Gender Justice in Islamic Law

Homicide and Bodily Injuries

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OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2018

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Abubakar, Musa Usman, 1969- author.

Title: Gender justice in Islamic law : homicide and bodily injuries / Musa Usman Abubakar.

Description: Oxford : Hart Publishing, 2018. | Based on author's thesis (doctoral - University of Warwick, 2012) issued under title: Gender justice and Islamic laws of homicide and bodily hurt of Pakistan and Nigeria. | Includes bibliographical references and index.

Identifiers: LCCN 2018000164 (print) | LCCN 2018000913 (ebook) | ISBN 9781509915101 (Epub) | ISBN 9781509915095 (hardback : alk. paper)

Subjects: LCSH: Offenses against the person (Islamic law) | Women (Islamic law) | Restorative justice—Religious aspects—Islam. | Violent crimes—Law and legislation—Pakistan. | Sex discrimination in criminal justice administration—Pakistan. | Violent crimes—Law and legislation—Nigeria. | Sex discrimination in criminal justice administration—Nigeria.

Classification: LCC KBP4048 (ebook) | LCC KBP4048 .A28 2018 (print) | DDC 345/.167025081—dc23

LC record available at https://lccn.loc.gov/2018000164

ISBN: HB: 978-1-50991-509-5
ePDF: 978-1-50991-508-8
ePub: 978-1-50991-510-1

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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Addressing the Conflicting Narratives Using Elimination (*Al-tarjīḥ*) and Abrogation (*Al-naskh*) Methods

I. Introduction

Having examined the juristic arguments in rationalising the *diyah* disparity on the ground of biological determinism and the counter-argument against the same, it is pertinent in this chapter to examine the textual authorities that gave rise to legal argumentation in the interpretative process. This will help in ascertaining whether the juristic stipulations of compensation for loss of life and for bodily injuries along gender lines are explicit in the revelatory texts or are mere products of human engagement with them. The book has demonstrated in the two preceding chapters the factors that mainly informed jurists' views in their formulations on the subject. The discussion here is triggered by the observation that the classical discourse favoured men over women bearing in mind their social responsibilities. The chapter shall argue that the divine sources are generally gender neutral in tone, although there are some provisions that are seemingly contradictory; however, careful analysis reveal that they are not. The fact that the classical jurists were more inclined to using *al-jamʿ wa'l-tawfīq* in reconciling conflicting authorities made them look so. Here, elimination (*al-tarjīḥ*) and abrogation (*al-naskh*) methods were employed, taking into account the chronological order of their revelation and other historical factors.

II. Qurʾān on Homicide and Bodily Injuries

As the first primary source of Islamic criminal system, the Holy Qurʾān addresses murder as a despicable and intolerable atrocity by equating deliberate murder of one person to the total annihilation of the entire human race. It reads:

> *If anyone slew a person—unless it be for murder or for spreading mischief in the land—it would be as if he slew the whole people: and if anyone saved a life, it would be as if he saved the life of the whole people.*[1]

[1] Q5:32.

Islam does not condone unjustified killing of another regardless of his social, religious or gender status. In the event such an unwelcome act occurs the perpetrator is not only to be tormented in the hereafter, but is also to be punished in this world. This is as per the prescribed law of equality in retribution as provided in the Qur'an thus:

> *If a man kills a believer intentionally, his recompense is Hell, to abide therein (For ever): And the wrath and the* curse *of Allah are upon him, and a dreadful penalty is prepared for him.*[2]

The verses most relevant to our discussion include the following:

> *O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.*[3]

Unless otherwise put in the proper context, Q2:178 may be interpreted to suggest that social or gender statuses are worth reckoning in murder cases because of the specific mention of 'the slave for the slave', and 'the woman for the woman'. As we shall subsequently see, the non-contextualisation of this provision carries with it serious implications in gender relations judging by the huge legal principles extracted from the verse by those endowed with the wisdom to interpret divine texts.

There is yet another verse, which has a harmonising feature, as it does not distinguish between individuals based on status. Qurʾān 5:45 reads: 'We ordained therein for them: "Life for life … and wounds equal for equal"'.[4]

These two Qurʾānic provisions, ie Q2:178 and Q5:45 form the basis upon which the Islamic law of retribution was established. The scholastic interpretive engagement with the divine text and subsequent establishment of legal principles along gender lines appear to stem from the seeming contradiction between the two verses. It is worth noting that while the phraseology of 'life for life' accorded equal status between men and women in the sanctity of life in Q5:45; Q2:178 only made reference to cases involving sets of humans with a shared identity, ie 'the free for the free', 'the slave for the slave' and 'the woman for the woman'. In other words, the verse did not categorically say 'the woman for the man' or 'the man for the woman'. In view of this therefore, scholars exert their efforts in trying to determine whether gender hierarchisation is the intendment of God.

[2] Q4:93.
[3] Q2:178.
[4] Q5:45.

III. Addressing the Seeming Discrepancy in the Qur'anic Verses

In addressing the seeming contradiction in these verses three approaches have been identified:

A. Sequencing Approach

Al-Ṭabari identifies a group of scholars who use elimination (*al-tarjīḥ*) and abrogation (*al-naskh*) methods in resolving the seeming contradiction between these two verses, ie Q2:178 and 5:45. They did that by juxtaposing the verses taking into account the order of their revelation and concluded that Q5:45, which conveys the prescription of equality 'life for life' was late in time, being the last to be revealed. That being the case, the verse of equality takes precedence over Q2:178, which created a hierarchy. A renowned companion, Abdullāh b ʿAbbās was noted among the proponents of this viewpoint. According to them, this view is in consonance with the practice of the Prophet, who ordered the killing of a Jewish man for killing a woman.[5] By necessary implication, Q5:45 not only terminated the application of Q2:178, by bringing to the end recourse to social and gender status, but also abrogated it.[6]

Ibn Kathīr holds the same view. He traced the reason for revealing Q2:178 with reference to the hostilities between two certain Arab tribes. One of these tribes killed members of the other and the latter promised to avenge the death of their members by killing a freeperson for their slain slave, and also by killing a man for their woman. Therefore, on the advent of Islam they wanted to fulfil their promise but were prevented from doing what they wanted. They were only to kill a slave for a slave, and a woman for a woman.[7] According to Ibn Kathīr, Q5:45 had abrogated Q2:178 since the latter did not allow killing a man for a woman or a free person for a slave.[8]

By this approach, it may be argued that during its early stage, Islam tolerated recourse to 'social status', but phased it out subsequently. This may well explain the consensus among the Sunni schools on the issue of retribution where they all allow the execution of man for deliberately causing the death of woman and vice versa, as earlier highlighted.

Another point worth noting is that, many Qurʾānic exegetes consider the prescription on *diyah* (monetary compensation) as one of the distinctive features of

[5] M Al-Ṭabari, *Jāmiʿ al-Bayān fi Taʾwīl al-Qurʾan*, vol X (AM Shākir, ed) (Beirut, Muʾassasat al-Risālah, 2000) at 360.

[6] ibid.

[7] IU Ibn Kathīr, *Tafsir Ibn Kathīr*, vol I (Cairo, Dār-al-Tayyibah, 1999) at 489.

[8] ibid.

Islamic criminal justice policy, particularly when compared with other revealed religions, such as Judaism and Christianity.[9] By implication, if a 'sequencing approach' is adopted in the circumstances, then the concession of collecting monetary compensation in intentional cases, as a special feature of the Islamic criminal justice system, will cease, leaving the heirs of a slain person with only two options, ie 'retribution'(*qiṣāṣ*) and 'forgiveness (ʿ*afw*)'. This is because Q5:45, being the last in time to be revealed, does not provide the option of *diyah.* Besides, another relevant verse (Q4:92), only refers to unintentional murder:

> *Never should a believer kill a believer; but (if it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely.*

However, notwithstanding this observation, Abdullāh b ʿAbbās interpreted the verse 'but if any one remits the retaliation by way of charity' in Q5:45, to mean agreement to collect *diyah*.[10] Therefore, Q5:45 has taken care of *diyah* in intentional homicide.

In addition, the Sunnah of the Prophet is explicit on accepting *diyah* in intentional murders as reported in the ḥadīth of ʿAmr b Ḥazm thus: 'Whoever kills a believer deliberately for no reason or a crime that he committed, he should be killed (in retaliation), unless the family of the murdered person agrees to take *diyah* (blood money)'.[11]

Above, we have identified that Q5:45 was the last to be revealed; as such, it shall be taken as the position of the law on the issue in contention, as attested by a renowned companion of Prophet Muhammad (PBUH), Abdullahi b ʿAbbās. This approach enjoys the support of the Ḥanafis, for they do not differentiate between a freeman and slave in murder cases. The former is liable to a capital penalty for causing the death of the latter, owing to the inviolability of life.[12]

B. Historical Approach

Muhammad El-Awa is one of the advocates of the historical approach. The position of this school of thought is that Q5:45 is particularly relaying historical antecedents of the past. It is only making a simple reference to what was ordained for the people of the revealed Book (*Ahl al-Kitāb*), ie the Jews and the Christians. According to this school of thought, this is discernible from the opening of the verse: 'We ordained therein for them'.

[9] S Quṭb, *Fī Ẓilāl al-Qurʾān*, vol I (Beirut, Dar al-Shurouq, 1991) at 164.

[10] M Bukhāri, *Sahih Bukhāri*, vol 9, bk 83, No 20 (trans M Khan) https://archive.org/details/TheTranslationOfTheMeaningsOfSahihAl-Bukhari-Arabic-English9Volumes.

[11] AA ʿAsqalāni, *Bulūgh Al-Marām*, vol I (Riyadh, Dar al-Falaq, 2003) at 359.

[12] M Al-Sarakhsi, *Al-Mabsūṭ*, vol XXVI (KM Al-Mays, ed) (Beirut, Dār al-Fikr, 2000) at 236.

The implication of this viewpoint is that the *lex talionis* principle of 'life for life' does not apply to Muslims.[13] El-Awa strengthens his view by pointing to the fact that, if the verse is analysed contextually, it will be clear that it is placed in between verses that referred to the Jews. He further argues that the provision of this verse could not apply to the Muslim community since Q5:48 declares that each Prophet comes with his own specific teaching: 'To each among you have we prescribed a law and an open way'.[14]

El-Awa's approach seems to be another form of elimination method suggesting that the historical verses must give way to the prescribed law for the Muslims. If El-Awa's approach is adopted it means the equality principle as embodied in the expression 'life for life' is not the applicable law for Muslims.[15]

If El-Awa's view on this issue holds then it will appear that the various examples of historical events cited in the Qurʾān are merely historical, or at most only revealed for moral persuasion and thus lacking any legal force. It would mean that hopes for gender equality in this regard would remain unrealised. This is because the approach has the tendency of institutionalising recourse to social and gender status in murder cases. If Q5:45 is taken as revealed only as a rendition of historical prescriptions to other communities, and thus incapable of being used as a basis for legal formulation for Muslims, as El-Awa seeks to suggest, then social and gender status, as exemplified in Q2:178, shall be the basis for legal policy formulation within the sharīʿah framework. This ultimately means that social and gender equality, in this respect, would be unachievable. The actions and pronouncements of Prophet Muḥammad (PBUH) and his rightly guided caliphs were at odds with such reasoning. In one of the many aḥādīth, the Prophet says:

> O people! Your Creator is one, and you are all descendants of the same ancestor. There is no superiority of an Arab over a non-Arab or of the black over the red, except on the basis of righteous conduct.[16]

To further debunk El-Awa's contention, Al-Sarakhsi submits that although the verse in question, as rightly observed by El-Awa, was making reference to the law ordained for the people of the revealed books, such prescription equally applies to the Muslims, unless there is express provision limiting its application to them.[17]

[13] MS El-Awa, *Punishment in Islamic Law: A Comparative Study*, (Plainfield, American Trust Publication, 2000) 72–73.

[14] Q5:48.

[15] El-Awa, *Punishment in Islamic Law* (n 13) at 74.

[16] MH Kamali, *Freedom, Equality and Justice in Islam* (Cambridge, The Islamic Text Society, 2002) at 52.

[17] MA Ibn al-ʿArabi, *Aḥkām al-Qurʾān*, vol II (Beirut, Dār Kutub al-ʿIlmiyyah, 2003) at 128; see also Al-Sarakhsi, *Al-Mabsūṭ* (n 12) vol XXVI at 106.

C. Contextual Approach

Scholars like Ibn al-ʿArabi (d 543 AH/1148 AD), a prominent Māliki scholar, adopts what I term a 'contextual approach'. Ibn al-ʿArabi mentions some notable successors (*tābiʿūn*) like al-Shaʿabi and Qatādah as saying that Q2:178 was actually revealed to correct the transgression of some Arab tribes, who, on the pretext of nobility, avenged the death of a member of their tribe by killing a person of high social status from another tribe. Such that, if a slave from a non-noble tribe killed a slave from a noble tribe, the latter used to kill the master of the offending slave.[18]

On the other hand, Q5:45, according to ʿAbdullāhi b ʿAbbās, was revealed in response to the practice of the Banū Qurayẓah, a Jewish tribe of Madīnah. Members of this tribe used to exceed or transgress the limit whenever they were avenging the death of one of their members against the Banū Naḍīr. Therefore, the verse prescribed equality among them.[19] Seyd Quṭb supports this view, arguing that Q5:45 may be taken as referring to a case of intentional murder targeted against a 'particular person' or 'group of persons', while Q2:178 is with reference to communal feuds since no particular person is intended. In that case, social status may be taken into account.[20]

By necessary implication, these narratives suggest that these two verses were case-specific and revealed in relation to some specific historical facts, of course with general application to Muslims.

In addressing these verses, Imām Mālik may have yielded to this viewpoint, albeit, from a different perspective. According to him:

> The best of what I have heard on the interpretation of this *āyat*, the word of Allāh, the Blessed, the Exalted, 'The free man for the free man and the slave for the slave—these are men and 'the woman for the woman,' (Q2:178) is that retaliation is between women as it is between men. The free woman is killed for the free woman as the free man is killed for the free man. The slave-girl is slain for the slave-girl as the slave is slain for the slave. Retaliation is between women as it is between men. That is because Allāh, the Blessed, the Exalted, said in His Book, 'We have written for them in it that it is a life for a life and an eye for an eye, a nose for a nose, and an ear for an ear, and a tooth for a tooth, and for wounds there is retaliation.' (Q5: 48) Allāh, the Blessed, the Exalted, mentioned that it is a life for a life. It is the life of a free woman for the life of a free man, and her injury for his injury.[21]

Under this approach, the two seemingly contradictory provisions have been juxtaposed together and utilised in the formulation of legal principles, undermining the context in which the verses were revealed. However, in relation to the issue under review, the approach did not take into account the gradual method employed in

[18] Ibn al-ʿArabi, *Aḥkām al-Qurʾān* (n 17) vol I at 89.
[19] ibid, vol II at 128.
[20] S Quṭb, *Fī Ẓilāl al-Qurʾān* (n 9) vol I at 152.
[21] AM Malik, *Al-Muwatta*, vol II (Beirut, Dār Gurāb al-Islam, 1996) at 445.

the Qurʾān. Apparently, the approach allows recourse to social status, as in the case of free man and slave. The former may not be killed for the latter, but at the same time, the approach allows retribution across genders.

Having identified and discussed various approaches to the Qurʾānic provisions on the matter under review, the sequencing approach appear more appealing, and is in line with the gradual approach mostly used in the revelation of Qurʾanic provisions. Interestingly, in reconciling these two seemingly contradictory verses the Islamic jurists appear more inclined to using *al-jamʿ wa'l-tawfīq* (conciliation) being the first method of dealing with contradictory narratives. This method is resorted to where the two contradictory narratives are not mutually exclusive; as such, none of them is jettisoned. Perhaps they were guided by some aḥādīth that allow gender hierarchisation in *diyah.*

IV. Prophetic Sayings in Murder and Bodily Injuries Across Genders

It is now pertinent to survey the aḥādīth of the Prophet, being the next in the hierarchy of sources of the law in order to determine their reliability. This would assist in settling these divergences and perhaps settle the matter once and for all.

There are many aḥādīth of the Prophet dealing with matters of homicides across genders, which explained how he dealt with such cases. Equally reported were his pronouncements on *diyah* in both homicidal cases and bodily injury, as we shall see in due course. There is however great difficulty in ascertaining why the classical fiqh jurists preferred narrations that create gender disparity in the face of more inclusive narrations.

As for retribution between a man and woman no problem exists with respect to loss of life as all the Sunni schools treat genders at par in that respect. The Prophet demonstrated gender equality in a case involving a man who crushed the head of a young girl to snatch her ornaments, which ultimately resulted into her death. Imām Bukhāri reported this on the authority of Anas b Malik:

> A Jew crushed the head of a girl between two stones, and the girl was asked, 'Who has done that to you, so-and-so or so and so?' (Some names were mentioned to her) until the name of that Jew was mentioned, (whereupon she agreed). The Jew was brought to the Prophet and the Prophet kept on questioning him till he confessed, whereupon his head was crushed with stones.[22]

However, on the issue of *diyah* involving loss of life, the author was unable to come across any ḥadīth where the Prophet decided an 'actual case' and specifically prescribed the *diyah* of a woman. What is found in the literature is that the Prophet

[22] M Bukhāri, *Sahih Bukhāri* (n 10), vol IX, bk 83 ḥadīth 15.

had reportedly fixed the *diyah* of a man killed from the tribe of Banū Adi at the rate of 12,000 *dirhams* (silver coins).[23] This could have settled the matter because it is on record that pre-Islamic Arabian society was characterised by gender disparity in favour of men.

Notwithstanding the absence of actual decided case on the *diyah* of woman, at least two seemingly contradictory narrations have been identified as emanating from the Prophet (PBUH). The first hadith is said to be reported by Muʿādh b Jabal (d 18 AH/639 AD) in which the Prophet declared that 'the compensation of woman is half that of man'.[24] The second one is as contained in the epistle of the Prophet which he handed over to ʿAmr b Ḥazm (d 53 AH/673 AD) when he was sent to Najran, a province under the Muslim authority to teach the new converts about Islam.[25] The epistle, among other things, contained the expression 'The compensation for life is hundred camels'.[26]

Most of the classical jurists including Ibn Qudāmah[27] are of the view that the half *diyah* stipulation was also contained in the same epistle(s), and it is an exception to the general rule. This suggests that the source of gender inequality in *diyah* is the divine component, ie, the content of the Prophet's epistle.[28] Ibn Qudāmah further condemned the views of Ibn Ulayyah and Abubakar Al-Asamm that *diyah* is equal across genders as isolated and thus not acceptable.[29]

It is said that ʿAmr b Ḥazm Al-Anṣāri was sent to Najran in 10 AH, immediately after the people of the area converted to Islam, with the epistle addressed to some prominent figures such as Shuraḥbīl b ʿAbdi Kalāl, Ḥārith b ʿAbdi Kalāl, etc.[30] The epistle contained many religious instructions ranging from issues of *zakāt* (poor due) to *diyah* etc.[31]

It is pertinent to state that the claim by jurists like Ibn Qudāmah that the expression 'the compensation of woman is half that of man' in the Prophet's epistle is highly contentious. Ibn Ḥajar Al-ʿAsqalāni (1372–1448 AD) was among the scholars of ḥadīth who fired the first salvo. He asserted that the said expression was not found in that long epistle sent to ʿAmr b Ḥazm.[32] A contemporary ḥadīth scholar,

[23] SA Abū Daūd, *Sunan Abū Daūd*, vol IV (MM ʿAbd al-Ḥamīd, ed) (Beirut, Maktabat al-ʿAṣriyyah, nd) at 185, ḥadīth 4546. Albāni has declared this a weak ḥadīth.

[24] MI Al-Ṣanʿānī, *Subl al-Salām*, vol II (Cairo, Dār al-Ḥadīth, nd) at 365.

[25] AS Al-Liḥyāni, 'Asānīd Kitāb ʿAmr b. Ḥazm (RA)' (2001) 2 *Majallah al-Aḥmadiyyah Muharram* 1422, 48–101 at 53 www.ahlalhdeeth.com/vb/showthread.php?t=111760.

[26] ʿAsqalāni, *Bulūgh Al-Marām* (n 11) at 437–38; see also Ibn al-ʿArabi (n 17) vol II at 128.

[27] AA Ibn Qudāmah, *Al-Mughni* (MR Riḍā, ed), vol VIII (Beirut, Dār al-Kitāb al- ʿArabi, 1983) at 403.

[28] Multaqa ahl al-Ḥadīth, 'Hal Diyat al- Marʿat ʿalā Niṣf Min Diyat al-Rajul?'. www.ahlalhdeeth.com/vb/showthread.php?t=14647.

[29] Ibn Qudāmah, *Al-Mughni* (n 27) at 403.

[30] For the full content of the epistle, see Al-Lihyāni, 'Asānīd Kitāb ʿAmr b. Ḥazm (RA)' (n 25) at 54–59.

[31] ibid.

[32] MN Albāni, *Irwāʾ al-Ghalīl fi Takhrīj Aḥādīth Manār al-Sabīl*, vol VII (Beirut, Maktabat al-Islāmī, 1985) at 306, ḥadīth 2249.

Muḥammad Naṣiruddīn Albāni (1914–99 AD) also claimed that he had searched for that expression in the epistle to ʿAmr b Ḥazm but could not find it.[33] Hence, Albāni did not mince words in declaring the controversial expression 'the compensation of woman is half that of man' as 'weak' (*ḍaʿīf*).[34] Interestingly however, he accepts and authenticates the all-inclusive portion, 'the compensation for life is hundred camels'.[35]

It is noteworthy that the then Umayyad caliph, ʿUmar b ʿAbdul Azīz (d 720 AD), obtained the Prophet's epistle through Abūbakar b Muḥammad, the grandson of ʿAmr b Ḥazm. This narration is considered as the 'only well-authenticated tradition on the subject'.[36] The relevant portion of it has been cited by many scholars including Imām Mālik in his famous book *Al-Muwatta* and Ibn Ḥajar in *Bulūgh-al Marām* and is reproduced here thus:

> Whoever kills a believer deliberately for no reason or a crime that he committed, he should be killed (in retaliation), unless the family of the murdered person agrees to take *diyah* (blood money). *The diyah for life is a hundred camels* (italics mine). Full blood money (ie total *diyah* of 100 camels) is paid for the total cutting off of each of the following: the nose, the eyes, the tongue, the lips, the penis, the testicles and the backbone. For cutting off of one leg; half a *diyah* is paid (ie 50 camels). For a head injury a third of the *diyah* is paid, for stab which penetrates the body, one third of the *diyah*. For a blow which breaks a bone or dislocates it; 15 camels. For each finger or toe, 10 camels are paid. For wound which exposes a bone five camels are paid. A man is killed in *qiṣāṣ* for killing a woman. For those who possess gold, they shall pay the equivalent of the 100 camels which is fixed as one thousand *dinar*.[37]

Notwithstanding the clean bill of health given to this narration by Yusuf al-Qaraḍāwi and others, the narration is classified as hurried (*mursal*) because Abubakar b Muhammad, the narrator of the ḥadīth, did not meet his grandfather, ʿAmr b Ḥazm. However, recent research into the validity of this epistle by ʿAbdullāhi b Saʿāf Al-Liḥyāni, though identifying many defects in its chains of transmission, reveals the existence of the epistle for it was well known among the people of Madina from the first and second century after Hijra. He painstakingly scrutinised different versions of this narration from many sources. Al-Liḥyāni maintains that the epistle is undoubtedly a *mursal* narration. After a thorough analysis, he found that the content of the epistle has been corroborated by Qur'anic verses and other aḥādīth of the Prophet. He claimed that the transmission of Al-Zuhri (d 742 AD) is the most acceptable, as Al-Zuhri claimed to have seen the epistle with the family of ʿAmr b Ḥazm and had actually read it.[38]

[33] ibid at 308, ḥadīth 2252.
[34] ibid at 306, ḥadīth 2249.
[35] ibid at 300; 303, ḥadīth 2243 and also 2248.
[36] Y Qaraḍāwi, *The Status of Women in Islam* (trans M Gemeaah) (nd) www.scribd.com/doc/13460421/The-Status-of-Women-in-IslamQaradawy.
[37] ʿAsqalāni (n 11) at 437–38.
[38] Al-Liḥyāni (n 25).

It is noteworthy that in all the versions of this narration identified by Al-Liḥyāni none of them contains this statement 'the compensation of woman is half that of man'.

The above tradition is the bedrock of compensation in monetary terms or rather money's worth. As can be observed, it stipulates the *diyah* without reference to gender. One wonders why jurists interpreted the narration restrictively despite the all-inclusive tone of the Prophet's epistle. The treatment given to this ḥadīth by the classical jurists appear to suggest that any statement made in the revelatory text is to be presumed as addressing only men, save where women are expressly mentioned.

Some scholars posit that the answer to this query will be appreciated if one makes an imaginary journey in retrospective to the aristocratic leadership of the ʿAbbāsid dynasty.[39] This view suggests that the perception of women in that society would leave an indelible mark on any person, and would almost naturally affect one's perception of them.[40] According to this view, during this period, the dividing line between a 'woman' and 'property' was thin, as they can be purchased from the market with little difficulty.[41] In the words of Leila Ahmed, 'the marketing of people, and particularly women, as commodities and as objects for sexual use was an everyday reality in ʿAbbāsid society'.[42] Indeed, most aristocrats of that time were complicit in the perpetuation of this culture of debasing the worth of women, as is discernible from the array of women they housed as their concubines.[43] Leila Ahmed cited the likes of Caliph Hārūn Rashīd who was known for having over 100 concubines, as well as a host of other notable opinion leaders.[44] This was largely attributed to the assimilation of foreign cultures by the Muslims because of the territorial expansion of the Islamic state and the influence of tales from the Semitic religions (*Isrāʿiliyyāt*) before Islam.[45] The fact that there was social abuse of women folk during the period under review was simply a reflection of the patriarchal system of that society and not the requirement of Islam.

Karen Bauer also shares this concern, for according to her, Muslim jurists of that period share similar characteristics with the Jewish and Christian medieval scholars in their treatment of women. According to Bauer:

> That the gender hierarchy was considered natural in the medieval period is apparent in legal rulings, such as that for the blood-money payment in the case of killing: 100 camels

[39] See generally L Ahmed, *Women and Gender in Islam: Historical Roots of the Modern Debate* (New Haven and London, Yale University Press, 1992).

[40] ibid; K Bauer, *Gender Hierarchy in the Qur'an: Medieval Interpretations, Modern Responses* (New York, Cambridge University Press, 2015) at 19.

[41] Ahmed, *Women and Gender in Islam* (n 39) at 85.

[42] ibid, at 84.

[43] ibid.

[44] Ahmed (n 39) at 83.

[45] ibid at 79–101; G Adnan, *Women and the Glorious Qurʾān: An Analytical Study of Women-related Verses of Sura an-Nisa* (PhD thesis, Universitat Gottingen, 2004) available at http://webdoc.sub.gwdg.de/univerlag/2004/adnan.pdf at 189.

> for men, 50 for women. … These ḥadīths are often reinterpreted today; but in the medieval period, they were taken at face value. In their view of women as unequal, subservient, and deficient, medieval Muslim interpreters are on common ground with medieval interpreters from other world religions, particularly Judaism and Christianity. Medieval Jewish interpretations of the Biblical verse Genesis 3:16, to the woman he said, 'I will make your pains in childbirth severe; with labour you will give birth to children, and your desire shall be for your husband, and he shall rule over thee', are similar to Medieval Islamic interpretations of Q. 4:34.[46]

It is noteworthy that the development of this important field of knowledge, ie fiqh, as an autonomous Islamic pedagogy, coincided with these extreme social prejudices against women. The period, usually characterised as the golden age of Islamic civilisation, witnessed, among other things, elaborate scriptural interpretation and formulation of legal principles by Muslim scholars with active state support.[47] It is therefore not surprising for such social prejudice to impact on the interpretation of scholars of the period, as Leila Ahmed observes:

> Altogether the prevalence and ordinariness of the sale of women for sexual use must have eroded the humanity from the idea of woman for everyone in this society, at all class levels, women as well as men. The mores of the elites and the realities of social life, and their implications for the very idea and definition of the concept 'woman,' could not have failed to inform the ideology of the day, thus determining how early texts were heard and interpreted and how their broad principles were rendered into law[48]

Arguing in the same vein, Gunawan Adnan claims that even apart from social perception of women in this classical age, other factors that contributed to the biased interpretation included fear of political victimisation from the political authorities. The aristocrats wanted uniformity and consistency in policies and were intolerant to any opposing view against the position of the establishment *madhhab*.[49] He thus concludes:

> Sociologically, they [Muslim jurists] cannot be separated from their society and time in which they lived and their opinions were much influenced by the culture and social values of their time. History tells us that society in the lifetimes of these scholars was very male-oriented or male-dominated. In other words, they lived in a patriarchal society. As a logical consequence, their fiqh judgements (verdicts/fatawa) naturally reflected the patriarchal system. This in its turn influenced the so called male bias of opinions.[50]

While we note the plausibility of Gunawan Adnan's argument with reference to the sociological influence, his point on fear of victimisation is hardly tenable, at least on the issue under consideration here. This is because even during the

[46] Bauer, *Gender Hierarchy in the Qur'an* (n 40) at 13.
[47] AB Phillips, *The Evolution of Islamic Fiqh* (Riyadh, International Islamic Publishing House, 2005) at 85.
[48] Ahmed (n 39) at 86.
[49] Adnan, *Women and the Glorious Qur'ān* (n 45) at 221.
[50] ibid, at 195.

period under review, there were the dissenting egalitarian views of the likes of Ibn ʿUlayyah (d 809 AD) and Abūbakar Al-ʾAṣamm (d 816 AD), who insisted on interpreting the expression 'the compensation for life is hundred camels' in all-inclusive terms. This appears to have weakened Adnan's view on fear of political victimisation, as another possible reason for such interpretation. Besides, the fact that the seventh ʿAbbāsid caliph, Al-Māʾmūn (d 833 AD), was known for his sympathy to the Muʿtazilite School, which Al-ʾAṣamm belonged to, exposes the weakness of this viewpoint. It is on record that the Muʿtazilite doctrine had gained ground during the ʿAbbāsid dynasty particularly from 813–47 AD during the reigns of Al-Māʾmūn, Al-Muʿtaṣim and al-Wāthiq as the official state creed.[51] Ordinarily, if fear of victimisation had been one of the reasons for male biased interpretation, at least within the interval of about 30 years when the Muʿtazilite doctrine held sway in this dynasty, views of scholars like Al-ʾAṣamm would have prevailed as no state threat would have occasioned any person propagating the all-inclusive interpretation of the expression 'the compensation for life is hundred camels'.

V. Creating a Chronology between the Narratives

Obviously, these narratives of Muʿādh b Jabal and ʿAmr b Ḥazm might have been reconciled to be in tandem with Arabia's gender relation being the default system. As shown above, the jurists may have treated the two narratives as not contradicting each other. By this, the narration of Muʿādh was interpreted as explaining that of ʿAmr b Ḥazm, hence construing the latter as exception to the general rule. According to Ṣanʿāni, the narration of Muʿādh was the basis for the unanimity of the classical jurists on halving the *diyah* of women.[52]

Ṣanʿāni's argument suggests that the half *diyah* stipulation is rooted in the second primary source of Islamic law as something that received the endorsement of the Prophet (PBUH). The implication of attributing this statement to the Prophet Muḥammad is, if it turns out to be the position of sharīʿah, that the half *diyah* stipulation becomes a 'no go area', thus not debatable within the Islamic framework. Consequently, this forecloses any agitation for gender equality with respect to *diyah* between men and women from within the sharīʿah regime in view of the bindingness of Sunnah as the second major source of Islamic law.

It is an established principle of reconciling conflicting aḥādīth that the conflicting narratives may only be reconciled if both of them are classified valid, in the nature of '*ṣaḥīḥ*' (authentic) or '*ḥasan*' (good). This means that a *ḍaʿīf* (weak) narration does not merit consideration in the face of valid narration, since they

[51] 'Ash'ariyya and Mu'tazila' www.muslimphilosophy.com/ip/rep/H052.
[52] Al-Ṣanʿāni, *Subl al-Salām* (n 24) vol II at 365.

are not on the same pedestal.[53] It is therefore wrong to reconcile narrations of unequal status, as a weak narration, according to prevailing opinion, cannot be used as the basis for any legal ruling (*ḥukm*).[54] Even where the two narratives satisfy the requirement of validity as enunciated by the scholars of ḥadīth, another requirement is that the process of conciliation is undertaken only if their chronological sequence cannot be ascertained.[55]

Careful analysis of the happenings during the formative period of Islam reveals that the two narratives under consideration must have been wrongly reconciled, as historical facts were not taken into account. One will appreciate the scenario sought to be drawn when recourse is made to the historical facts herein discussed. It is on record that both Muʿādh b Jabal and ʿAmr b Ḥazm were among the closest young companions of the Prophet. It is also an established fact that they were all sent on special assignments outside Madīnah to what used to be called the Greater Yemen.[56] Furthermore, it is a known fact that, immediately after the Battle of Tabouk in 9 AH/631 AD, the Prophet sent Muʿādh to Yemen on administrative and judicial duty;[57] and that since Muʿādh left Madīnah for the assignment he did not come back until after the death of the Prophet in 10 AH[58] Ibn Kathīr notes some narrations which suggest that Muʿādh came back before the death of the Prophet but he debunked the assertion stressing that the most reliable information is that he did not come back.[59] On the other hand, before his death, the Prophet sent ʿAmr b Ḥazm on a similar mission to Najrān in Yemen in 10 AH/632 AD, and he too did not come back to Madīnah until after the demise of the Prophet.[60] The time margin apparently shows that the later narration was that of ʿAmr and not that of Muʿādh.

It may well be worth noting that since both ʿAmr and Muʿādh were emissaries of the Prophet to the same region, there is a presumption, albeit rebuttable, that they all received similar message. This seems to be true when one takes into account some narrations on *diyah* for loss of teeth and loss of faculties such as mental, hearing, speech etc reported by Bayhaqi, and attributed to Muʿādh b Jabal.[61] If what we postulate here turns out to be the case, the question that readily comes to mind is why should the two messages differ in their contents? How can

[53] M Kamali, *A Textbook of Ḥadīth Studies: Authenticity, Compilation, Classification and Criticism of Ḥadīth* (Leicestershire, the Islamic Foundation, 2009) at 109.

[54] ibid, at 149–50.

[55] ibid, at 130.

[56] Greater Yemen covers the Republic of Yemen as well as the Southern regions of Saudi Arabia, such as Asir, Najran, Jizan, etc.

[57] M Al-Dhahabī *Tārīkh al-Islam*, 1st edn, vol I (Beirut, Dār al-Ghurab al-Islāmī, 2003) at 464; IU Ibn Kathīr, *Al-Bidāyat wa al-Nihāy*ah, 1st edn, vol VII (AA al-Turki, ed) (Dār Hijr, 2003) at 382.

[58] ibid.

[59] IU Ibn Kathīr, *Al-Bidāyat wa al-Nihāy*ah (n 57) vol VII at 386.

[60] Al-Liḥyāni (n 25) at 53; M Lecker, 'Amr ibn Ḥazm al-Anṣāri and Qurʾan 2:265: No Compulsion is There in Religion' (1996) 35 *Oreins* 57–64, note 14 at 59.

[61] See AA Bayhaqī, *Sunan al-Bayhaqī al-Kubrā*, vol VIII (MA ʿAṭāʾ, ed) (Makkah, Maktabat Dār al-Bāz, 1994) at 83–95.

the disputed expression 'the compensation of woman is half that of man', which Ibn Ḥajar and Albāni claim is not found in the epistle of ʿAmr be accepted as authentic with reference to Muʿādh's? Is it possible for the Prophet to give different instructions to his emissaries on the same subject matter? If the answer is in the affirmative, the implication will be that *diyah* can vary from place to place since in Yemen the Prophet instructed Muʿādh to collect 50 camels as *diyah* for woman and 100 for man while in Najran he gave contrary instruction of 100 camels across genders. This assumption seems to support Javed Ahmad Ghamidi's unpopular view. He uses linguistic analysis to reach the conclusion that the quantum of *diyah* is relative and is determined by the 'general custom and tradition' of a given community.[62] According to him, the Qurʾān uses a common noun '*diyah*' as against '*al-diyah*', which is a proper noun. The implication of this usage, according to him, is that there is no fixed rate for *diyah* but it may only be contextually determined according to the usage of a given society.[63] Much as the argument of Ghamidi has some substance, it is submitted that the instruction of the Prophet to the emissaries was meant to harmonise the *diyah* of human beings in all territories of Islam irrespective of one's social or gender status.

On the other hand, if the answer to the question posed is in the negative, then the two epistles must have been worded the same way. Why do the two narrations differ then? Since the scholars of ḥadīth have scrutinised the epistle given to ʿAmr and could not find the disputed expression 'the compensation of woman is half that of man', does it sound rational to hold as authentic the one contained in the Muʿādh's epistle? Having declared the said expression as 'weak' insofar as, the epistle of ʿAmr b Ḥazm was concerned, it is only logical that the one said to have allegedly emanated from Muʿādh should suffer the same consequence.

Another possibility is to consider the Muʿādh's narration as something entirely independent of the said epistle given to the emissaries, by assuming that Muʿādh had heard the Prophet say, 'the compensation of woman is half that of man' on a different occasion. Suppose this was the case, the question that readily comes to mind is, when or on what occasion? At least, the fact that Muʿādh went on assignment to Yemen is not in dispute. At what time did he hear this ḥadīth from the Prophet? Was it before his departure from Madīnah to Yemen or later? As noted above, the last meeting of Muʿādh with the Prophet was before leaving for Yemen, and he did not return to Madīnah until after the Prophet's death. That being the case, he could not have heard the narration after his return to Madīnah. The only possible time he could have heard it must have been before his departure for Yemen. The resultant effect of this proposition will be that, perhaps up to 9 AH, the *diyah* of a woman was half that of man in accordance with the pre-Islamic Arabian system of compensation. However, this default legal order was reformed

[62] JA Ghamidi, 'What is Diyah?' (trans S Saleem) (2002) 12(9) *Islamic Punishments: A Fresh Insight Renaissance Monthly Islamic Journal*, special edn www.monthly-renaissance.com/issue/content.aspx?id=446.

[63] ibid.

towards the end of Muḥammad's lifetime in 10 AH, which the dispatched epistle handed to Amr b Hazm seems to suggest. This sounds reasonable given the evolutionary nature of the Islamic legal development during its formative stage.

The sequencing approach identified above appears to support this proposition, which is to the effect that Q5:45 was the last verse to be revealed in relation to homicidal cases, thus abrogating Q2:178. It may then be taken that during the early period of Islam, there was difference of *diyah* between men and women as was common under the default system of the pre-Islamic Arabian society. Since there was no contrary order in the nature of revelation to the Prophet, halving of *diyah* became the established normative order only to be changed thereafter. Interestingly, according to Ibn Saʿad in Al-Ṭabaqāt Al Kubrā, the quantum of *diyah* before Islam was 10 camels but was later changed to 100 camels by Abdul Mutallib. This was adopted by all the Arab tribes including the Quraysh. According to ʿAbdullahi b ʿAbbās this practice was maintained by the Prophet (SAW).[64] It is therefore submitted that the new gender-neutral order came when Muʿādh was in Yemen away from the Prophet.

The problem with the collection of ḥadīth is that the Prophet did not officially order its collection during his life. However, this assertion should not be interpreted as doubting the existence of individual collections. Many companions had recorded the aḥādīth of the Prophet in writing, although at a point he stopped the writing of ḥadīth so as to avoid becoming mixed-up with the Qurʾan,[65] although he lifted the embargo thereafter. Recorded evidence has shown that the Umayyad caliph, ʿUmar b ʿAbdul Azīz (d102 AH/720 AD), was the first to order official collection and writing of ḥadīth during his tenure.[66] In view of this therefore, it was difficult to catalogue the aḥādīth in chronological order to enable a discerning mind to ascertain, in cases of contradiction, which of the various narrations was either the first or the last in time. On the contrary, the Prophet was the one who ordered the collection of the Qurʾān during his lifetime.

This period in question also witnessed proliferation of many false narrations attributed to the Prophet by some people for their selfish ends, particularly fabricated ahādīth along sectarian or political lines.[67] Such ugly scenarios caused many problems to the Muslim community, ranging from uncertainty as to the genuineness of some narrations, trustworthiness of the transmitters and likelihood of contradictory narratives. This necessitated the development of some strict criteria for determining the authenticity and veracity of *aḥādīth*, known as the science of *ḥadīth*.[68]

[64] M Ibn Saad, *Al-Ṭabaqāt Al Kubrā*, vol I (Beirut, Dār Kutub al-ʿIlmiyyah, 1990) at 72.

[65] IA Al-Marzouqi, *Human Rights in Islamic Law* (Abu Dhabi, Diane Publishing Company, 2000) at 10 and 34.

[66] ibid.

[67] S Hassan, *An Introduction to the Science of Hadith* (London, Al-Qurʾan Society, 1994) at 30; J Auda, *Maqāṣid al-Sharīʿah as Philosophy of Islamic Law: A Systems Approach* (London, The International Institute of Islamic Thought London, 2008) at 61.

[68] ibid.

The criteria appear to be more inclined to tracing the chain of transmitters and the content of the narration.[69] Analysis of the chronological order of narrations is hardly visible in the literature on the science of ḥadīth thus leaving both abrogated and abrogating narrations in the corpus of ḥadīth. Scholars like Al-Zuhri have acknowledged this problem and attributed it to the lack of adequate knowledge of ḥadīth abrogation among scholars.[70] Undertaking such an endeavour in resolving these contradictory narratives, might have brought to light the true position of the sharīʿah on the *diyah* of woman, as attempted in this chapter.

At any rate, insofar as the narratives of Muʿādh b Jabal and ʿAmr b Ḥazm were concerned, the failure to consider the order of these narratives had had a telling effect on the right of women to equal *diyah* in Islamic legal tradition. The half *diyah* stipulation has acquired an almost eternal and universal feature in the classical Islamic literature, such that the opposing narration is either misinterpreted or simply suppressed and relegated to the background as non-existent.

From the above analysis, it is clear that disparity of *diyah* along gender lines was part of the practice of the pre-Islamic Arabs partly adopted by the Prophet. It was, however, replaced with a new order as established in the epistle sent to his emissary to Najran, Amr b Hazm. The only reasonable conclusion one can make here is that classical jurists did not advert their minds to such historical facts.

VI. The Half *Diyah* Narration in the Earlier Hadith Literature

As alluded to earlier, Ṣan'āni declares the narration of Muʿādh as the basis of *diyah* disparity across genders. As we shall discuss below, the said narration of Muʿādh was not reported in the first four centuries of Islamic history. It is also pertinent to know that the said narration on half *diyah* was not reported in any of the early collections of ḥadīth like the *Muwaṭṭa* of Imām Mālik (d 179 AH/ 795 AD). However, the Musnad of Imam Shafi'i mentioned 'Aṭā', a follower of the companions, as reporting that *diyah* disparity was the order of the day during the time of the Prophet and that Umar b Khattab had reaffirmed it during his reign.[71] Similarly, the half *diyah* narration is not reported in any of the six highly rated aḥādīth collections (*ṣiḥaḥ sittā*) viz: Ṣaḥīḥ Bukhāri, Ṣaḥīḥ Muslim, Sunan Abu Dawūd, Sunan Tirmidhi, Sunan Nasā'i and Sunan Ibn Mājāh.[72]

[69] M Haredy 'Ḥadīth Textual Criticism: A Reconsideration' (2005) https://archive.islamonline.net/?p=5986.

[70] Kamali, *A Textbook of Ḥadīth Studies* (n 53) at 127.

[71] MI Shāfiʿi, *Al-Musnad* (Beirut, Dār Kutub al-ʿIlmiyyah, 1980) vol I at 348.

[72] Qaraḍāwi, Y, 'Diyat al-Mar'at fi al-Sharīʿat al-Islamiyyah' (unpublished, 2005) www.cmrim.com/index.php?option=com_content&view=article&id=2573:2012-11-21-10-18-06&catid=121:2012-11-15-12-51-36&Itemid=233.

According to Yūsuf al-Qaraḍāwi he has gone through generations of āḥadīth collection from 194 AH/810 AD, being the first generation, starting with the two major collections of Bukhāri and Muslim, but did not see such narration. He also checked the second generation, comprising the four Sunan mentioned above, which ended in 303 AH/915 AD, but could not see any such ḥadīth transmitted through Muʿādh b Jabal or any other narrator.[73] Indeed, he could not find even a hanging ḥadīth (*muʿallaq*),[74] which is the lowest in the categories of chain of transmission (*isnād*), in support of the half *diyah* formula.[75] He also searched through the Musnad of Abū Yaʿala, Ṣaḥīḥ of Ibn Khuzaymah, Ṣaḥīḥ of Ibn Ḥibbān, Sunan of Ṭabarāni among others, constituting the scholars of the third generation of ḥadīth collection, without any trace of such ḥadīth.[76] In essence, this narration of Muʿādh b Jabal was not reported until the fifth century AH/eleventh century AD, as recorded by Imām Bayhaqī (d 458 AH/1066 AD) in his famous collection Sunan al-Kubra. However, the fact that Bayhaqi reported the ḥadīth did not stop him from critically assessing its validity; and was quick to fault it as weak (*ḍaʿīf)*[77] since it emanated through Ubāda b Nusayy.[78]

Paradoxically, despite the apparent defects observed in the transmission of this narration, none of the scholars of ḥadīth declared it a fabrication. Having declared it weak, they appear to allow it to be used in legal rulings on the ground that it is supported by the views of other companions.[79] One would have expected such express declaration from Qaradāwi's courageous effort of championing the cause of challenging the validity of the said narration. Nevertheless, he appears to be very cautious in his selection of words by not declaring the disputed expression as fabricated or forged (*mauḍuʿ*). He argues that if inequality was the norm, the epistle given to ʿAmr b Ḥazm should have contained that since it contains the tariffs due for every injury.[80]

Although Yūsuf al-Qaraḍāwi emphatically denies the existence of the narration of Muʿādh b Jabal in the earlier aḥādith collections, Imam Shafi'i had reported the existence of a *diyah* disparity during the lifetime of the Prophet SAW as confirmed by some followers of the companions like 'Aṭā'.[81] However, he did not link

[73] ibid.

[74] *Muʿallaq* is a ḥadīth whose reporter omits the whole chain of transmitters and quotes the Prophet directly. eg Mr A, the reporter omitting the name of a successor to the successors (*tābiʿi tābiʿin)*; a successor *(tābiʿī*) and a companion (*ṣaḥābī*) who heard and narrated the ḥadīth from the Prophet. Such types of aḥādīth are found even in Bukhāri and Muslim. It is not declared invalid by scholars as they may well be authentic, good or weak (see M Kamali (n 53) at 163.)

[75] Qaraḍāwi, 'Diyat al-Mar'at fi al-Sharīʿat al-Islamiyyah' (n 72).

[76] ibid.

[77] A ḥadīth is declared weak on many grounds, which includes the reporter's questionable character, or that he is an unknown personality. Likewise, where there is broken chain in the transmission as where the narration is *mursal*, *muʿallaq*, *munqaṭiʿ* or *muʿḍal*. See generally Hassan, *An Introduction to the Science of Hadith* (n 67) at 13–17.

[78] Qaraḍāwi (n 72).

[79] Albāni, *Irwāʾ al-Ghalīl fi Takhrīj Aḥādīth Manār al-Sabīl* (n 32), vol VII at 306.

[80] Qaraḍāwi (n 72).

[81] Al-Shafi'i, *Al-Musnad* (n 71) vol I at 347.

the narration to Muʿādh or to any companion save ʿUmar b Khattab whom it is claimed reaffirmed the disparity during his reign. Hence, Yūsuf al-Qaraḍāwi's refusal to declare the half *diyah* narration as fabrication.

VII. The 'One Third' Formula in Bodily Injuries

Apart from the half *diyah* narration, there is yet another narration from Amr b Shuʿayb, the grandson of ʿAmr b Al-ʿAṣṣ, in which it was reported that the Prophet had ruled that in bodily injury men and women are indemnified on equal terms up to the maximum of one third of full *diyah*.[82] The prevailing view of the Maliki School is that in all cases of bodily injury, equal compensation applies to both sexes up to the maximum of one third of a man's *diyah*.[83] In other words, equality ceases where the aggregate claim of compensation for injuries sustained by the woman is more than one third of a man's *diyah*; her claim is reduced and quantified based on half of a man's *diyah*.[84] This is the position of Mālik and his disciples.[85] This school relied on the *fatwas* of successors (*ṭābiʿun*),[86] who, in turn, relied upon the views of some companions of the Prophet like Zaid b Thabit (d 45 AH/666 AD) and ʿAbdullāh b ʿAbbās (d 68 AH/643 AD).[87] The Ḥanbalis support this view, although there is no agreement on whether to maintain equality 'up to' or 'below' one third of man's *diyah*.[88]

On the other hand, Imām Al-Shafiʿi had reservations over the authenticity of the up to one third narration. According to Imām Al-Shafiʿi, he used to apply that principle since his teacher, Imām Mālik was referring to it as Sunnah. However, it dawned on him that what Imām Mālik actually meant here was the practice of the people of Madīnah; and upon this discovery, he stopped using it.[89] Again, according to another authoritative source, Imām Shāfiʿi was quoted as saying:

> we use to refer to it (ie, Saʿīd b Musayyib's narration), but we later stopped … This is because we know the person saying it is Sunnah but we did not see where he linked it to the Prophet (PBUH). For that reason, analogy is a better choice for us in this case.[90]

[82] Ibn Qudāmah (n 27) vol VIII at 403.

[83] R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (New York, Cambridge University Press, 2005) at 53.

[84] A Mālik, *Al-Mudawwanat al-Kubra*, vol IV (Beirut, Dār Kutub al-ʿIlmiyyah, 1994) at 627–28.

[85] AMA, Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol II (Cairo, Mustapha Albābī Printing and Publishing Company, 1975) at 513.

[86] Like Saʿīd b Musayyib (d 94 AH/711 AD), ʿUrwat b Al-Zubayr (d 94 AH/711 AD) and Muḥammad b Abībakar Al-Zuhrī (d 124 AH/741 AD).

[87] SH Al-Bāji, *Al-Muntaqa Sharḥ al-Muwaṭṭa*, 1st edn, vol VII (Egypt, Maḍbaʿat al-Saʿādah, 1913) at 78.

[88] M Al-Maqdisī, *Kitāb al-Furūʿ*, vol X (Beirut, Al-Resalah Publishers, 2003) at 9; AS Al-Mardāwi, *Al-Inṣāf*, vol X (Beirut, Dār Iḥyāʾ al-Turāth al-ʿArabi, 1998) at 49.

[89] AA ʿAsqalāni, *Talkhīṣ al-Ḥabīr*, vol IV (Cairo, Muʾassasat al-Qurṭubah, 1995) at 49.

[90] AY Zaylaʿi, *Naṣbu al-Rāyat li Aḥādīth Al-Hidāyah*, vol IV (M ʿAwāmah, ed) (Beirut, Muʿassasat al-Rayyān, 1997) at 364.

Scholars of ḥadīth equally disapproved this narration as weak narration on the ground of what is technically referred to as '*tadlīs al-isnād*', ie the narration suffers from concealment of authority.[91] This means there is uncertainty as to whether Ibn Jurayj, the reporter of the narration had actually met ʿAmr b Shu ʿayb, the person from whom he claimed to have heard the narration. Both the early scholars (*al-mutaqaddimūn*) like Bukhāri and Aḥmad b Ḥanbal and the later scholars (*al-mutaʾakhkhirūn*) like Albāni concur on the weakness of Ibn Jurayj, as he was known for *tadlīs* (concealment of defect). Indeed, Bukhāri and Aḥmad hold the view that Ibn Jurayj, the reporter of this narration, did not meet ʿAmr b Shuayb.[92]

VIII. Opinion of Individual Companions as Source of Half *Diyah* Stipulation

Having established the absence of the half *diyah* stipulation in the primary sources of Islamic criminal regime, it is pertinent to review the opinions of some companions with a view to ascertaining whether the issue was unanimously settled by them at the formative stage of Islam. In this section, two arguments are made: there was hardly an *ijmāʿ* on the issue of half *diyah,* and that even if it existed, as a subsidiary source of Islamic law, juridical consensus is only resorted to when an issue is not dealt with in the Qurʾān or the Sunnah.

Claim of the existence of *ijmāʿ* is commonplace in the classical fiqh literature. It is, however, one thing to make a claim and another to prove a consensus really existed.[93] The issue under review here is whether there was *ijmāʿ* of the companions on the half *diyah* of a woman as is being claimed. Ascertaining this issue is imperative in view of the serious division among the ranks of the contemporary scholars in that regard. Some jurists consider the ruling on half *diyah* as a definitive (*qaṭʾīʿ*)[94] while others see it as speculative (*ẓannī*),[95] as evidenced in the writings of Yusuf al-Qaraḍāwi and Saʿud Abdullāh al-Finīsāni.[96] Al-Finīsāni sees the ruling on *diyah* as definitive while Qaraḍāwi considers it otherwise. Qaraḍāwi's view receives the support of early scholars like Shāfiʿi, who declared that only

[91] Qaraḍāwi (n 72).

[92] ibid; Ibn Qudāmah (n 27) vol VIII at 403.

[93] AH Ali, 'Scholarly Consensus: Ijmāʿ: Between Use and Misuse' (unpublished, 2010) www.lamppostproductions.com/files/articles/Scholarly%20Consensus.pdf.

[94] A ruling is said to be definitive where it is clearly and unequivocally stated in the text and such a ruling is binding and not debatable and it also admits no *ijtihād*.

[95] A ruling is speculative when it is not clear and equivocal. *Ijtihād*, in this case, may be undertaken by the scholars to ascertain the actual position. Such ruling, though non-binding, will nevertheless have binding force if it is supported by a *ḥadīth* or by a consensus (*ʾijmāʿ*).

[96] *cf* the positions in S Al-Finīsāni, 'Istidrāk wa Taʿqīb ʿalā Fatwā Diyat al-Marʾa' (2006) available at http://www.islamtoday.net/bohooth/artshow-35-7039.htm and Qaraḍāwi (n 72).

matters unambiguously stated in the Qurʾān and Sunnah can be regarded as definitive ruling.[97]

Juridical consensus presupposes the agreement of all qualified scholars of a given time without any dissent. This means that an issue must have been tabled before the companions and the opinion of each of them extracted, analysed and synthesised.[98] This would seem difficult in view of their number and the fact that not all of them were living in Madīnah. However, notwithstanding the seeming difficulty in arriving at an *ijmāʿ*, as per the legal theorists' definition, juridical consensus used to be arrived at during the period of the companions through various means, the chief of which was by consultation usually triggered by a legal question.[99] A conclusive *ijmāʿ* used to be reached when one of the caliphs decided an actual case through *ijtihād* (exercise of personal reasoning) and was not objected by other companions.[100]

Going through the literature, what emerges in this respect is that there was hardly any actual case where a matter involving the unintentional killing of a woman was either tabled before the companions for their opinion or determined by a caliph. During the formative period, it was common to table a legal issue of importance before the public in the mosque to elicit their input. The case of limiting the dower (*mahr*) is instructive in the circumstances. In this case, the second caliph, ʿUmar was unhappy with the way people were paying an exorbitant amount in the name of dower and wanted to limit it to what he felt was reasonable. No sooner had he finished the statement than one woman felt uncomfortable and challenged him saying: 'O leader of the Faithful! You prevented people from paying more than four hundred *dirhams* for a dower'. He said, 'Yes!' She said: 'Have you not heard what Allāh sent down in the Qurʾān 4:20:

> If you wish to take one wife in place of another and you have given the first one a large sum of money do not take away anything of it. Would you take it away though that constitutes a gross injustice and a manifest sin?'

Immediately, he withdrew his statement in the following words:

> 'O Allah! Forgive me.' He then went back and stood up on the *Minbar* saying, 'I had prohibited you from paying more than four hundred Dirhams in a dowry for women. So, let everyone pay what he likes from his money'.[101]

[97] MH Kamali, *Principles of Islamic Jurisprudence* (Cambridge, The Islamic Texts Society, 2003) at 228.

[98] M Izzi Dien, *Islamic Law from Historical Foundations to Contemporary Practice* (Indiana, University of Notre Dame, 2004) at 41.

[99] ibid.

[100] AA Qadri, *Justice in Historical Islam* (Lahore, Sh. Muhammad Ashraf, 1968) at 18.

[101] Quran X.com, 7 Tafsir(s) Related to Verse 4.19 available at http://quranx.com/Tafsirs/4.19; see also 'Does Islam Discourage Women from attending the Masjid?' available at www.a1realism.com/ENGLISH/human_rights/Islamdiscouragewomen.htm.

Apparently, while he was delivering the sermon in the mosque, many companions of the Prophet were there but did not support ʿUmar's view. This made the opposing view the accepted norm under the Islamic law.

It is also a known fact that the caliphs or their appointed judges used to deliver judgments; and in the absence of any precedents, they used their reasoning to adjudicate and issue verdicts. Such rulings acquire the status of *ijmāʿ* in the absence of any dissenting view from any other companion. The idea of best interests of the child in Islamic law emerged from such decisions.[102] A matrimonial dispute was brought before the first caliph, Abūbakar involving ʿUmar b Khaṭṭāb and his divorced wife, both claiming the right to custody of a child. In giving judgment in favour of the divorced woman, the caliph observed: 'O ʿUmar! For this infant, his mother's spit is better than honey which you may procure'.[103] Caliph Abūbakar made this decision in the midst of other companions without objection from them and it became an *ijmāʿ*. From these examples, it can be said that consensus could be reached either expressly (*al-ijmāʿ al-ṣarīḥ*) or implicitly (*al-ijmāʿ al-sukūti*). The question one may ask is whether the half *diyah* stipulation was reached through any of these two forms of *ijmāʿ*.

Obviously, no statistic is available to give an accurate account of the nature of cases during the formative period of Islam, but we have to bear in mind that the degree of occurrence or probability of occurrence of a phenomenon can be measured by the proliferation of cases before an adjudicator at a given period. It is also measurable through sociological indicators of a given historical age. For instance, it is common for both genders in any society to be involved in matrimonial disputes, because the desire for procreation necessitates strong social intercourse between the opposite sexes in any given generation. People resort to marriage as a gateway to legitimise procreation, although in modern days it is not always the case. Therefore, it is natural in such arrangement for partners to approach state agencies like courts for determination of their matrimonial disputes as evidenced in the case of ʿUmar and his wife on child custody and many cases not reported here. During the period under review, marital relations between the opposite sexes were all too common. In such a situation, divorces and other matrimonial disputes were more likely to occur. Apart from cases of custody there were cases of *khul*' and of a lady challenging her father's authority to force her into marriage. Similarly, social havoc, that may result in the growing number of unmarried youth, problem of broken marriages etc, were more likely to attract the attention of the authorities because of the numerous cases emanating from such relationships. ʿUmar's attempt at restricting the dower is instructive here. Therefore, matters of this nature are all matters within the private sphere, and of course all sexes will be involved. Conversely, disputes in the public sphere, which was considered the domain of men, were more likely to involve men only, although involvement of women cannot be ruled out.

[102] Qadri, *Justice in Historical Islam* (n 100) at 18.
[103] ibid.

Now, if we critically assess the occurrence of unintentional homicide that attracts payment of *diyah*, we will realise that the common examples given by the classical jurists always involved cases of accidental shooting in the course of hunting. One hardly finds any example in the nature of say, a plane crash or motor accident, as commonly happens today. Of course, during the classical period trades like hunting were the preoccupation of men, as the division of labour between public and private was so obvious that one can claim, without mincing words, that it would be difficult to find women engaged in hunting during this period. It was also not common to find a woman wandering alone in the desert. Even in modern days, women are less likely to be victims of heinous offences outside domestic crimes, just as they are less likely to commit them. For instance, in 2012, the report of United Kingdom Office for National Statistics shows that of every five crime suspects four of them were male.[104] If a free society like the United Kingdom can have such a low figure for females involved in crimes one wonders what statistics would have shown for female criminality during the formative period of Islam. Even in a typical Muslim community like the North-western part of Nigeria it is difficult to see a woman in court on criminal allegation, barring the recent phenomenon of drug abuse, where women are now peddling anti-depressants.

There was hardly any reported case before any of the four rightly guided caliphs in which a man mistakenly killed a woman. Indeed, the reverse case scenario was even harder to come by in view of the delineation of social boundaries between men and women. However, cases that fall under the class of intentional homicide across genders were possible, as in the case of the man who crushed a woman's head to steal her ornaments, cited above.

Drawing an analogy from this postulation, disputes/offences involving both genders were more likely to occur in the private sphere than in the public sphere, because the former afforded more room for interaction between opposite sexes than the latter. Misunderstandings that may lead to dissolution of marriage, for instance, could not be ruled out. As such, it would not be surprising to come across many rulings on this issue during the period under review. However, a similar conclusion cannot be reached with respect to homicide cases, since they were more likely to occur in the public domain. Accidental or unintentional homicide culminating in the killing of woman by man was even more difficult. Hence, the rarity of the recorded instances of unintentional homicide across the genders at that time.

The difficulty in identifying an actual case of unintentional homicide involving a man and a woman in the age of the companions makes it less likely to afford them the chance to air their views on the issue. The result is that there was hardly any explicit *ijmāʿ* on the matter under review. However, pronouncements of individual companions have been recorded in the literature of fiqh and ḥadīth to

[104] Office for National Statistics, UK, 'Crime:4 in 5 offenders are Male' available at www.statistics.gov.uk/CCI/nugget.asp?ID=442.

justify the half *diyah* stipulation, as we shall discuss below. Suffice it at this stage to state that all of these narratives are of doubtful origin, for they have been analysed by scholars of ḥadīth and were found wanting mostly on ground of weaknesses of their chains of transmission.[105]

As noted in chapter 3, ʿUmar b Khaṭṭāb is said to be among the companions who stipulated half *diyah* for women along with ʿAli b Abī Ṭalib, Zaid b Thābit and Abdullāhi b Masʿud. For that, the half *diyah* stipulation was given the stamp of finality as consensus (*ijmāʿ*) of the companions, since no opposing view was expressed.[106] The question asked is on what occasion did they meet and agree on this? Was there an actual case they decided? Who were the parties? Given that the number of the Prophet's companions was very high, running into thousands, can four or even a hundred of them take a decision that will bind all generations of Muslims? Furthermore, given that the companions had dispersed throughout the Muslim territories, how possible was it to seek the opinions of all of them on the issue?

The rarity of the unintentional homicide cases involving a man and a woman, as alluded to earlier, made it almost certain that these were mere individual opinions of the respective and respectful companions. There is also the problem of ascertaining when a particular pronouncement was made, even if it was uttered. For instance, in the case of ʿAli, at least three contradictory views emerged as coming from him. Sarakhsi is quoted as saying that the expression 'the compensation of woman is half that of man in loss of life and injury' was not the saying of the Prophet but something attributable to ʿAli b Abi Ṭālib.[107] Qaraḍāwi has cited another narration by Ibrahim al-Nakha'i and reported by Bayhaqi which was attributed to ʿUmar and ʿAli that they both agreed that compensation of woman is half that of man in loss of life and injuries.[108] This statement however could not escape the onslaught of scholars of ḥadīth like Bayhaqi, who declares it broken (*munqaṭiʿ*).[109] Indeed, research has shown that al-Nakha'i did not meet any of the Prophet's companions.[110]

Another statement attributed to ʿUmar which reads: 'The compensation of woman is five hundred gold coins or six thousand silver coins', was faulted by the

[105] See generally Qaraḍāwi (n 72); MI Abū Shallāl, *Diyat al-Marʾatul Muslimatu fi al-Sharīʿat al-Islāmiyyah* (thesis submitted to the Faculty of Postgraduate Studies, Al-Najah National University for the award of MSc of Islamic Laws and Islamic Legislation, Nablus, Palestine, 2007) at 87–101. https://scholar.najah.edu/sites/default/files/all-thesis/muslim_woman_diya_at_the_islamic_shrea.pdf.

[106] Al-Sarakhsi (n 12) vol XXVI at 140.

[107] ibid.

[108] Qaraḍāwi (n 72).

[109] It is classified as broken where in narrating a ḥadīth or statement there is a missing link before the name of a successor. eg Mr A reports that Mr C (a successor of the companions) narrated to him so and so and omits Mr B who was his immediate source. In addition, it is declared as broken even though the chain of transmission is continuous where it is factually known that one of the reporters had not heard from his immediate authority, even if they were contemporaries. See Hassan (n 67) at 13.

[110] Abū Shallāl, *Diyat al-Marʾatul Muslimatu fi al-Sharīʿat al-Islāmiyyah* (n 105) at 93–95.

scholars of ḥadīth like Bukhāri and others as 'denounced' (*munkar al-ḥadīth*),[111] because someone by the name of Muslim b Khālid Al-Zinji featured in the chain of transmission.[112] This prompted Qaraḍāwi to conclude that such statements lack any authority, and can neither be the basis for legal ruling nor corroborate a similar statement (*athar*).[113]

Against what was attributed to ʿUmar b Khaṭṭāb, there are other reports that are at variance with that assertion. It is reported by Ibrahim al-Nakha'i from Shurayḥ that ʿUmar treated as equal injuries of both male and female as attested by his words as follows: 'the injuries of both men and women are the same'.[114]

Scholars of hadith have faulted another narration that ʿAli did not allow execution of a man for killing a woman save after remittance of half of a man's *diyah* to his next of kin.[115] Al-Qurṭubi (d 671 AH/1273 AD) refuted this assertion arguing that there was a broken chain in its transmission since Al-Shaʿabi, the purported narrator of that opinion, did not meet ʿAli b Abu Ṭālib, so could not have heard that view from him.[116] On the contrary, Al-Qurṭubi cited another pronouncement of ʿAli where he advocated equal treatment of sexes.[117] Another authoritative source, Ibn Ḥajar dismissed Al-Shaʿabi's narration as untrue, insofar as it is being attributed to ʿAli. He said this statement was the view of Uthman al-Batti, a prominent scholar of Basra.[118]

From the above, even if we disregard the more reliable and gender-neutral pronouncements of ʿUmar and ʿAli, by holding that halving of woman's *diyah* was their opinion, the principle is at best attributable to individual companions. The question is whether such opinions have binding effect. The exalted position accorded the companions because of their closeness to the Prophet and the services they rendered in nurturing the religion put them in far better position to articulate the principles and objectives of the law. Even then, scholars do not agree on whether their individual opinion (ie *qaul al-ṣaḥābi* or *madhhab al-ṣaḥābi*) is an authoritative source of law.[119]

ʿAbdullahi Yūsuf Al-Judaiʿ identifies three opinions in this regard. First, where the opinion was widely known among the companions and no contrary view was available, it is taken as authoritative. This, according to the classical views of the Ḥanafis, Mālikis, Ḥanbalis and Shāfiʿis, will be considered as 'implicit consensus' (*ijmāʿ al-sukūti*).[120] Secondly, the opinion will have no binding force if another

[111] It is *munkar* if its narrator fails the test of trustworthiness (*ʿadālah*), or the narration goes contrary to an authentic narration. See Kamali (n 53) at 148.

[112] Qaraḍāwi (n 72).

[113] ibid.

[114] AA ʿAsqalāni, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhāri*, vol XVI (NM Al-Fāriyabi, ed) (Riyadh, Dār al-Ṭaibah, 2005) at 25.

[115] M Al-Qurṭubi, *Tafsīr al-Qurṭubi* (Cairo, Dar Kutub al-Misriyyah, 1964).

[116] ibid.

[117] ibid.

[118] ʿAsqalāni, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhāri* (n 114) vol XVI at 25.

[119] AY Al- Judaiʿ, *Taysīr ʿIlm ʿUsūl al-Fiqh*, 1st edn (Beirut, Muassasat al-Rayyān, 1997) at 216.

[120] ibid.

companion challenged it.[121] Thirdly, where it was not widely known among the companions, majority scholars accept it as binding while others do not.[122]

Al-Judaiʿ did not merely give the rendition of the views of legal theorists on this point, but has analysed them taking into account the aḥādīth that show the pre-eminence of the companions. He then concluded that the authorities relied upon only prescribe obedience to the companions as leaders, but have not made their opinions as binding.[123] According to Al-Judaiʿ, if the opinions of companions were binding at least the four rightly guided caliphs would have demonstrated that by their actions. This is discernible from the fact that succeeding caliphs did not endorse and apply all the rulings of their predecessors. For instance, ʿUmar b Khattāb did not follow all the rulings of Abūbakar, nor did ʿUthman and ʿAli. Indeed, the succeeding caliphs had turned down many such rulings.[124] For instance, ʿUmar b Khaṭṭāb overhauled the state welfare system he inherited from ʿAbubakar and instituted a different arrangement. During the days of the first caliph, Abūbakar, the state welfare package was distributed to the Muslims according to one's needs, as the caliph did not see any justification in sharing government resources asymmetrically. As a result, the early and late converts to Islam were treated equally and given equal share from the public treasury.[125] The issue that arose was whether one's loyalty and service to Islam was worth considering in assessing the quantum of one's entitlement from the public treasury. While most of the companions felt it was worth considering, the first caliph felt differently. He remarked that, 'those who served Islam would have their reward from God, the Most High; as for dealing with the people's needs, they should be treated equally without any reference to their past record'.[126] Abūbakar's stance did not go down well with ʿUmar, who later introduced a hierarchical system, as discussed in detail in chapter 4.

In the same vein, Imām Shawkāni also opines that the opinion of a companion is not a binding proof. In his words,

> The truth of the matter is that God did not send to this community anybody besides Muḥammad (PBUH). We have only one Prophet and one book (the Holy Qurʾān). God bounds all the people of this community to follow His book and the practice of His Messenger. There is no difference, in this respect, between the companions and their successors. The dictates of Sharīʿah binds all of them.[127]

Furthermore, Imām Shawkāni said the only area jurists differ is on the question whether the *ijtihad* of the companions binds the subsequent generations. Even

[121] ibid.
[122] ibid.
[123] ibid, at 218.
[124] ibid, at 167.
[125] See Kamali, *Freedom, Equality and Justice in Islam* (n 16) at 60.
[126] ibid.
[127] MA Shawkāni, *Irshad al Fuhuli ila ilm al Uṣūl*, vol II (Cairo, Dar al-Kitab al Arabi, 1999) at 188.

then, he argues that just as it was not binding among the companions inter se, it is not binding on the subsequent generations according to the majority view.[128]

It is on record that some of the caliphs reached a number of decisions based on intellectual reasoning but unknown to them already the Prophet had decided a similar case differently. The companions around the caliph, at the material time, might not be aware of the Prophet's decision, and consequently, they allowed the later ruling to sail through unchallenged. The four rightly guided caliphs were, by nature, humans and could not know all or be privy to all the Prophet's utterances and actions spanning more than two decades. They were not glued to the Prophet as people assume. Some were family men and had to fend for the family. They often engaged in journeys and business trips. The closest people to the Prophet like Abūbakar and ʿUmar were his in-laws so were ʿUthmān and Ali both of whom got married to his daughters. There were instances where out of shyness some of them could not ask the Prophet any question directly except through an intermediary. Obviously, they may not be around to hear the answers. The Prophet himself, being a family man, had his personal life, so had to be with his family in his matrimonial home. Happenings there can only be narrated by his wives or any person who at the point in time was in the house. The fact that al-Ḍaḥḥāk b Sufyān had had to draw the attention of the second caliph to the entitlement of a widow to the *diyah* of her deceased husband underscores the limits of their knowledge over events that happened in their absence.[129] It also shows that not all their decisions were supported by divine sources. Consequently, in the absence of anybody who was privy to the pronouncement of the Prophet such decision remains unchallenged. By implication, cases that rarely occur, like the unintentional homicide involving members of opposite sex, might have been decided in the presence of few companions none of whom was aware of a contrary ḥadīth. Hence, no objection was raised and no opportunity arose where a case with similar facts came up in the presence of yet another set of companions who happened to be aware of the prophetic ruling.

The influence of default pre-Islamic Arabian culture may be another reason responsible for the absence of objection from other companions. The case of the widow under review was previously decided by ʿUmar based on the pre-Islamic Arabian practice. Under this practice, *diyah* was the entitlement of male members of one's solidarity group (*ʿaṣabah*) to the exclusion of the female members of the deceased's clan. The Prophet abolished this practice via an epistle sent to Ḍaḥḥāk b Sufyān, in which he instructed Ḍaḥḥāk to allow the wife of Ashyam al-Dibābi to inherit the *diyah* of her deceased husband.[130]

Similarly, when another case pertaining to a claim of *diyah* for loss of thumb was brought before Caliph ʿUmar (RA), he used his analogy based on the utility

[128] ibid, at 187.

[129] MI Al-Shāfiʿi, *Al- Risālah fi Usūl al-Fiqh (Treatise on the Foundation of Islamic Jurisprudence)* (trans M Khadduri) 2nd edn (Cambridge, The Islamic Texts Society, 1987) at 263.

[130] ibid.

value of fingers. Given that fingers are of different sizes and utility, ʿUmar allotted 15 camels for loss of a thumb. This remained the position of the law until probably the last quarter of first century AH, when it was discovered in the Prophet's epistle to ʿAmr b Ḥazm that, 'for every finger [the compensation] shall be ten camels'.[131] Apparently, when ʿUmar gave that ruling he was not aware of the Prophet's ruling and none of the companions who knew about it was around to draw his attention to it.

It is also reported that in matters of opinion, some companions used to allow ʿUmar b Khattab to have the day even though they had reservations. For instance, when an unusually isolated case of inheritance was brought before ʿUmar, he took a position against the view of ʿAbdullāh b ʿAbbās, but the latter kept mute and did not object, only to air his view after the death of ʿUmar b Khattāb. When he was asked why he did not make public his view on the matter he simply answered that, 'I am afraid of him, because of his personality'.[132] It was a case of over-subscription (*awl*) in which no precedent was available to place a decision. A woman died and left behind her husband and two full sisters. Under the Islamic rules of inheritance the husband was entitled to one half and the full sisters were entitled to two thirds of the estate. This means that their entitlement was more than unity because ½ + 2/3 = 7/6.This is a clear case of over-subscription, as if either party is allowed to take his allotted share the other party will be short-changed. To illustrate the scenario, supposing the deceased wife left £600. The husband would be entitled to one half of £600 = £300, and the two full sisters would get two thirds of £600 = £400. Therefore, the amount they inherit could not be shared as per their respective allotments. It was suggested to ʿUmar to apply the bankruptcy rule and share the estate proportionately. One of the companions said that if a person dies and is indebted to two people, one claiming three *darāhim* and the other four *darāhim* but he only left six *darāhim*, then each should be paid from the estate an amount proportionate to his claim. ʿUmar accepted this opinion and applied it thereby reducing the respective shares of the heirs from three sixths to three sevenths for the husband and from four sixths to four sevenths for the two full sisters, such that they respectively get £257.2 and £342.8.

It was only after the death of ʿUmar that ʿAbdullāhi b ʿAbbās made his point that the decision of ʿUmar was flawed because it means the minimum entitlement expressly prescribed for the husband in the Qur'an has been reduced. To him, heirs like mother, grandmother, husband, wife and uterine sisters are *aṣḥāb al-farā'iḍ* each of whose entitlement is clearly stated in the Qur'an and is the minimum that each must get. To reduce it further, as done in this case, is to go against the necessary intendment of God. As for full sisters, consanguine sisters, daughters and daughter of son, their entitlement is not guaranteed as they can, depending on

[131] ibid.

[132] AM Gurin, *An Introduction to Islamic Law of Succession (Testate and Intestate)*, 2nd edn (Lagos, Malthouse Law Books, 2015) at 112.

the circumstances, either be *aṣḥāb al-farā'iḍ* or residuary (*ʿaṣabah*).[133] Therefore, in cases of over-subscription, these categories of people should simply inherit as residuary. In other words, in the case at hand, the husband inherits as Qur'anic heir and get his half of £600 = £300 and the two full sisters take the reminder, ie £300, thus inheriting as residuary heirs.

What this point suggests is that rulings of ʿUmar on many issues acquired the status of *ijmaʿ* and remained the established norm since no companion contested it. It also suggests that even during Shāfiʿi's era, it was not until when they confirmed the authenticity of ʿAmr b Ḥazm's epistle that they stopped applying the decision of ʿUmar in favour of the pronouncement of the Prophet. On this point, Shāfiʿi made the following remarks:

> First, a narrative [from the Prophet] must be accepted. Secondly, the narrative is to be accepted when it is confirmed, even though none of the Imāms may ever have done anything similar to the narrative in question. … if the actions of one of the Imāms subsequently were found to be contrary to a narrative of the Prophet, the Imām's action must be abandoned in favour of the Apostle's narrative.[134]

The comments of Shāfiʿi is clear testimony that it is common to find at a later date that the position held by a companion or a scholar was flawed and it is usual to deviate from it, once it is discovered that it goes against the position of the Prophet. Therefore, the only possible basis upon which the half *diyah* stipulation was established is a cross-contextual analogy of unrelated matters/fields as addressed in the previous chapter.

IX. Conclusion

In the foregoing, the chapter undertook a thorough review of the conflicting authorities that gave rise to gendered juristic formulations in *diyah*. It identified the Qur'anic provisions on the subject matter under review on the one hand, and the aḥādīth of the Prophet, on the other hand. What emerged from the review is that classical jurists favoured the conciliation method over the elimination and abrogation methods thereby allowing the use of both authorities as circumstances warrant. This made it easy to maintain both rulings thereby making the disparity in *diyah* across genders as a universal ruling accommodating no change. This approach perpetuated the pre-existing pre-Islamic Arab default culture which gave prominence to male over female. However, in this chapter, I have used elimination and abrogation methods to demonstrate that Islam, as a social system, revolutionised the default Arabian culture through gradual replacement and abrogation.

[133] ibid.
[134] Al-Shāfiʿi, *Al- Risālah fi Usūl al-Fiqh* (n 133) at 262.

In the end, the chapter concluded that even the much-touted juridical consensus (*ijmāʿ*) which conveniently silenced any opposing voice, irrespective of its plausibility, could not stand the litmus test of credibility. It found that the juristic formulation could, at best, be supported by individual opinions of some companions and even then, none of the narrations was sound. The only possible basis was cross-contextual analogy, which in itself was lopsided as principles relevant in civil matters like the Islamic law of inheritance and law of commercial transactions were transposed into matters of criminality, like homicide. Hence, the only logical conclusion one can make is that there is no disparity in *diyah* across genders for intentional or unintentional homicide and bodily injuries.

Part II

Case Studies

Contemporary Application of Islamic Legal Principles on Homicide and Bodily Injuries in the Muslim World

This part explores the practical application of Islamic principles on homicide and bodily injuries and its effect across genders in the Muslim jurisdictions of Nigeria and Pakistan with a view to ascertaining the extent to which they conform or deviate from the principles as prescribed by the classical Islamic jurists. This is mostly to be found in modern legislation passed by legislative houses. The argument sought to be made is that there has been palpable tension between the new principles introduced by Islam and the ingrained cultural prejudices in many societies. Just as in the early years of Islam when resistance to the new order was clearly evident in gender relations, even today the story appears to be the same. The legislature may be persuaded by the constitutional restrictions to enact seemingly gender-neutral legislation, but this may not translate to reality in practice. The exploration will reveal the reluctance to yield to the new order often comes through judicial interpretation, which is mostly influenced by the perspectives of their societies towards genders. Therefore, it is usual for formal legislation to prescribe equality, yet in giving it the force of law, judges may sneak in cultural baggage. As shall be demonstrated in this part the long interaction with the colonialist's culture has influenced the attitude of English-trained judges into treating honour crimes with kid gloves, and this has negatively affected women, particularly in Pakistan.

Ordinarily, the exploration would have been more enriching if it considered four Muslim states with entrenched Islamic criminal law regime to represent the four main Sunni schools of thought. But, Nigeria and Pakistan are considered on the basis of the fact that they represent the two most formidable Sunni schools of Ḥanafi and Māliki. Indeed, they represent two extremes, ie rationalist and traditionalist respectively. Other Sunni schools will not be considered as states applying them are difficult to come by; and where they are found they have very strange legal framework. For instance, Saudi Arabia is a Sunni state adhering to the Ḥanbali School, yet it has no codified Islamic criminal code. This means that judges resort to classical text of Ḥanbali School without more, thus giving considerable discretion to choose any interpretation that suits them. An attempt was

made in 2005 to come up with a uniform criminal code but to date nothing has been forthcoming.[1] The choice of Pakistan and Nigeria is necessitated by many factors such as their common colonial legacy, and each is party to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).[2]

This part has four chapters, two for each state. It is organised in such a way that the formal legislation is discussed in separate chapters and then judicial interpretations are separately discussed. Chapters 7 and 8 deal with the case study of Pakistan, while Nigeria's experience is contained in chapters 9 and 10. The importance of these case studies is to find ways by which either of these states can learn from the other. It also affords an opportunity to avoid problems faced by either in the course of its struggle for the implementation of the law.

[1] SM Al-Subaie, 'The Right to Fair Trial under Saudi Law of Criminal Procedure: A Human Rights Critique' (thesis submitted to Brunel University, London, for award of PhD in Law, 2013).

[2] Ratified by Nigeria on 13 June 1985, and Pakistan on 12 March 1996. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.