

Reasons for Adopting Weak Opinions in Islamic Jurisprudence

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Abstract

The field of this study is in Islamic jurisprudence. Taking the preferred saying is contrary to the original, and takes it if necessity or need arises. There are reasons for adopting the preferred saying that were mentioned in this research so that the mufti and jurist know when to take the preferred saying, and when to act with the most correct saying. The origin is the work of the jurist and mufti by saying the most correct. If the necessity or the need that prompted the mufti to take the preferred saying ceases, then he returns to work with the most correct saying, and gives it precedence over the most preferred opinion. The researcher recommends that this topic be given more attention from researchers, and that it is taken care of in jurisprudential developments; So that the embarrassment of the nation is lifted, and the jurists clarify the legal ruling on emerging issues.

Keywords: *Jurisprudence, Weak Opinions, Law*

1. Introduction

Praise be to Allah, and peace and blessings be upon His Messenger, Prophet Mohamed (PBUH). Allah has decreed for humanity a lenient and easy legal system (Islamic Shari'a) which is a distinctive feature of Islamic Jurisprudence, where more than one opinion exist in most of the provisions related to the life and transactions of people. Generally speaking, people usually tend to adopt the strongest and most reasonable opinions; however, in certain cases, jurists rely on weak opinions (less substantiated) and they adopt the same for certain considerations; that is so in order to indicate the leniency of Islamic Jurisprudence, and its validity in respect of dealing with emerging matters in human life, whatever

its form or the status of the societal might be; and this is certainly due to the rules and principles contained in Islamic Jurisprudence.

Defining the adoption of the weak opinion

This refers to the adoption by the Mufti (scholar) of a weak opinion, and departure from a strong or more substantiated opinion for a legal necessity or need¹. However, adopting a less substantiated or weak opinion is deemed to be an exception and departure from the other opinion; therefore, it shall only be adopted in case of necessity or legitimate need. This is based on the conditions set forth by the Islamic Jurisprudence (Figh) Academy, which is an affiliate of the organization of the Islamic Conference in Jeddah². According to the authority of most jurists, this is acceptable in the event the Mufti is capable of assessing needs and necessities, and this requires that the Mufti has the ability to weighting and selecting between various opinions, which is a quite common practice by jurists and Muftis. However, the Mufti shall verify the justification for the adoption of the weak (less substantiated) opinion, while doing so more deliberately; and he shall at the same time be careful to assess the need or necessity requiring such adoption.

Furthermore, justifications and reasons, necessitating the adoption of the weak opinion, are basically subject to the rationale contained in the

¹ Fatawa in Islamic Shari'a, Sheikh Abdullah Bin Khenain, Al-Obeikan Bookshop, Riyadh First Edition 1429AH/2009, 1/327.

² The Magazine of Islamic Figh, Issue No. 8, p. 41, decision no. 70.

legitimate causes; because there are many judgments that are based on variable considerations pursuant to necessity; therefore, judgments that are prone to variation, are those which have been based on influential reflections which are neither fixed or constant; and they are attributable to interest or necessity³.

Reasons for adopting weak (less substantiated) opinion

There are several and various reasons, which can be summarized as follows:

2. Consideration of Difference

Consideration of difference is one of the reasons relied only by scholars with regards to the adoption of the weak opinion⁴, particularly the scholars of the Malki School of Jurisprudence. This is often referred to as a way out of disagreement.

Definition of Consideration of Difference

It means rendering a verdict on each of the two opinions, regardless of the existence of discrepancy⁵.

It simply means that the jurist (Fagih) should primarily mention the evidence which is deemed most appropriate and reasonable by him; however, in the event that an opinion is formed in accordance with different evidence, the jurist should give due consideration to the strength and substantiation of such evidence; i.e. he should have a moderate opinion in respect of the requirements of such pieces of evidence⁶.

³ E'taborat Al-Ma'alat, Sahousi, p. 415.

⁴ Fatwa in Islamic Shari'a, Sheikh Abdullah Bin Khinain, 1/329.

⁵ Al-Meyar Al-Maa'rab, Al-Wansharisi, 6/388, and Fath Al-Ali Al-Malik, Olaish, 1/81.

⁶ Al-Meyar Al-Muarab, Al-Wansharisi, 6/388.

Legal Opinion on the Consideration of Difference

Consideration of difference is generally accepted by most jurists, so as to avoid things in respect of which there is disagreement as to the prohibition thereof, and to perform actions in respect of which there is disagreement as to their non-prohibition.

Guiding opinion:

In case the opinion, leading to disagreement, is quite weak, it shall not be taken into consideration, particularly if it is of the type that can invalidate the decision; and if pieces of evidence are so similar, this should be avoided, because the opponent usually has the right opinion⁷.

It was stated by Ibn Arabi that: "*making a ruling based on the strong (more substantiative) does not exclude the weak opinion altogether, but shall also be taken into account.*"⁸

Conditions for considering difference:

Scholars of Al-Shafi School of Jurisprudence put the following as conditions for considering difference:

- a. The opinion giving rise to difference, shall be strong, otherwise it shall be disregarded.
- b. Considering difference shall not lead to the violation of consensus.
- c. It is possible to combine opinions from different schools of jurisprudence, otherwise the strong opinion shall not be abandoned.
- d. Consideration of difference shall not lead to the prohibition of worship⁹.

⁷ Al-Manthor, Al-Zarkashi, 2/128-129.

⁸ Al-Muwafasat, Al-Shatibi, 4/109.

⁹ Al-Manthor, Al-Zarkashi, 2/192.

3. Consideration of Conduct Norms in One of the Regions

This is deemed one of the strong reasons for adopting a weak opinion, and departure of a strong opinion. This approach is generally adopted by the jurists of Malki School of Jurisprudence, as they often use expressions such as *“this is the way how jurists used to work”*.

Definition of Consideration of Conduct Norms in One of the Regions

This means selecting a weak opinion and giving a legal opinion (Fatwa) accordingly. Furthermore, judges and Muftis rely on this approach to make judgments and to perform their jobs for a reason so required¹⁰. Moreover, Sheikh Abdullah Bin Beyh defines this approach as follows:

*“Adopting a weak opinion in the field of the judiciary or Fatwa “giving a legal opinion” by a reliable scholar, at any time, or any place, in order achieve a benefit or to ward off perversion”*¹¹.

Accordingly, work shall not be approved unless it is based on a strong opinion, or it is produced by a judge who could explain why chose to act according to such opinion; because a diligent person is one who can distinguish between benefit and perversion, and can also distinguish various types of necessity and need¹².

Sheikh Al-Hajawi states that:

“It is not permissible for a judge or a Mufti to elaborate in Fatwa based on the prevailing opinion or

*acts, and he shall not believe that his Fatwa is everlasting, while it is only temporary pursuant to the existence of the benefit or perversion in respect of which he departed from the strong opinion; therefore, upon the disappearance of such benefit or perversion, judgment shall be according to the strong opinion once again”*¹³.

Conditions for adopting prevailing norms of actions:

These conditions can be summarized as follows:

- a. The action shall be adopted by a reliable scholar.
- b. The action shall be established on the testimony of fair witnesses.
- c. To find out whether such opinion or act is generally or particularly acceptable.
- d. To know the reason for departing from the strong opinion to the weak one¹⁴.

4. Consideration of the constancy of contracts and transactions

One of the important reasons which make jurists adopt a weak opinion is the consideration of the constancy of contracts and transactions.

In fact, the results, arising from contracts, are arranged in accordance with Shari’a Law; that is to say such results are not left to fancy; but Shari’a has set forth regulations to govern these results, and it is permissible to bypass or disregard these regulations; therefore, Shari’a invalidates conditions which are contrary to the contract or an express provision from the Holy Quran or Sunnah. This principle does not contradict with the fact that contracts are based on mutual consent; that is because consent shall not be obtained under pressure,

¹⁰ Al-Urf and Al-Amal Fi Al-Mazhab Al-Malki, Dr. Omer Abdul-Kareem Al-Jaidi, Morocco, 1984, p. 45.

¹¹ Making Fatwa, Sheikh Abdullah Bin Beyh, Jeddah, 2007, p. 114.

¹² Al-Fikr Al-Sami, Al-Hajawi 2/406.

¹³ Al-Fikr Al-Sami, Al-Hajawi, 2/410.

¹⁴ Hashiat Al-Mahdi Al-Wazani, p. 337, Asul Al-Fatwa wa Al-Gada, Dr. Mohamed Riyadh p. 517.

because a contracting party is free to accept the contract, while the results of such contract are regulated by Shari'a Law¹⁵.

Now, Islamic Shari'a is keen to maintain the constancy of contracts and transactions, as well as rectifying the same in case of default which might render them legally prohibited in accordance with certain controls.

The jurists of the Hanafi, Shafi'e, and Zahiri Schools of Jurisprudence, are of the opinion that contracts shall be rectified pursuant to the manifestations thereof. Accordingly, a contract shall only be deemed invalid if there is an express illegitimate intent¹⁶.

5. Committing perversion is worse than acting contrary to the strong opinion

One of the reasons that make a jurist resort to adopting a weak opinion, and depart from a strong one, is the occurrence of a severe case of perversion as a result of acting pursuant to a strong opinion; in which case the jurist will be compelled to adopt or act according to the weak opinion in order to avoid or guard against hardship. Indeed, Shari'a is intended to achieve advantages and guard against spoilers; particularly at the present time, where good has intermingled with evil.

In example of this, is the throwing of stones during Hajj, before noon, while most jurists say that throwing stones shall be in the afternoon; a number of jurists issued a Fatwa that it is permissible to throw stones before noon; that is so decided to alleviate the hardship associated with crowdedness which might lead to the death or injury of many pilgrims. In this case, the weak

opinion has been preferred to the strong one, because adopting the strong opinion is likely to lead to certain perversion, which can be avoided by resorting to the weak opinion; that is why it is reasonable and more convenient to adopt the weak opinion.

6. Change in people's conditions

Change in people's conditions is one of the reasons for adopting weak opinions in certain cases, because it might be the most appropriate for them. Additionally, recent progress and development in the fields of science, economy, sociology, and the resolutions between peoples and countries, as well as the existence of big factories, and powerful giant companies, and the expansion of commerce, all these things made it necessary to make various laws, and they have brought forth new life conditions, and forms of relations and conventions, such as commercial regulations, the judiciary system, promulgating legislation, as well as organizing other facilities like water, electricity and telephone services, within the framework of public interest, and in the field of necessities and needs; accordingly, there has been an urgent need to establish and organize various government bodies and authorities, including the interest of the state.

Ibn Al-Gayem reports that "*if most people are wanton, it is permissible that their testimony shall be accepted vis a vis each other, given priority to the testimony of the less wanton. Also, a wanton person can be a guardian in respect of marriage, and a trustee regarding funds*"¹⁷.

¹⁵ Kashf Al-Asrar, Ala'a Al-Deen Al-Bukhari, 4/1291-1292, Al-Furuq, Al-Girafi, 1-195, Al-Muwafaqat, Al-Shatibi, 1/190, Al-Mutasfa, Al-Ghazali 1/93-94.

¹⁶ Al-Ashbah wa Al-Nazayir, Sayoti, p. 166.

¹⁷ Al-Turuq Al-Hakmiah, Ibn Al-Gayan, Cairo, 1953, p. 265.

7. Conclusion

This is an attempt to give a brief account regarding the reasons why some jurists and Mufties adopt a weak opinion/less substantiated, together with a simple explanation of each reason.

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