ijmaa’

الاجماع has two لغوى meanings:

1. العزم – resolution to do something.

Example: أجمع فلان على السفر “*So-and-so made a firm intention to travel.*”

2. الاتفاق – agreement.

Example: أجمع القوم على السفر “*They all agreed to travel.*”

اصطلاحا it is the consensus of the مجتهدين of a particular era after the demise of Nabi *sallallahu alaihi wasallam* upon a particular shar’i ruling.

Note: Usage of the word مجتهدين clearly indicates that the occurrence of الاجماع does not depend on the opinion of masses who lack expertise in Usool-ul-Fiqh. In fact, let alone the masses, in this regard consideration is not even given to the opinions of those scholars of علم الكلام and علم الحديث who are unaware of the intricacies of Usool-ul-Fiqh.

The حجية (authoritative nature) of الاجماع and its inclusion among the primary sources of the شريعة are established from a number of دلائل. For the sake of brevity, we will suffice with the following:

1. ومن يشاقق الرسول من بعد ما تبين له الحق ويتبع غير سبيل المؤمنين نوله
ما تولى و نصله جهنم و ساءت مصيرا

“Whoever opposes the Rasool after the truth has become manifest to him and follows a path other than that of the

Believers, We will turn him to what he has turned to and We will enter him into Jahannam – and it is an evil destination.”

2. لا تجتمع أمتى على الخطأ

“My ummah will never unite on error.”

The Different Types of الاجماع

الاجماع is of two types:

1. مجتهدين – الاجماع السندى – The concensus of all the مجتهدين
2. مجتهدين and not all of them. – الاجماع المذهبى

Thereafter there are four types of الاجماع السندى and two types of الاجماع المذهبى.

The Four Types of الاجماع السندى

1. When all the Sahaabah *radiallahu anhum* explicitly mention their agreement on a particular issue.

Example: The بيعة (pledge of obedience) that all the Sahaabah *radiallahu anhum* had given to Sayyiduna Abu Bakr *radiallahu anhu*.

Ruling: This is the strongest type of الاجماع. Its status is like that of the Qur-aan. Thus the result of rejecting a ruling that is established from this type is كفر.

2. When some of the Sahaabah *radiallahu anhum* verbally agree and the others voice neither agreement nor disagreement.

Example: The اجماع of the Sahaabah *radiallahu anhum* regarding Sayyiduna ‘Umar’s *radiallahu anhu* decision that three *talaafs* which are issued at once are all valid and effective.

Ruling: The status of this type of الاجماع is like that of الحديث الحديث. It is therefore واجب (compulsory) to practise on it.

However, denying a ruling that is established from such كفر *اجماع* does not result in

3. When the مجتهدين of an era after the Sahaabah *radiallahu anhum* agree upon something regarding which there is no narration from the Sahaabah *radiallahu anhum*.

Ruling: This type of *الاجماع* is weaker than the previous type; it is like الحديث المشهور. Thus:

- ~ While the first and second types are قطعى, this type is merely ظنى.
- ~ Although it is واجب (compulsory) to practise on it, denying a ruling that is established from it does not result in كفر.

4. When the Sahaabah *radiallahu anhum* disagreed about a particular issue but latter generations agreed upon the opinion of some of them.

Ruling: This type of *الاجماع* is equivalent to a خبر الواحد.

The Two Types of *الاجماع المذهبي*

1. *الاجماع البسيط* – When there is agreement regarding the حكم and its علة.

Example: The agreement of Imaam Abu Hanifah and Imaam Shaafi'i regarding the nullification of *wudoo* due to anything that leaves the body via the private parts.

2. *الاجماع المركب* – When there is agreement regarding a حكم but not its علة.

Example: The agreement of Imaam Abu Hanifah and Imaam Shaafi'i regarding the nullification of the *wudoo* of a man who vomitted and touched a woman. While both of them agree that his *wudoo* is nullified, they disagree regarding the علة; Imaam Abu Hanifah says that it is القيء (vomitting) and Imaam Shaafi'i says that its مس المرأة (the touching of a woman).

عدم القائل بالفصل

When two مسائل are disputed among the Fuqahaa and, due to the relationship between them, all those who answer the first مسألة positively also answer the second مسألة positively. Similarly, all those who answer the first مسألة negatively also answer the second مسألة negatively. However, there is not a single Faqeeh who answers the first مسألة positively and the second مسألة negatively. This is a type of **الاجماع المركب** and it is called **عدم القائل بالفصل**

Example: Consider the following two مسائل

1. Does the **نهي** (prohibition) of a **تصرف شرعى** (action ordained by the **شريعة**) indicate **فساد** (invalidity) of the actual action? For example, does the prohibition of fasting on the day of ‘eid mean that such a fast is invalid? Thus, if a person fasts on the day of ‘eid with the intention of fulfilling an oath, would his oath be fulfilled?
2. Does **البيع الفاسد** prevent the transfer of ownership?

Due to the relationship between these two مسائل Imaam Abu Hanifah’s answer to both of them is negative. He therefore says that:

1. The **نهي** (prohibition) of a **تصرف شرعى** (action ordained by the **شريعة**) does not indicate **فساد** (invalidity) of the actual action. Thus the prohibition of fasting on the day of ‘eid does not mean that such a fast is invalid. Hence, if a person fasts on the day of ‘eid with the intention of fulfilling an oath, his oath would be fulfilled.
2. **البيع الفاسد** does not prevent the transfer of ownership

On the other hand, Imaam Shaafi’i answers both these مسائل in the affirmative. Thus he says that:

1. The **نهي** (prohibition) of a **تصرف شرعى** (action ordained by the **شرعية**) does indicate **فساد** (invalidity) of the actual action. Thus the prohibition of fasting on the day of 'eid means that such a fast is invalid. Hence, if a person fasts on the day of 'eid with the intention of fulfilling an oath, his oath would not be fulfilled.
2. **البيع الفاسد** does prevent the transfer of ownership
However, there is not a single Faqeeh who agrees with Imaam Abu Hanifah in one of these two **مسائل** and with Imaam Shaafi'i in the other.

سند الاجماع

In view of the fact that the ordainment of shar'i laws is the prerogative of none but Allah and His Rasool *sallallahu alaihi wasallam*, the **جمهور** are of the opinion that it is imperative for **الاجماع** to be based on a **سند** which could be an aayah from the Qur-aan, a hadith or qiyaas. For example:

- The **اجماع** concerning the **ميراث الجدة** (inheritance of the grandmother) is based on the narration of Mugheerah bin Shu'bah *radiallahu anhu*.
- The **اجماع** concerning the impermissibility of pig fat is based on qiyaas on its meat.

The benefit of such a **سند** is that:

1. If the **سند** of **الاجماع** is a **دليل قطعي**, the **حكم** established through it will be substantiated.
2. If the **سند** of **الاجماع** is a **دليل ظنى**, the **حكم** established through it will be elevated from **ظنى** to **قطعي**.

نسخ الاجماع

Considering the fact that **النسخ** can only occur during the era of Rasulullah *sallallahu alaihi wasallam*), it must be remembered that **الاجماع** can never be **ناسخ** nor **منسوخ**. Thus, **الاجماع** can niether cancel an aayah of the Qur-aan nor a Hadith.

It must also be remembered that الاجماع cannot be cancelled by another اجماع because when اجماع takes place, it becomes a حجة قطعية, and opposing a حجة قطعية is impermissible.

The Forth باب (Section)

القياس

The لغوى meaning of القياس is التقدير (to measure). This meaning is used in the statement قست الثوب بالثوب (“I measured this garment with that garment.”)

Its اصطلاحي (technical) meaning is:

تعديدية الحكم من الأصل الى الفرع لعللة متحدة لا تدرك بمجرد اللغة
Extension of the حكم of the أصل to the فرع on the basis of a common عللة which cannot be understood through اللغة only.

In order to understand this definition, we have to understand the أركان (components) of القياس

1. الأصل

2. الفرع

3. العلة المتحدة

4. الحكم

The aim of القياس is to understand the حكم of a مسألة that is not منصوص عليه (discussed in any aayah or hadith). In order to do so we compare it to a مسألة that is منصوص عليه (discussed in an aayah or hadith). We first establish the عللة (cause) of the حكم in the مسألة that is منصوص عليه. Thereafter, if the same وصف which is the عللة in منصوص عليه is found in the مسألة that is not منصوص عليه, we apply the حكم of the مسألة that is منصوص عليه to the other مسألة.

Example: الخمر (fermented grape juice) is prohibited in the Qur-aan and the hadith. However, all other fermented juices are

neither mentioned in the Qur-aan nor the hadith. Nevertheless, the Fuqahaa had established that:

1. The علة (cause) of the prohibition of الخمر is الاسكار (intoxication).
2. الاسكار (intoxication) is found in all other fermented juices as well.

They therefore applied the ruling of الخمر to all other fermented juices and declared all of them *haraam*.

It should be clear from this example that the مسألة that is منصوص عليه is the أصل, the مسألة that is not منصوص عليه is the فرع, the علة is الاسكار and the حكم is حرمة (impermissibility).

| | |
|---------------|-------------------------------------|
| الأصل | Fermented grape juice |
| الفرع | Fermented juice of all other fruits |
| العلة المتحدة | Intoxication |
| الحكم | Impermissibility |

Having understood the example and the above table, it should be easier for you to understand the اصطلاحي (technical) meaning of القياس. However, before concluding this discussion on the menaing of القياس, we have to mention that the reason for adding the clause لا تدرك بمجرد اللغة (which cannot be understood through اللغة only) is to avoid confusing القياس with النص.

القياس of حجية

The حجية of القياس is established from a number of aayaat and ahaadith. Here too, we will suffice with just one of each.

Proof From The Qur-aan:

ان مثل عيسى عند الله كمثل آدم خلقه من تراب ثم قال له كن فيكون

There is no doubt that by Allah the similitude of ‘Eesa is like that of Aadam. He created him from sand and then said ‘Be!’ Thus he became.

In this aayah ‘Eesa *alaihis salaam* is being compared to Aadam *alaihis salaam* because both of them were created without fathers. The message of the aayah is that just as Aadam *alaihis salaam* is not the son of Allah, ‘Eesa *alaihis salaam* also cannot be His son.

| | |
|-------|-----------------------------|
| الأصل | Aadam <i>alaihis salaam</i> |
| الفرع | ‘Eesa <i>alaihis salaam</i> |
| العلة | Created without a father |
| الحكم | Not the son of Allah |

Proof From As-Sunnah:

A lady from the tribe of Bani Khath’am¹ asked Rasulullah *sallallahu alaihi wasallam* whether she could make hajj on behalf of her elderly father who was no longer able to sit on a camel.² “Tell me,” asked Rasulullah *sallallahu alaihi wasallam* “If your has a debt and you settle it on his behalf, would that suffice?” She replied in the affirmative. Rasulullah *sallallahu alaihi wasallam* then said: “The debt of Allah is more important.”

In this hadith Rasulullah *sallallahu alaihi wasallam* compared making hajj on behalf of one’s aged father to settling his debts on his behalf. The common علة between the two is debt: one is a debt owed to people and the other is a debt owed to Allah.

¹ Her name was Asmaa bint Umais *radiallahu anhaa*.

² Do not forget that in those days camels were the most common mode of transport in Arabia.

| | |
|---------------|---|
| الأصل | Fulfilling one's father's debt on his behalf. |
| الفرع | Making hajj on one's father's behalf. |
| العلة المتحدة | Both are debts. |
| الحكم | Both are fulfilled – your father is absolved of his obligation. |

The Conditions For The Validity of القياس

The author of Usool-ush-Shaashi mentioned five conditions for the validity of القياس:

The First Condition: القياس should not be utilised to oppose النص.

Example: The argument that if false accusation of a chaste woman of zinaa (adultery) which is a greater sin than laughing loudly in salaah does not nullify one's wudoo, why should the latter do so? This قياس is incorrect because it is being used to oppose النص ie. the hadith of the weak-sighted bedouin who entered the masjid in the course of the salaah and fell in a nearby trench causing some of the sahaabah to laugh. After the salaah Rasulullah *sallallahu alaihi wasallam* commanded all those who laughed in the salaah to repeat their wudoo and salaah.

| | |
|-------|--------------------------------------|
| الأصل | False accusation of zinaa in salaah. |
| الفرع | Laughing loudly in salaah. |
| العلة | Both are sinful. |
| الحكم | Both should not nullify wudoo. |

The Second Condition: It should not alter any حكم that is established from النص.

Example: The argument that if niyyah (intention) is compulsory in tayammum, should it not be compulsory in wudoo also? After all, both of them are methods of gaining tahaarah (purification). This قياس is invalid because it alters the اطلاق of the aayah of wudoo.

| | |
|-------|-------------------------------|
| الأصل | Tayammum |
| الفرع | Wudoo |
| العلة | Means of tahaarah |
| الحكم | Compulsion of niyyah in both. |

The Third Condition: The حكم of the أصل should not be مخالف للعقل (in conflict with common understanding).

Example: The argument that if it is permissible to make wudoo with نبيذ التمر, should it not be permissible to make wudoo with all other types of نبيذ? This قياس is invalid because the حكم of the أصل (the permissibility of wudoo using نبيذ التمر) is مخالف للعقل (in conflict with common understanding). If we did not prefer الحديث over القياس, we would have agreed with those Fuqahaa who regard it (wudoo using نبيذ التمر) as impermissible.

| | |
|-------|------------------------------------|
| الأصل | Wudoo using نبيذ التمر |
| الفرع | Wudoo using any other type of نبيذ |
| العلة | Both are نبيذ |
| الحكم | Permissibility of wudoo. |

The Fourth Condition: The علة should be identified in accordance with the principles of the شريعة instead of those of اللغة.

Example: Imaam Shaafi'i *rahimahullah* is of the opinion that the hand of the نباش (person who secretly exhumes a grave to steal the kafn/shroud of the deceased) should be amputated. His argument is that:

- ~ The reason for calling the thief a سارق is that he perpetrates his crime secretly.
- ~ The نباش also operates secretly.
- ~ Hence the نباش is a سارق and should be punished accordingly.

The أحناف disagree with this قياس because it is based on اللغة instead of الشريعة. Furthermore, the grave is not a حرز (protected place). Therefore they do not amputate the hand of the نباش.

| | |
|-------|--|
| الأصل | السارق (the thief) |
| الفرع | النباش (the person who steals from the grave). |
| العلة | They both operate in secret. |
| الحكم | Both their hands must be amputated. |

The Fifth Condition: المنصوص عليه فرع should not be.

Example: The argument that freeing a non-Muslim slave for the كفارة (atonement) of ظهار should not be valid just as it is not valid in the كفارة of قتل الخطأ (unintentional murder). According to the أحناف this قياس is unacceptable because the فرع (the كفارة of ظهار) is المنصوص عليه.

| | |
|-------|-------------------------------|
| الأصل | ظهار كفارة of ظهار |
| الفرع | قتل الخطأ كفارة of قتل الخطأ |
| العلة | They are both كفارة |
| الحكم | You must free a Muslim slave. |

Besides the above, there are a few more conditions for the validity of القياس:

Condition: The حكم of the أصل should not be its خصوصية (speciality). In other words, there should be no indication in any other نص that this particular حكم is only applicable to the أصل and hence unextendable.

Example: It is a basic rule in the شريعة that the مدعى (claimant) requires two witnesses to substantiate his claim. However, Rasulullah *sallallahu alaihi wasallam* equated the testimony of Khuzaimah *radiallahu anhu* to that of two people. This meant that if Khuzaimah *radiallahu anhu* bore testimony in anybody's favour, he would not require a second witness in court. Now, it is incorrect to make قياس of anybody else on Khuzaimah *radiallahu anhu* because equation of his testimony to the testimony of two people is his خصوصية (speciality).

Condition: The مشروعية (ordainment) of the أصل must have occurred before that of the فرع.

Example: It is therefore incorrect to make قياس of tayammum on wudoo and conclude that if niyyah is compulsory in tayammum, it should be compulsory in wudoo also because tayammum was ordained some time after the ordainment of wudoo.

Condition: The حكم should be applied to the فرع in exactly the same manner (without any زيادة, نقصان, عموم or خصوص) that it is applied to the أصل.

Example: It is incorrect to make قياس of the ظهار of a ذمی (non-Muslim living in the Muslim state) on the ظهار of a Muslim

because the حكم is not applied to the فرع in exactly the same manner that it is applied to the أصل in the sense that while the resultant حرمة (impermissibility of conjugal relations) in the أصل is restricted to the discharging of كفارة (atonement), it is مؤبددة (unrestricted) in the فرع. In the case of the Muslim the حرمة is terminated by payment of كفارة. However, كفارة is a form of عبادة (worship) and the ذمى is not أهل (qualified) to perform any act of عبادة (worship). Thus the resultant حرمة when he makes ظاهر with his wife does not terminate by payment of كفارة.

Condition: The علة of the فرع must either be identically the same as that of the أصل or it must belong to its جنس.

Example: According to Imaam Abu Hanifah *rahimahullah* the علة for the impermissibility of selling البر (wheat) in exchange for البر (wheat) is القدر and الجنس (the item being purchased and its payment are both bought/sold in quantity or weight and both of them belong to the same جنس/type). Having identified the same وصف (description) in the sale of الذرة (maize) in exchange for الذرة (maize), we declared this sale also impermissible. In this قياس the علة in the أصل and the فرع are identically the same.

Example: Our conclusion that there should be قصاص in الاعتداء في الأعضاء (transgression that results in the loss of a human limb) just as there is قصاص في النفس (transgression that results in the loss of human life). In this قياس the علة of the فرع is not identically the same as the علة of the أصل. However, they belong to the same جنس.

فصل (Chapter) ركن القياس: العلة

Having discussed the شرط of الفياس, we now have to discuss its العلة. viz. ركن.

العلة The Definition of

The definition of العلة as one of the أحكام وضعية will be explained later on, إن شاء الله. However, in the context of الفياس, it is defined as the common characteristic that is:

- ~ (مقيس) فرع and (مقيس عليه) أصل Shared by
- ~ (مقيس عليه) أصل The basis of the ruling of the
- ~ (مقيس عليه) أصل The reason for extension of the ruling of the (مقيس) فرع to the

العلة شروط (Conditions) of

The أصوليين (experts in usool-ul-fiqh) have discussed the following شروط (conditions) of العلة:

1. أن تكون العلة وصفا مناسباً للحكم – That it corresponds to the حكم.¹
This مناسبة (correspondence) is established by either التأثير or الملائمة.
 - i. التأثير is when أحكام are based on the وصف itself (ie. its نوع) or its عين.
 - ii. الملائمة is when أحكام are based on the وصف of the جنس.

1. The meaning of this is that the Mujtahid must have غلبة الظن (convinced) that only this particular وصف (which he has identified as the علة) and nothing else is the cause of the حكم in the أصل. This غلبة الظن is attained by verifying the presence of the حكمة (wisdom) in the ordainment of أحكام viz. جلب المصلحة (procurement of something beneficial) and دفع المصلحة (aversion of something harmful).

2. أن تكون العلة ظاهرة جلية – That it be apparent. The purpose of the علة is to serve as an علامة (sign) for the حكم. If the علة is not apparent, this purpose of the علة will be defeated and hence application of the حكم to the فرع will not be possible.
3. أن تكون العلة وصفا منضبطا – That it be constant. The meaning of this is that application of the علة must not differ from individual to individual and situation to situation. For example, المشقة (hardship, difficulty) cannot be regarded as the علة for the permission that is granted to the مسافر (traveller) to make افطار in the month of Ramadaan because المشقة (hardship, difficulty) is an اضافى (relative) issue that differs from person to person and situation to situation. We therefore regard السفر as the علة because it is منضبط (constant ie. it applies to all circumstances).
4. أن تكون العلة متعددة – That it be extendable. In other words, the علة has to be a وصف that could be found in other issues besides the أصل. The reason for this is obvious. If the essence of القياس is المشاركة (partnership) between the اصل and the فرع in the علة and حكم, it (ie. القياس) cannot materialise if the علة is non-extendable?

مسالك العلة

Mere recognition of a common characteristic that is found in the أصل and the فرع is not sufficient to implement القياس. Instead, a دليل is required to identify which وصف is the علة. The مسالك العلة through which the علة is identified are called مسالك العلة.

According to the أحناف there are only three مسالك العلة viz.

1. النص من القرآن و السنة – When a text in the Qur-aan or the Sunnah refers to the علة.

Example: Allah Ta'aala tells us in the Qur-aan that there are three times in which children who have not yet reached

puberty and slaves may not enter the rooms of their parents and masters without seeking permission. These three times are:

- i. Before the fajr salaah.
- ii. In the afternoon when the parents and masters would be having a قيلولة (siesta).
- iii. After the esha salaah.

Allah Ta'aala thereafter says that the children and slaves do not have to seek permission during any other time of the day because طوافون بعضكم على بعض (*you frequently enter and leave each other's rooms*). This means that the علة for dropping of the inconvenience of seeking permission is كثرة الطواف (frequent entering and leaving of each other's rooms). Some time later Rasulullah *sallallahu alaihi wasallam* was asked whether the left-over water of the cat is *taahir* (pure) or not. He replied that it is *taahir* (pure) because cats are من الطوافين عليكم و الطوافات (*those who frequently enter and leave your rooms*). In short Rasulullah *sallallahu alaihi wasallam* made قياس. Observing that the same علة is found in the cat, he compared it to the children and the slaves. Thus he concluded that just as كثرة الطواف caused الاستئذان to be cancelled for the children and the slaves, it should cause cancellation of the نجاسة (impurity) of the left-over water of the cat to be cancelled. (Note that in this example consideration was given to the جنس of the علة of the حكم. Thus the أصل and the فرع belong to the same جنس)

2. الاجماع – When all the Mujtahideen of a certain period in time unanimously identify the same علة of a particular حكم.

Example: Identification of الصغر (childhood) as the علة of the father's ولاية (guardianship) over his غير البالغ (young) son.

3. علة – الاستنباط and العقل – When the Mujtahid gathers all the أوصاف of the أصل and then removes all those أوصاف that could not possibly be the علة until he is eventually left with only one وصف. Upon reaching this stage he declares the last وصف as the علة.
- i. السبر و التقسيم – When the Mujtahid gathers all the أوصاف of the أصل and then removes all those أوصاف that could not possibly be the علة until he is eventually left with only one وصف. Upon reaching this stage he declares the last وصف as the علة.
- ii. إبداء مناسبة العلة – Identification of a مناسبة (relationship) between a specific وصف and the حكم. This is possible when it is observed that the aim in ordaining any shar'i حكم ie. جلب المصلحة (procurement of something permissible) or دفع النقصان (aversion of something harmful) is only found in the presence of that particular وصف.

Note:

1. The second procedure (إبداء مناسبة العلة) is also known as:
- ~ رعاية المقاصد
 - ~ تخريج المناط
 - ~ الاخالة
 - ~ المصلحة
 - ~ الاستدلال
2. The مناسبة referred to above must be something that is considered by the شريعة or الاجماع. Mentioned below are the مناسبات considered by the شريعة
- i. حفظ الدين (protection of the deen) – This is the مناسبة behind the ordaining of the death sentence for الردة (blasphemy) and waging of war against the kuffaar.
- ii. حفظ النفوس (protection of human life) - This is the مناسبة behind القصاص (sentencing the murderer to death).

- iii. حفظ العقول (protection of one's sanity) – It is due to this مناسبة that alcohol is prohibited.
- iv. حفظ الأموال (protection of one's wealth) – This مناسبة is the reason for the ordainment of a specific penal code for السرقة (theft) and قطع الطريق (highway robbery).
- v. حفظ النسل (protection of lineage) – Thus the شريعة prohibited zinaa and ordained a severe penal code for those who perpetrate this heinous sin.
- vi. حفظ الأعراض (protection of one's honour and respect) – Hence the prohibition of القذف (false accusation of zinaa) and the ordainment of a specific punishment for committing this crime.

الاستحسان

The لغوى meaning of الاستحسان is عد الشيء حسنا (to regard something as good). In the اصطلاحى context it is defined as:

العدول من موجب قياس الى قياس أقوى

*The abandoning of the demand of one qiyaas
in favour of another stronger qiyaas.*

Some writers have defined it as:

ترجيح قياس خفي على قياس جلي

*The preference of a subtle qiyaas over a
(seemingly) apparent qiyaas.*

Note:

Any قياس that is apparent and easily understood is called جلى and any قياس that is not very apparent and easily understood is called خفي.

Example:

القياس الجلى demands the permissibility of performing salaah while mounted on an animal because it is not actually a salaah; it is a du'aa for the deceased. However, القياس الخفي,

demands its impermissibility because, although salaah-ul-janaazah is not a salaah, it has a very strong resemblance with salaah. The preference given by the Fuqahaa to the latter قياس over the former الاستحسان is an example of قياس.

الاستصحاب

The meaning of الاستصحاب is طلب المصاحبة (to seek friendship). Its اصطلاحى meaning is:

الحكم بثبوت أمر فى الزمان الحاضر بناء على ثبوته فى الزمان الماضى لعدم قيام دليل على تغييره

Judgement that something is currently present because it was previously present and there is no evidence that the situation has changed.

Example: Zaid went missing ten years ago. There is still no trace of him. Let alone his whereabouts, nobody knows if he is still alive or not. Relying on the concept of الاستصحاب we conclude that he is still alive because he was alive ten years ago and there is no evidence that he has passed away.

Ruling: الاستصحاب can be used for الدفع (rejection of a claim) but not for الاستحقاق (claiming a right).

Example 1: It is already ten years since Zaid went missing. There is still no clue as to his whereabouts and whether he is still alive or not. One of his would-be heirs is now demanding that he be regarded as dead and that his estate be dissolved. In this instance we rely on الاستصحاب to dismiss the above claim. Thus we say that because he was alive ten years ago and we do not have any evidence that he has since died, he must be still alive. Hence his estate cannot be distributed among his heir.

Example 2: In the above example, if one of Zaid's close relatives (eg. his father) dies, we cannot depend on الاستصحاب to

say that Zaid is still alive and should therefore receive a share in the deceased's estate.

The Fifth باب (Section) The Different Types of أحكام

Al-Hamdu-lillah, we have thus far discussed the four primary sources of all أحكام (injunctions) in the شريعة. In this باب (section) we will discuss the various types of these أحكام.

الحكم الشرعى is of two types:

1. الحكم التكليفى: The خطاب (speech) of Allah in which the مكلفين (people who are obligated to observe the precepts of the شريعة) are commanded or given a choice to do certain actions.
2. الحكم الوضعى: The خطاب (speech) of Allah regarding the وضع (composition) of the actions of the مكلفين. It has also been defined as the خطاب (speech) of Allah regarding the أسباب, أسباب, أسباب, أسباب of the actions of the مكلفين and شروط.

There are seven types of الحكم التكليفى and three types of الحكم الوضعى. The seven types of الحكم التكليفى are:

- | | |
|--------------------|---------------------|
| 1. الفرض | 5. المكروه التحريمى |
| 2. الواجب | 6. المكروه التنزيهى |
| 3. السنة و المندوب | 7. المباح |
| 4. الحرام | |

Explaining the above the scholars of usool-ul-fiqh say that:

- ~ Every command of Allah demands either the commission or omission of an action.
- ~ Every command of Allah is either mandatory or discretionary.
- ~ The دليل (source) of every command is either ظنى or قطعى.
- ~ The mandatory command regarding the commission of an action is called فرض if it is established from دليل قطعى and واجب if it established from دليل ظنى.

- ~ The discretionary command regarding the commission of an action is called مندوب or سنة.
- ~ The mandatory command regarding the omission of an action is called حرام if it is established from دليل قطعى and مكروه تحريمى if it is established from دليل ظنى.
- ~ The discretionary command regarding the omission of an action is called مكروه تنزيهى
- ~ Any action in which there is a choice between omission and commission is called مباح

فصل (Chapter)

الفرض و الواجب

الفرض

Defintion:

The meaning of الفرض is التقدير (to determine and ordain). Thus the فرائض of the شريعة are actions that are مقدر (determined and ordained) by the شريعة. In the اصطلاحى context it is any compulsory action that is established from a دليل قطعى.

Ruling:

- ~ التصديق (believing it) and العمل (practising on it) are both compulsory.
- ~ الجحود (denial) of its compulsion results in كفر (blasphemy). A person who denies its compulsion is hence a كافر (disbeliever).
- ~ Failure to implement it without a valid excuse results in فسق (sin). Thus a person who does not implement without a valid excuse is a فاسق

الواجب

Definition:

وجب يجب (active participle) of the verb اسم الفاعل is the الواجب which means سقط يسقط (to fall). Defining its اصطلاحي meaning in the light of its لغوى meaning we could say that it is 'something that fell on the مكلف without his choice'. اصطلاحا it is a compulsory action that is established from a دليل ظنى.

Ruling:

- ~ التصديق (believing it) is not compulsory.
- ~ Therefore, الجحود (denial) of its compulsion does not result in كفر (blasphemy). Nevertheless it (ie. denial of its compulsion) is a major deviation due to which a person is regarded as ضال (astray).
- ~ However, العمل (practising on it) is compulsory. Thus a person who fails to implement it without a valid excuse is a فاسق

فصل (Chapter) السنة و المندوب

In this chapter we discuss non-obligatory actions which the مكلف has been encouraged to fulfil. There are two types of such actions:

1. السنة

2. المندوب

السنة The Definition of:

The لغوى meaning of السنة is الطريقة (method) and العادة (habit) irrespective of whether it is good or bad. The author of Usool-ush-Shaashi defined its اصطلاحي meaning as:

الطريقة المسلوكة المرضية فى باب الدين سواء كانت من رسول الله صلى الله عليه و سلم أو من الصحابة

The adopted and preferred method in deen irrespective of whether it has reached us from Rasulallah sallallahu alaihi wasallam or his sahaabah radiallahu anhum.

Other scholars define it as 'ما طلب فعله بدون لزوم مع تأكيد الفعل *A non-obligatory action whose commission has been emphasised.*' They thereafter explain that this applies to anything that has reached us from Rasulallah *sallallahu alaihi wasallam* or his sahaabah *radiallahu anhum* in the form of a spoken word, physical action or التقدير (tacit approval).

There are two types of السنة:

1. سنة الهدى

2. السنة الزائدة

سنة الهدى is also called السنة المؤكدة. The following are the salient qualities of this type:

- It is a form of عبادة (worship).
- Rasulallah *sallallahu alaihi wasallam* observed it so diligently that he seldom omitted it.
- There were a few occasions when it was omitted without any excuse.
- Because it was observed so diligently, its implementation is regarded as هدى (guidance) and its negligence is regarded as ضلالة (misguidance).
- It is among the شعائر (outstanding features) of دين
- It is a مكمل للفرائض و الواجبات (a source of perfection in the فرائض and the واجبات)

Examples of سنة الهدى are: الصلاة بالجماعة and الإقامة, الأذان (congregational salaah).

The Ruling of سنة الهدى is that:

- The مكلف is required to observe it even though it is not compulsory.

2. The person who observes it is praiseworthy and will be rewarded by Allah.
3. The person who neglects it (does not observe it) is blameworthy and will be reprimanded by Allah.
4. Persistent negligence may result in punishment.
5. If it is a شعار (outstanding feature of deen), it is compulsory to wage war against the community who collectively discard it.

سنة الهدى is further divided into:

- a. المؤكدة على العين – An action that has to be observed by every individual. The observance of some does not absolve the others.

Example: Attendance of the salaah in جماعة (congregation) and performance of صلاة التراويح.

- b. المؤكدة على الكفاية – An action that does not have to be observed by every individual. The observance of some members in the community absolves the rest.

السنة غير المؤكدة is also called السنة الزائدة. There are two types of actions in this regard:

1. Those actions which Rasulullah *sallallahu alaihi wasallam* had observed on the basis of عادة (habit) instead of عبادة (worship).

Example:

- i. The length of the قراءة (recitation), ركوع and سجود in the salaah.
- ii. Fasting on certain days of the week¹ and month.²
2. Those actions which Rasulullah *sallallahu alaihi wasallam* had observed on the basis of عبادة (worship) but due to continuous observance became more of an عادة (habit) and

¹ Mondays and Thursdays.

² The thirteenth, fourteenth and fifteenth of the lunar month.

are hence not included among the مكملات (sources of perfection) and شعائر (outstanding features) of deen.

Example:

- i. The food Rasulullah *sallahu alaihi wasallam* ate.
- ii. The way he *sallahu alaihi wasallam* dressed, walked, talked etc.

The ruling of this type of سنة is that:

1. Observing it is praiseworthy and rewardable.
2. There is no harm if it is not observed.
3. It is therefore of a lower rank (less important) than the سنة الهدى.
4. Its rank is higher than that of المندوب.

The Definition of المندوب

ندب يندب اسم المفعول (passive participle) of the verb يندب (to urge and encourage). It therefore means 'something that has been encouraged'. اصطلاحاً it is defined as: 'A non-obligatory action whose commission has not been emphasized.' Explaining the difference between السنة and النفل Sadr-ush-Sharee'ah *rahimahullah* says that if it is better to fulfil it (ie. the non-obligatory action) and:

- ~ It is a طريقة مسلوكة (common practise in deen), it is called سنة
- ~ It is not a طريقة مسلوكة (common practise in deen), it is called نفل

Note: التطوع and النفل, المستحب is also called المندوب.

The Ruling of المندوب is that:

1. It is lower in rank than السنة الزائدة
2. Its commission is rewarding.
3. Its omission is niether blameworthy nor punishable.

فصل (Chapter) الحرام و المكروه التحريمى و المكروه التنزيهى

الحرام

The Definition of الحرام

From the حرم الشيء point of view الحرام is derived from حرم الشيء (to be impermissible). اصطلاحا it is an action that is prohibited through a دليل قطعى (The دليل for its prohibition is قطعى)

Examples of الحرام are zinaa (adultery), gambling and drinking alcohol.

The Ruling of الحرام

The following rules apply to الحرام:

1. الاعتقاد (believing) that it is prohibited is compulsory.
2. الاجتناب (practical abstention) is also compulsory.
3. الجحود (denial) of its prohibition is كفر (blasphemy).
4. Indulgence without a valid excuse will result in عتاب (reprimand) and عقاب (punishment).

المكروه التحريمى

The Definition of المكروه التحريمى

As far as كره الشيء is concerned المكروه is derived from كره الشيء (to dislike something). In the اصطلاح of the Fuqahaa it is an action that has been prohibited through a دليل ظنى (the دليل for its prohibition is ظنى) and adherence to this prohibiton is حتمى (imperative).

Example: To dye one's hair black.

The Ruling of المكروه التحريمي

The following rules apply to المكروه التحريمي:

1. Although it should be regarded as impermissible, one who does not do so will be classified as ضال (deviant) but not كافر
2. Indulgence without تأويل (an alternative explanation) is ضلال (misguidance and deviation).
3. Indulgence without a valid excuse is blameworthy and may result in عقاب (punishment).

المكروه التنزيهي

The Definition of المكروه التنزيهي

According to the اصطلاح of the Fuqahaa it is:

ما طلب ترك فعله مع التأكيد بدون لزوم

Thus it could be defined as an action which Muslims have been strongly recommended (but not commanded) to refrain from.

Example: To give the adhaan without wudoo.

The Ruling of المكروه التنزيهي

1. Abstention is praiseworthy and rewarding.
2. Engaging in such an action may result in عتاب (reprimand).

المباح

The Definition of المباح

As far as اللغة is concerned المباح is the اسم المفعول (passive participle) of the verb أباح يبيح (to permit). اصطلاحا it is any action in which the مكلف has a choice between commission and omission.

Example: Most basic human necessities.

The Ruling of المباح

There is no difference between commission and omission of such actions. The مكلف will neither be rewarded for committing it nor will he be punished for omitting it.

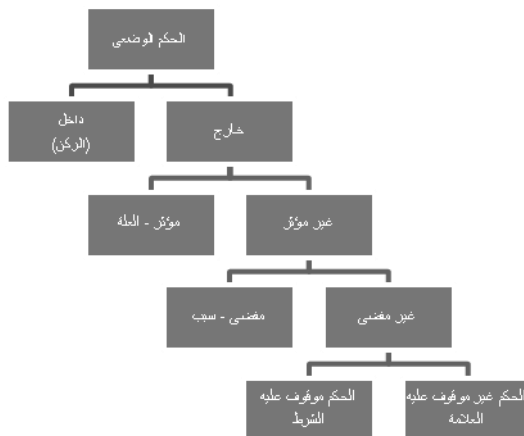
فصل (Chapter)

الحكم الوضعى The Different Types of

As previously mentioned, الحكم الوضعى refers to the خطاب (speech) of Allah regarding the وضع (composition) of the actions of the مكلفين. The author of Usool-ush-Shaashi says in this regard that “the حكم is attached to its سبب, established through its علة and found when its شرط is found”.

Explaining the above the scholars say that:

- ~ Anything upon which الحكم الشرعى depends is either داخله (an internal factor) or خارجه (an external factor).
- ~ The former is called الركن.
- ~ The latter is of two types: it is either مؤثر (it plays a direct role in the establishment of the حكم) or غير مؤثر (it does not play a direct role in the establishment of the حكم).
- ~ If it is مؤثر, it is called العلة.
- ~ If it is not مؤثر, it is either مفضى الى الحكم (a factor that leads to the establishment of the حكم) or not.
- ~ If it is مفضى الى الحكم (a factor that leads to the establishment of the حكم), it is called السبب.
- ~ If it is not مفضى الى الحكم (a factor that leads to the establishment of the حكم), the حكم either depends on it or not.
- ~ If the حكم does depend on it, it is called الشرط
- ~ If the حكم does not depend on it, it is called العلامة



The Difference Between العلة and السبب

The simplest method of differentiation between the two is that the *علة* is *مقتضى الى الحكم بدون واسطة* (a direct cause of the *حكم*) and the *السبب* is *مقتضى الى الحكم بواسطة* (an indirect cause of the *حكم*). The author of *Usool-ush-Shaashi* explains that:

كل ما كان طريقا الى الحكم بواسطة يسمى سببا له شرعا و يسمى الواسطة علة
Anything that leads to the حكم through the means of an intermediate factor is called its shar'i سبب and the intermediate factor is called the علة.

Example: I opened the door of your stable and enabled your horse to go outside. A few minutes later it was knocked down by a speeding motorist and it died. My opening of the door of the stable is the *سبب* because it led to your horse's death through the *توسط* (intermediacy) of the action of the horse. The action of the horse is thus the *علة*.

A Few Rules

Rule 1: When there is a *سبب* and an *علة* and *نسبة* (attribution) of the *حكم* to the *علة* is possible, the *حكم* will be attributed to the *علة* and not the *سبب*.

Example 1: Bakr told Zaid where Amr keeps his money. Thus Zaid went and stole it. Now, if Bakr did not inform Zaid about the whereabouts of Amr's money, Zaid would not have been able to commit this crime. Bakr's action is therefore the سبب and Zaid's action is the علة. Since it is possible to attribute the حكم to Zaid, he will be held responsible.

Example 2: A man gave a knife to a small child. The knife was too heavy for him and thus fell from his hand and injured him. In this case, the fact that the man gave the knife to the child is the سبب and the fact that the knife fell from the child's hand is the علة. However, since the knife fell from the child's hand involuntarily, the child cannot be blamed. Thus the حكم will be attributed to the سبب and the man will be held responsible.

Rule 2: When the سبب has the meaning of an علة (for example, when the علة is established due to the سبب), the حكم will be related to the سبب

Example: Two men gave شهادة (testimony) that Bakr owes Zaid one thousand rands. The judge relied on their شهادة and commanded Bakr to pay Zaid one thousand rands. Some time later it was learnt that the witnesses were lying. In this instance the ruling of the judge is the علة and the testimony of the two witnesses is the سبب. However, this سبب has the meaning of an علة because it is the علة (cause) of the judge's ruling. Had they not given this شهادة, the judge would not have ruled in this manner. The witnesses will therefore be held responsible for the incorrect judgement and hence they will have to compensate Bakr.

Rule 3: When it is very difficult to detect the علة, the Fuqahaa substitute it with the سبب. Hence the حكم is now based on the سبب and no consideration is given to علة.

Example: It is common knowledge that wudoo is nullified when one falls asleep while leaning against something (eg. a wall or pillar). The reason for this being that falling asleep in this manner results in استرخاء المفاصل (relaxation of the internal organs) which could very easily lead to خروج الريح (passing of wind). خروج الريح (passing of wind) is hence the علة for the nullification of the wudoo and sleep is merely the سبب. In principle, we should attribute the nullification of the wudoo to the علة. However, we cannot do so because it is not possible for a person who was asleep to know whether خروج الريح took place while he was asleep or not. We therefore substitute خروج الريح with sleep. Thus we say that sleep nullifies wudoo irrespective of whether خروج الريح took place or not.

Rule 4: Sometimes something that is not the سبب is called the مجاز on the basis of مجاز.

Example: It is commonly said that اليمين (taking an oath) is the سبب for الكفارة. However, الحنث (breaking one's oath) is the actual سبب and اليمين is the شرط. This explains why the أحناف disallow the payment of الكفارة before الحنث (breaking one's oath). How can a واجب be discharged before its سبب has even occurred? It is like performing salaah before its time has commenced or payment of zakaah before one became the owner of nisaab (the minimum zakaatable amount).

The Definition of المانع

As far as اللغة is concerned, المانع is the اسم الفاعل (active participle) of the verb منع يمنع (to prevent). اصطلاحاً it is a factor that According to many أحناف there are four types of المانع:

1. The مانع which prevents the inception of the علة.

Example: The sale of an item is the علة for it leaving the ownership of the بائع (seller) and entering the ownership of the مشتري. However, this transfer of ownership does not take place if the مبيع (sold item) is not محل للبيع / something that may be sold (eg. blood, a free person). The reason for this is that in this case the بيع (sale) does not even take place. Thus the fact that the مبيع (sold item) is not محل للبيع (something that may be sold) prevented the inception of the علة for transfer of ownership to take place.

| | |
|--------|------------------------|
| العلة | The sale. |
| الحكم | Transfer of ownership. |
| المانع | محل للبيع is not مبيع |

2. The مانع which prevents the completion of the علة after its inception.

Example: Possession of النصاب is the علة for zakaat to be compulsory on the مكلف. However, in order for zakaat to be compulsory, he must possess the نصاب at the end of one year from the time he became its owner. Thus, zakaat will not be compulsory if the نصاب was lost in the course of the year (ie. before one year passes since the مكلف became the owner of the نصاب) because, although the علة for its compulsion (ownership of the نصاب) is found, it is incomplete. It should be found at the end of the year as well. In short, loss

of نصاب in the course of the year prevented the completion of the علة.

| | |
|--------|---|
| العلة | النصاب Possession of |
| الحكم | Compulsion of zakaat. |
| المانع | Loss of نصاب during the course of the year. |

3. The مانع which prevents the inception of the حكم.

Example: At the time of selling his car to Zaid, Bakr (the seller) stipulated الخيار in his favour. The fact that Bakr stipulated الخيار does not invalidate the sale of the car. However, it does not allow its حكم to take place. Thus the مبيع does not yet transfer from the ownership of the seller to taht of the buyer.

| | |
|--------|--|
| العلة | The sale of the car. |
| الحكم | Transfer of ownership. |
| المانع | Stipulation of الخيار in favour of the seller. |

4. The مانع which prevents the continuity of the حكم.

Example: Bakr purchased something without actually seeing it. This sale is pemissible and resulted in the مبيع being transfered to his ownership. However, when he eventually saw it for the first time, he did not like it and therefore returned it to the seller on the basis of خيار الرؤية. This returning of the مبيع on the basis of خيار الرؤية prevents the continuity of the حكم of the purchase. Thus the مبيع no longer remains in the purchaser's ownership.

| | |
|--------|--|
| العلة | The purchase made by Bakr. |
| الحكم | Transfer of ownership. |
| المانع | Returning of the مبيع due to خيار الرؤية |

فصل (Chapter) الرخصة و العزيمة

There is a difference of opinion among the experts of usool-ul-fiqh with regards to whether الرخصة and العزيمة belong to the أحكام تكليفية or the أحكام وضعية. The author of Fawaatih-ur-Rahmoot classified them among the أحكام وضعية. Sadr-ush-Sharee'ah adopted a totally different approach. He divided all أحكام into two categories: أصلية and غير أصلية. He thereafter discussed all the أحكام تكليفية under the former and الرخصة under the latter. Some scholars have observed that:

- ~ Most Hanafi experts merely divided all shar'i laws into two types viz. الرخصة and العزيمة without specifying whether these two types belong to the أحكام تكليفية or the أحكام وضعية.
- ~ There is no benefit in disputing this issue because it is nothing more than a خلاف لفظي (war of words).

Nevertheless, it is due to this difference of opinion that we decided to dedicate a separate فصل (chapter) regarding الرخصة and العزيمة.

تعريف العزيمة

العزيمة is derived from العزم (determination and resolution) and its لغوي meaning is therefore ما عزم عليه (something that you are determined to do). Its اصطلاحى meaning is:

المشروع ابتداء من غير أن يكون متصلاً بعراض

The actual ruling in the absence of an excuse.

Note: The previously mentioned seven types of الأحكام التكليفية are classified as العزيمة.

الرخصة The Definition of

The لغوى meaning of الرخصة is اليسر و السهولة (ease). The Arabs say رخص السعر when the commodity that they are speaking about is easily available and hence unexpensive. Its اصطلاحي meaning is:

صرف الأمر من عسر الى يسر بواسطة عذر فى المكلف

Easening of a difficulty due to an excuse of the مكلف.

الرخصة The Two Types of

The author of اصول الشاشي mentions that there are two types of الرخصة:

The First Type:

When the رخصة (concession) to commit a haraam action does not alter its shar'i status. It therefore remains haraam. However, the benefit of the رخصة is that engaging in such an action will not be punishable.

Examples:

- i. Utterance of a statement of kufr (a blasphemous statement) under duress.
- ii. Unlawful murder of a Muslim because one was coerced to do so.
- iii. Unlawful destruction of a Muslim's belongings because one was coerced to do so.

Ruling:

It is more rewarding to exercise sabr (patience) and practise on العزيمة. If a person does so and thus loses his life, he will be rewarded for shunning something haraam and upholding the نهى (prohibition) of Rasulullah *sallallahu alaihi wasallam*.

The Second Type:

When the رخصة (concession) to commit a haraam action alters its shar'i status. As a result of the رخصة it is no longer haraam (it becomes مباح) for the person who finds himself in such a situation.

Example:

Consumption of pig-meat, carrion or alcohol due to extreme hunger and thirst or because one has been coerced to do so.

Ruling:

It is compulsory to practise on this رخصة. Refusal to do so is therefore sinful. A person who loses his life due to such refusal is classified as a sinner. In fact, he could be regarded as having committed suicide.

الحمد لله الذي هدانا لهذا وما كنا لنهتدي لولا أن هدانا الله
اللهم تقبل منا أنك أنت السميع العليم و تبج علينا أنك أنت التواب الرحيم

و صل و سلم يا الله على نبينا محمد و على آله و أصحابه أجمعين

Abu Hudhaifa Muhammed bin Adam Karolia

Al-Jaami'ah Al-Mahmoodiah

Persida, Springs

9 Rabee-ul-Awwal 1431

23 February 2010

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و ما توفيقى الا بالله